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Presidential Documents

Title 3—

The President

Proclamation 6710 of July 29, 1994

National Scleroderma Awareness Month, 1994

By the President of the United States of America

A Proclamation

Literally meaning "hard skin," scleroderma is a chronic disease that thickens and attaches the skin to underlying structures. Its cause is unknown.

Scleroderma strikes individuals of every age, sex, and ethnic background, although women between the ages of 25 and 55 are four times more likely to be afflicted. It is a painful and sometimes progressive disorder of the connective tissue that can cause disability, disfigurement, and even death. Its impact, in terms of both physical and emotional suffering, is enormous.

In patients with scleroderma, there is an excess production of collagen, the main fibrous component of connective tissue. As a result, the formation of dense, compact tissue causes the skin to lose its elasticity. Scleroderma is also a disease of the vascular and immune systems and can impair internal organs, such as the kidneys, lungs, heart, and gastrointestinal tract.

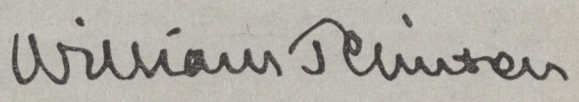
New biomedical research findings and innovative approaches to diagnosis and treatment are essential in fighting against this multifaceted disorder The Federal Government and private voluntary organizations are working together to increase both public awareness of and research on scleroderma. Their objective is to discover the cause of this devastating disease and to develop effective ways to prevent, treat, and cure it.

I applaud all those who are working to bring public attention to this disabling illness, those who are aiding its victims, and those who are researching its complex nature.

The Congress, by Public Law 103–92, has designated the month of August 1994 as "National Scleroderma Awareness Month" and has authorized and requested the President to issue a proclamation in observance of this month.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, do hereby proclaim the month of August 1994 as National Scleroderma Awareness Month. I urge all Government agencies and the people of the United States, as well as educational, philanthropic, scientific, medical, and health care organizations and professionals, to participate in appropriate activities to encourage greater awareness of scleroderma and further research into its cause and cure.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of July, in the year of our Lord nineteen hundred and ninety-four, and of the Independence of the United States of America the two hundred and nineteenth.



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Presidential Documents

Proclamation 6711 of August 1, 1994

Helsinki Human Rights Day, 1994

By the President of the United States of America

A Proclamation

For over 20 years, the Conference on Security and Cooperation in Europe has been an important forum in leading humanity's ongoing struggle to define and defend human rights. The Helsinki Final Act of 1975 committed the United States, Canada, and 33 European states to respect "freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language, or religion." It stands as a fundamental declaration of freedom—a beacon and a warning to all those who would turn away from democracy's welcoming light.

When the West called upon the states in the Eastern bloc to uphold their CSCE human rights commitments during the Cold War, CSCE members' support of these ideals played a pivotal role. In recent years, the end of the Cold War and the dramatic political changes sweeping Eastern Europe and the former Soviet Union have allowed the CSCE to expand and reinforce its mandate even further. The 1990 Charter of Paris added to existing CSCE principles, embracing new commitments to political pluralism, economic liberty, and the rule of law. The 1992 Helsinki Summit emphasized that "the protection and promotion of human rights and fundamental freedoms and the strengthening of democratic institutions continue to be a vital basis" for comprehensive security. Today, the shared determination of CSCE members to uphold these essential values remains the keystone of European security.

As CSCE member states strive to put the Helsinki principles into practice, violent conflicts around the globe remind us that many societies emerging from totalitarian rule still have far to travel toward international standards of humanitarian democracy. Ethnic tensions, civil unrest, and human rights abuses are all too prevalent in several of the recently admitted CSCE nations. The United States stands steadfast in our commitment to full implementation of the human rights and humanitarian provisions of the Helsinki Accords, and I call upon all of the signatory states to uphold their pledge to protect human rights, to seek peaceful resolutions of conflicts, and to fully abide by their obligations under the Helsinki Accords.

International security depends as never before upon respect for the rights of individuals and for the democratic principles of government. As we recognize the magnitude of the Helsinki Accords in the history of nations, we reaffirm our commitment to advancing its timeless wisdom. The vigilant protection of these basic freedoms is the world's best hope for a Europe of growing cooperation and lasting peace.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim August 1, 1994, as Helsinki Human Rights Day and reaffirm the American commitment to upholding human dignity and freedom—principles that are enshrined in the Helsinki Final Act. As we Americans observe this day with appropriate programs, ceremonies, and activities, let us remember our courageous citizens who have made sacrifices to secure the freedoms we enjoy. Let us work

together to encourage respect for human rights and democratic values around the world.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of August, in the year of our Lord nineteen hundred and ninety-four, and of the Independence of the United States of America the two hundred and nineteenth.

William J. Clinton

[FR Doc. 94–19167
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Rules and Regulations

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

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FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Regulation Y; Docket No. R–0832]

Revisions Regarding Tying Restrictions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is adopting a final rule amending the anti-tying provision of Regulation Y to permit a bank or a bank holding company to offer a discount on a loan, discount, deposit, or trust service (a "traditional bank product"), or on securities brokerage services, on condition that the customer obtain a traditional bank product from an affiliate. The Board believes that this will increase the efficiency with which organizations can deliver banking services.

EFFECTIVE DATE: September 2, 1994.

FOR FURTHER INFORMATION CONTACT: Robert deV. Frierson, Assistant General Counsel (202/452–3711); Gregory A. Baer, Managing Senior Counsel (202/452–3236), or David S. Simon, Attorney (202/452–3611), Legal Division; or Anthony Cyrnak, Economist, (202/452–2917), Division of Research and Statistics, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION:

Background

Section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972) generally prohibits a bank from tying a product or service to another product or service offered by the bank or by any of its affiliates. A prohibited tie occurs if a bank: (1) varies the consideration for a product or service (the "tying product") on the condition that the customer obtain some additional product or service (the "tied product") from the bank or from any of its affiliates; or (2) as a condition for providing a customer a product or service, requires the customer to purchase another product or service from the bank or from any of its affiliates. In 1971, the Board applied these tying restrictions to bank holding companies and their nonbank subsidiaries as if they were banks. 12 CFR 225.4(d)(1).

Section 106 contains an exception (the "traditional bank product exception") permitting a bank to tie a product to a traditional bank product offered by that bank, but not by any affiliated bank or nonbank.[1] Thus, for example, the statutory exception permits a bank to offer a discount on a loan on the condition that a customer maintain a deposit account at that bank; however, the bank may not offer a discount on a loan on the condition that a customer maintain a deposit account at an affiliated bank.

On March 11, 1994, the Board requested public comment on two proposed exceptions to section 106. 59 FR 12,202 (March 16, 1994). The first exception would extend the statutory traditional bank product exception described above to permit a bank or bank holding company to offer a discount on a traditional bank product to a customer who obtains another traditional bank product from an affiliate. The second proposed exception would permit a bank or bank holding company to offer a discount on securities brokerage services to a customer who obtains a traditional bank product from an affiliate.

Section 106 authorizes the Board to permit, by regulation or order, exceptions from its anti-tying provisions where the Board determines that an exception will not be contrary to the purposes of the section.

General Summary of Comments

The Board received 68 comments on its proposal. These commenters included 31 bank holding companies, 17 banks, two law firms, five Reserve Banks and seven trade associations. Overall, the comments supported both parts of the proposed rule. One commenter generally opposed the proposed amendments because it believed that exceptions to section 106 should be provided on a case-by-case basis and not as a general matter through rulemaking, and that by acting on individual requests, the Board would be able to prevent potential anticompetitive effects, especially in small towns. The Board has concluded, however, that the benefits and costs of the proposal may be assessed in the aggregate and that rulemaking is appropriate.

Traditional Bank Products

The Board is adopting substantially as proposed the extension of the traditional bank product exception in section 106 to cover discount arrangements involving an affiliate. In particular, the final rule permits a bank or nonbank to vary the consideration charged for a traditional bank product on the condition that a customer obtain another traditional bank product from an affiliate, provided that each product in the arrangement is separately available for purchase by the customer. The Board believes that the exception is fully consistent with the purposes of section 106, will increase the efficiency with which banking organizations can deliver banking services, and will allow those organizations to provide their customers discounts on packages of banking products that include products offered by affiliates.

As noted, section 106 contains an exception permitting a bank to tie a product to a traditional bank product offered by that same bank. The Senate Report accompanying section 106 states that the traditional bank product exception was intended to preserve a customer's ability to negotiate the price of multiple banking services with the bank on the basis of the customer's entire relationship with the bank. S. Rep. No. 1084, 91st Cong., 2d Sess., 16–17 (1970). The Board believes that it is consistent with this stated statutory purpose for a bank or bank holding company to offer a discount on packages of traditional bank products when one of the component products in the package is offered by an affiliate. Since 1970 and 1971, there has been a substantial increase in the number of affiliates in bank holding company

[1] Similarly, under the Board's extension of section 106 to nonbanks in Regulation Y, a nonbank may tie a product to a traditional bank product offered by itself, but not by an affiliate.

organizations and the extent of specialization of these affiliates, which has led to customers obtaining traditional bank products from multiple affiliates, both bank and nonbank. Adoption of the proposed rule will be consistent with the purposes of section 106 by allowing a customer to negotiate the price of multiple traditional banking services on the basis of the customer's entire relationship with a bank holding company organization, as opposed to just a single bank within such an organization.

By allowing bank holding companies to package traditional bank products offered by multiple subsidiaries, the exception also will increase the efficiency with which bank holding companies can deliver those products. Several commenters explained that the existing rule had created a disincentive for bank holding companies to consolidate a given traditional bank product in one affiliate (and thereby lose the exemption for that activity), as opposed to offering the product through all its subsidiary banks (retaining the exemption at each bank but forfeiting efficiency gains).

Adoption of the proposed exception to section 106 will not only permit bank holding companies to offer products more efficiently but also will allow their customers to benefit. Customers will be able to realize cost savings when they obtain traditional bank products from two or more subsidiaries of a bank holding company instead of just one.

Because the inter-affiliate traditional bank product exception will allow bank holding company affiliates to offer customers a more favorable price on packages of banking products, thereby relieving bank holding companies of a competitive disadvantage and benefitting their customers, the Board has concluded that the amendment is consistent with the purposes of section 106 and should be adopted.

Several commenters requested an expansion of the proposed exception to include inter-affiliate arrangements in which the tying product is a non-traditional bank product and the tied product is a traditional bank product. The Board has decided not to extend the statutory traditional bank product exception to inter-affiliate tying involving non-traditional bank products at this time. However, in a separate notice, the Board is proposing to amend the tying restrictions of Regulation Y to permit any discount arrangement that involves only nonbank affiliates.

Discounts on Securities Brokerage Services

In December 1993, the Board approved an exemption for a brokerage subsidiary of a bank to offer a discount on brokerage services to its customers who maintain a minimum balance in an account at the bank or any affiliated bank. *First Union Corporation*, 80 Federal Reserve Bulletin 166 (1994). The Board concluded that the requested exemption was consistent with the legislative purpose of section 106 (to prevent banks from using their economic power to engage in anticompetitive practices) and the legislative purpose of the Board's exemptive authority (to allow appropriate traditional banking practices based on sound economic analysis). In its order, the Board found that the market for retail brokerage services was national in scope and highly competitive, making it unlikely that any of these banks—or any other provider of brokerage services—could exercise sufficient market power in brokerage services to impair competition in the market for traditional banking services. As part of the order, the Board required that the two products in the arrangement be separately available for purchase by the customer, noting that under antitrust precedent, concerns about tying are substantially reduced when the buyer is free to take either product by itself.

The Board is adopting substantially as proposed an amendment to Regulation Y making this exemption available to all bank holding companies. This amendment will permit any bank or bank holding company to offer a discount on brokerage services if a customer obtains a traditional bank product from any affiliate. The regulatory exception is conditioned on the brokerage services and traditional bank products offered in the arrangement being separately available for purchase by the customer.

Commenters overwhelmingly favored the proposed amendment. Commenters stated that the regulatory exception would promote fair competition with nonbank competitors and would result in cost savings and other benefits to customers.

A securities industry association opposed the proposed exception because it believed that the exception would increase customer confusion by reinforcing the false impression that brokerage services offered by banks are insured by the federal government. However, the recent inter-agency statement on retail sales of non-deposit investment products specifies steps that banks should take to prevent confusion, including informing customers in writing that the products are not federally insured, are not deposits or other obligations of the institution and are not guaranteed by the institution, and involve investment risks including possible loss of principal. In addition, the statement restricts where an institution may offer non-deposit investment products. The Board believes that this statement satisfactorily addresses any possibility of an increase in customer confusion about coverage of federal deposit insurance where banks offer brokerage services as part of a package arrangement.

A few commenters requested that the Board clarify that "brokerage services" refers to "securities brokerage services" and that securities brokerage services include related incidental services as authorized by Regulation Y. These technical changes are consistent with the intent of the proposed rule, and will be included in the final rule.

Some commenters requested that the Board grant an exception permitting a bank or a bank holding company to vary the consideration charged for a traditional bank product, such as a deposit service, based on a customer's purchase of brokerage services—the converse of the proposed exception. The Board believes that this proposal should be evaluated in the context of a specific exemption request. One such request has been published for comment. *Fleet Financial Group, Inc.*, 59 FR 9,216 (February 25, 1994).

A few commenters sought an interpretation that ties involving mutual funds were either wholly or partially exempt from section 106, either because mutual funds are not bank holding company subsidiaries or because mutual fund products constitute trust services and therefore qualify as traditional bank products. The Board intends to address this issue separately.

Some commenters sought clarification on whether both proposed exceptions were limited to cases where the tying product was offered by a bank, or also included cases where the tying product was offered by a bank holding company or its nonbanking subsidiary. The concern arose because the proposed exceptions were phrased only in terms of banks. The Board notes that the language of section 225.4(d)(1) of Regulation Y would automatically apply the proposed exceptions for banks to bank holding companies and their nonbanking subsidiaries, as was intended by the proposed rulemaking. However, the final rule has been amended to make this coverage explicit. Rather than referring to a "bank"

offering a traditional bank product or a discount on brokerage services, the rule refers to a "bank holding company or bank or nonbank subsidiary thereof."

Reorganization of Regulation

In a non-substantive change, the Board has restructured the regulation to make it more easily understandable. The regulation has been moved from the section on corporate practices, § 225.4, and established as its own section, § 225.7. The application of section 106 to bank holding companies and their nonbank subsidiaries is contained in paragraph (a). Paragraph (b) contains exceptions to both section 106 and § 225.7(a), and paragraph (c) contains limitations on each of those exceptions. Finally, a definition paragraph, § 225.7(d), has been added.

In addition, the exception for credit card services previously contained in § 225.4(d)(2) has been removed from the regulation, as all transactions previously excepted under that provision are now excepted under the traditional bank product exception in § 225.7(b)(1). Also, the phrase "(but no other products)" has been deleted in places where it was superfluous. These changes are not substantive.

Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) are contained in the proposed rule.

Regulatory Flexibility Act

It is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities that would be subject to the regulation.

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, banking, Holding companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in this document, the Board amends 12 CFR part 225 as set forth below:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for 12 CFR part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1831i, 1831p-1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3907, 3909, 3310, and 3331–3351.

§ 225.4 [Amended]

2. In § 225.4, paragraph (d) is removed and paragraphs (e) through (g) are redesignated as paragraphs (d) through (f).

3. A new § 225.7 is added to subpart A of part 225 to read as follows:

§ 225.7 Tying restrictions.

(a) *Applicability to nonbanks.* A bank holding company and any nonbanking subsidiary conducting an activity authorized under § 225.23 may not in any manner extend credit, lease or sell property of any kind, provide any service, or fix or vary the consideration for any of these transactions subject to any condition or requirement that, if imposed by a bank, would constitute an unlawful tie-in arrangement under section 106 of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971, 1972(1)).

(b) *Exceptions.* Subject to the limitations of paragraph (c) of this section, the Board has adopted the following exceptions to the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970 and paragraph (a) of this section.

(1) *Traditional bank products.* A bank holding company or any bank or nonbank subsidiary thereof may vary the consideration charged for a traditional bank product on the condition or requirement that a customer also obtain a traditional bank product from an affiliate.

(2) *Securities brokerage services.* A bank holding company or any bank or nonbank subsidiary thereof may vary the consideration charged for securities brokerage services on the condition or requirement that a customer also obtain a traditional bank product from that bank holding company or bank or nonbank subsidiary, or from any affiliate of such company or subsidiary.

(c) *Limitations on exceptions.* (1) The exceptions of this section shall apply only if all products involved in the tying arrangement are separately available for purchase.

(2) Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anticompetitive practices.

(d) *Definitions.* For purposes of this section:

(1) *Traditional bank product* means a loan, discount, deposit, or trust service.

(2) *Affiliate* has the meaning given such term in section 2(k) of the Bank Holding Company Act (12 U.S.C. 1841(k)).

(3) *Securities brokerage services* means those activities authorized by the Board pursuant to § 225.25(b)(15).

By order of the Board of Governors of the Federal Reserve System, July 27, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94–18724 Filed 8–3–94; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 36 and 91

[Docket No. 25109]

RIN 2120–AC22

Civil Supersonic Airplane Noise Type Certification Standards and Operating Rules

AGENCY: Federal Aviation Administration, DOT.

ACTION: Statement of policy.

SUMMARY: This document provides a statement of Federal Aviation Administration (FAA) policy concerning noise limits for future civil supersonic airplanes (SST). The FAA is withdrawing a previously published Notice of Proposed Rulemaking (NPRM) that proposed to amend the regulations regarding type certification noise limits of these airplanes. This document supplements the withdrawal of the proposed rule.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Ms. Laurette Fisher, Policy and Regulatory Division (AEE–300), Office of Environment and Energy, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, telephone (202) 267–3561.

SUPPLEMENTARY INFORMATION: In 1990, the FAA proposed to amend the type certification noise standards and noise operating rules for future-generation civil supersonic airplanes. After analyzing the comments received on the NPRM, the FAA determined that further investigation and research is necessary before a final rule can be developed. The withdrawal of that NPRM its published elsewhere in this issue of the **Federal Register**. Although the proposed rule is being withdrawn, the FAA has not changed its policy on noise issues involving the development of future-generation civil supersonic airplanes.

Policy Statement

While it is premature at this time to issue a final rule establishing the specific noise standard for such supersonic airplanes, it is important to

reiterate the Federal Aviation Administration's (FAA) commitment to aviation's longstanding efforts to achieve increasingly effective noise abatement at its source. Consequently, it is anticipated that any future Notice of Proposed Rulemaking issued by FAA would propose that any future SST airplane shall produce no greater noise impact on a community than a subsonic airplane certified to Stage 3 noise limits. As such, the noise limits prescribed in 14 CFR part 36, Stage 3 may be used as guidelines for the development of any future SST airplane. This is consistent with the recommendation recently added to Chapter 4 of the International Civil Aviation Organization's Annex 16, Volume I, that states that Chapter 3 noise levels applicable to subsonic airplanes may be used as guidelines for future SST airplanes. Provisions for the noise certification of future SST airplanes will be developed giving consideration, to the extent possible, to the unique operational flight characteristics of future SST designs.

Issued in Washington, DC on July 29, 1994.

Paul R. Dykeman,

Acting Director of Environment and Energy.

[FR Doc. 94–18904 Filed 8–3–94; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–34466]

Delegation of Authority to the Office of General Counsel

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is amending its rules on organization and program management to rescind its delegation of authority for advice and activities concerning certain proceedings conducted pursuant to the provisions of Rule 2(e) of the Commission's Rules of Practice to the Executive Assistant to the Chairman and to transfer that delegation to the Office of the General Counsel.

EFFECTIVE DATE: September 6, 1994.

FOR FURTHER INFORMATION CONTACT: Joan L. Loizeaux, Assistant General Counsel, or Susie Youn, Attorney, Office of the General Counsel, (202) 942–0990.

SUPPLEMENTARY INFORMATION: In 1989, in connection with the consolidation of the Office of Opinions and Review into the Office of the General Counsel, the responsibility to advise the Commission, make certain procedural decisions, and take certain actions in connection with Rule 2(e) proceedings was delegated to the Executive Assistant to the Chairman. The delegation was designed to ensure required separation of functions in light of the fact that the General Counsel was then responsible for prosecuting Rule 2(e) proceedings. In February 1993, the Task Force on Administrative Proceedings of the Securities and Exchange Commission recommended that the authority to advise the Commission with respect to Rule 2(e) proceedings be delegated to the Office of the General Counsel. Since then, responsibility for the prosecution of Rule 2(e) proceedings involving professionals, other than attorneys, has been transferred to the Division of Enforcement. Transfer of the responsibility to advise the Commission, make certain procedural decisions, and take certain actions in connection with Rule 2(e) proceedings would permit the Commission to employ, with respect to those proceedings, the staff that reviews and prepares opinions and orders in other proceedings decided by the Commission. The Commission has determined to adopt the Task Force's recommendations and is not delegating the responsibility to advise the Commission, make certain procedural decisions, and take certain actions in connection with Rule 2(e) proceedings to the General Counsel.

The delegation provides that, in a case in which the involvement of the General Counsel is deemed inappropriate for any reason, the Executive Assistant to the Chairman, or other staff outside the Office of the General Counsel, will assume responsibility for the matter. In light of the fact that the General Counsel retains responsibility for prosecuting Rule 2(e) proceedings against attorneys, the Commission intends that persons other than staff in the Office of the General Counsel will provide advice concerning any such matters so long as the Office of the General Counsel prosecutes such cases. Some minor clarifying changes in language, without substantive effect, are also being made.

The Commission finds, in accordance with the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(A), that this revision relates solely to agency organization, procedures, or practice. It is therefore not subject to the provisions of the Administrative Procedure Act requiring prior publication. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, also does not apply. The revisions adopted today are effective September 6, 1994.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies).

Text of Amendments

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

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

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

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 7811(d), 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. Section 200.30–14 is amended by revising the introductory text of paragraph (g)(1) and paragraphs (g)(2), (g)(5), and (h) to read as follows:

§ 200.30–14 Delegation of authority to the General Counsel.

* * * * *

(g)(1) With respect to proceedings conducted pursuant to the Securities Act of 1933 (15 U.S.C. 77a, *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a, *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa, *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa, *et seq.*), and the provisions of Rule 2(e) of the Commission's Rules of Practice (§ 201.2(e) of this chapter):

* * * * *

(2) With respect to proceedings conducted pursuant to the Securities Act of 1933 (15 U.S.C. 77a, *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1, *et seq.*), the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa, *et seq.*), and the provisions of Rule 2(e) of the Commission's Rules of Practice (§ 201.2(e) of this chapter), to issue findings and orders taking the remedial action described in the order for proceedings where the respondents expressly consent to such action, fail to appear or default in the filing of answers required to be filed; or to grant a request, based upon a showing of good cause, to vacate an order of default, so as to permit presentation of a defense.

* * * * *

(5) With respect to proceedings conducted or reviewed pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1, *et seq.*), and the provisions of Rule 2(e) of the Commission's Rules of Practice (§ 201.2(e) of this chapter), to determine applications to stay Commission orders pending appeal of those orders to the federal courts.

* * * * *

(h) Notwithstanding anything in paragraph (g) of this section, the functions described in paragraph (g) of this section are not delegated to the General Counsel with respect to proceedings in which the Chairman or the General Counsel determines that separation of functions requirements or other circumstances would make inappropriate the General Counsel's exercise of such delegated functions. With respect to such proceedings, such functions are delegated to the Executive Assistant to the Chairman pursuant to § 200.30–16 of this chapter.

* * * * *

3. Section 200.30–16 is amended by removing paragraph (b), by redesignating paragraphs (c) and (d) as paragraphs (b) and (c), by revising the references "paragraph (d)" in the introductory text of this section to read "paragraph (c)", and by revising newly designated paragraphs (b) and (c) to read as follows:

§ 200.30–16 Delegation of authority to Executive Assistant to the Chairman.

* * * * *

(b) Notwithstanding anything in paragraph (a) of this section, in any proceeding described in paragraph (a) of this section in which the Executive Assistant believes it appropriate, the Executive Assistant may submit the matter to the Commission.

(c) Notwithstanding anything in this section, the functions otherwise delegated to the Executive Assistant respecting any proceeding in which the Chairman or the Executive Assistant determines that the Executive Assistant's exercise of such delegated functions would be inappropriate, are hereby delegated to such person or persons, not under the Executive Assistant's supervision, as may be designated by the Chairman.

Dated: July 29, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–19007 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 4

[T.D. 94–62]

Vessels in Foreign and Domestic Trades

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include Malta in the lists of nations which permit vessels of the United States to transport certain articles specified in section 27, Merchant Marine Act of 1920, as amended, between their ports. This amendment will provide reciprocal privileges for vessels of Maltese registry.

Customs has been furnished with satisfactory evidence that Malta places no restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country.

EFFECTIVE DATES: The reciprocal privileges for vessels registered in Malta became effective on May 27, 1994. This amendment is effective August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Barbara Whiting, Carrier Rulings Branch, at 202–482–6940.

SUPPLEMENTARY INFORMATION:

Background

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), provides generally that no merchandise shall be transported by water, or by land and water, between points in the United States except in vessels built in and documented under the laws of the United States and owned by U.S. citizens. However, the sixth proviso of the Act, as amended, provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the United States, reciprocal privileges will be accorded to vessels of that nation, and the prohibition against transportation of those articles between points in the U. S. will not apply to its vessels.

In accordance with the Act, the Customs Service has listed in § 4.93(b)(1) of the Customs Regulations (19 CFR 4.93(b)(1)) those nations found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Those nations found to grant reciprocal privileges to vessels of the United States for the transportation of equipment for use with cargo vans, lift vans, and shipping tanks; empty barges specifically designed for carriage aboard a vessel; empty instruments of international traffic; and certain stevedoring equipment and material, are listed in § 4.93(b)(2) of the Customs Regulations (19 CFR 4.93(b)(2)).

The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

Finding

By letter dated May 21, 1994, accompanied by a copy of a communication from the Embassy of Malta, the Department of State advised that Malta places no restrictions on the transportation of the articles listed in the Act by vessels of the United States between Maltese ports.

On the basis of information received from the Department of State and the Embassy of Malta, it has been determined that Malta places no restrictions on the transportation of the articles specified in section 27 of the Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), by vessels of the United States. Therefore, appropriate reciprocal privileges are accorded to vessels of Maltese registry as of May 27, 1994.

This document amends the regulations accordingly.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this amendment merely implements a statutory requirement and involves a matter in which the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Furthermore, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

Inapplicability of the Regulatory Flexibility Act and Executive Order 12866

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Janet Johnson, Regulations Branch, U. S. Customs Service. However, personnel from other offices of the Customs Service participated in its development.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

Amendment to the Customs Regulations

To reflect the reciprocal privileges granted to vessels registered in Malta, Part 4, Customs Regulations (19 CFR Part 4), is amended as follows:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 and the specific authority for § 4.93 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * *

Section 4.93 also issued under 19 U.S.C. 1322(a), 46 U.S.C. App. 883;

* * * * *

§ 4.93 [Amended]

2. Section 4.93(b) (1) and (2) is amended by adding "Malta" in alphabetical order in the lists of countries under those paragraphs.

Dated: July 28, 1994.

Harold Singer,

Chief, Regulations Branch.

[FR Doc. 94–18985 Filed 8–3–94; 8:45 am]

BILLING CODE 4820–02–P

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19 CFR Part 4

[T.D. 94–63]

Addition of Italy to the List of Countries Entitled to Reciprocal Cruising Licenses for its Pleasure Vessels

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Italy to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any U.S. resident are allowed to arrive at and depart from Italian ports and cruise in the waters of Italy without being subjected to formal entry and clearance procedures. Therefore, Customs is extending reciprocal entry and clearance procedures to Italian-flag pleasure vessels.

EFFECTIVE DATE: These reciprocal privileges became effective for Italy on March 11, 1994. This amendment is effective August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Barbara Whiting, Carrier Rulings Branch, 202–482–6940.

SUPPLEMENTARY INFORMATION:

Background

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. documented vessels with a recreational endorsement, that are used exclusively for pleasure and not engaged in any trade and that do not violate the U.S. Customs or navigation laws, may proceed from port to port in the U.S. or to foreign ports without entering and clearing, provided they have not visited a hovering vessel. However, when returning from a foreign port or place, such pleasure vessels are required to report their arrival pursuant to § 4.2, Customs Regulations (19 CFR 4.2).

Foreign-flag yachts entering the U.S. are generally required to comply with the laws applicable to foreign vessels arriving at, departing from, and proceeding between ports of the U.S. See, for example, § 433, Tariff Act of 1930, as amended (19 U.S.C. 1433). However, § 4.94(b), Customs Regulations (19 CFR 4.94(b)), provides that pleasure vessels from certain countries found to exempt U.S. pleasure vessels from certain formal Customs procedures may be issued cruising licenses that reciprocally exempt them from similar, U.S. formal entry and clearance procedures (*e.g.*, filing manifests, obtaining permits to proceed, and paying entry and clearance fees). Then, upon arrival at each U.S. port of entry, the masters of such licensed vessels simply report the fact of arrival to the appropriate Customs office. Also, yachts or pleasure vessels not carrying passengers or merchandise in trade are exempt from paying tonnage tax and light money pursuant to § 4.21(b)(5), Customs Regulations (19 CFR 4.21(b)(5)). The list of such countries that have been granted reciprocal customs privileges is set forth at § 4.94(b).

By diplomatic note dated January 20, 1994, the Embassy of Italy, in Washington, D.C., informed the Department of State that Italy allows U.S. yachts and other pleasure boats to arrive at and depart from Italian ports and to cruise without payment of import duties or taxes and free of import prohibitions and restrictions, subject to re-exportation and certain other conditions. By letter dated March 7, 1994, the Department of State advised the Chief, Carrier Rulings Branch, U.S. Customs Service, that the Italian treatment of U.S. pleasure vessels in Italian waters appeared to satisfy the conditions for reciprocal customs privileges and recommended that Italy be added to the list of countries under the provisions of 19 CFR 4.94(b). The Director, International Trade Compliance Division, is of the opinion that satisfactory evidence has been furnished to grant the reciprocal privileges allowed under § 4.94(b), effective March 11, 1994, and requested that Italy be added to the list of countries enumerated at § 4.94(b).

Authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

Inapplicability of Public Notice and Comment Requirements, Delayed Effective Date Requirements, the Regulatory Flexibility Act, and Executive Order 12866

Because this amendment merely reflects a statutory requirement that confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are not required. Furthermore, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d) (1) and (3).

Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices of the Customs Service participated in its development.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime Carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

Amendment to the Customs Regulations

To reflect the reciprocal privileges granted to vessels registered in Italy, Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 and the specific authority citation for § 4.94 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * *

Section 4.94 also issued under 19 U.S.C. 1441, 46 U.S.C. App. 104;

* * * * *

§ 4.94 [Amended]

2. In § 4.94, paragraph (b) is amended by inserting, in appropriate alphabetical order, "Italy" in the list of countries.

Dated: July 28, 1994.

Harold Singer,

Chief, Regulations Branch.

[FR Doc. 94–18984 Filed 8–3–94; 8:45 am]

BILLING CODE 4820–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AL–37–2–5926a; FRL–5009–7]

Clean Air Act Approval and Promulgation of Emission Statement Implementation Plan for Alabama

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving the State Implementation Plan (SIP) submitted by the State of Alabama through the Alabama Department of Environmental Management (ADEM) for the purpose of implementing an emission statement program for stationary sources within the Alabama portions of the Birmingham ozone nonattainment area. The SIP was submitted by the State to satisfy the federal requirements for an emission statement program as part of the SIP for Alabama.

EFFECTIVE DATE: This action will be effective October 3, 1994, unless someone submits adverse or critical comments by September 6, 1994. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Written comments should be addressed to:

Joey LeVasseur, Regulatory Planning and Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region IV Environmental Protection Agency, 345 Courtland Street, NE, Atlanta, Georgia 30365

Copies of the material submitted by the State of Alabama may be examined during normal business hours at the following locations:

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Environmental Protection Agency, Region IV Air Programs Branch, 345 Courtland Street NE., Atlanta, Georgia 30365

Alabama Department of Environmental Management, Office of General Counsel, 1751 Cong. W.L. Dickinson Drive, Montgomery, Alabama 36130.

FOR FURTHER INFORMATION CONTACT: Joey LeVasseur, Regulatory Planning and Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region IV Environmental Protection Agency, 345 Courtland Street, NE, Atlanta, Georgia 30365 The telephone number is 404/347–2864.

SUPPLEMENTARY INFORMATION: A SIP revision was submitted by the State of Alabama on November 13, 1992, to satisfy the requirements of section 182(a)(3)(B) of the Clean Air Act Amendments of 1990 (CAA) (November 15, 1990). The SIP revision was reviewed by EPA to determine completeness shortly after its submittal, in accordance with the completeness criteria set out at 40 CFR part 51, Appendix V (1991), as amended by 57 FR 42216 (August 26, 1991). The submittal was found to be complete and a letter dated December 24, 1992, was sent to Mr. Richard Grusnick, Chief of the Air Division in the Alabama Department of Environmental Management indicating the submittal was administratively complete.

There are several key general and specific components of an acceptable emission statement program. Specifically, the state must submit a revision to its SIP and the emission statement program must meet the minimum requirements for reporting. In general, the program must include, at a minimum, provisions for applicability, definitions, compliance, and specific source requirements detailed below.

A. SIP Revision Submission. The State of Alabama submitted their emission statement regulation on November 13, 1992, which meets the emission statement requirement.

B. Program Elements. The State emission statement program must, at a minimum, include provisions covering applicability of the regulations, a compliance schedule for sources covered by the regulations, and the specific reporting requirements for sources. The emission statement submitted by the source should contain, at a minimum, a certification that the information is accurate to the best knowledge of the individual certifying the statement. These requirements can be found in subpart D on page 2, of section 2, of chapter 11, in the Alabama SIP.

C. Applicability. Section 182(a)(3)(B) requires that states with areas designated as nonattainment for ozone, require emission statement data from sources of volatile organic compounds (VOC) or oxides of nitrogen (NO_X) in the nonattainment areas. This requirement applies to all ozone nonattainment areas, regardless of the classification (Marginal, Moderate, etc.).

The states may waive, with EPA approval, the requirement for emission statements for classes or categories of sources with less than 25 tons per year of actual plant-wide NO_X or VOC emissions in nonattainment areas if the class or category is included in the base year and periodic inventories and emissions are calculated using emission factors established by EPA (such as those found in EPA publication AP–42) or other methods acceptable to EPA. The Alabama submittal waives the emission statement requirement for sources with less than 25 tons per year combined of actual plant-wide NO_X and VOC emissions and has included calculations of these emissions in their 1990 Base Year Emissions Inventory.

Final Action

In this action, EPA is approving the Emission Statement SIP revision submitted by the State of Alabama through the ADEM. This action is being taken without prior proposal because the changes are noncontroversial and EPA anticipates no significant comments on them. The public should be advised that this action will be effective October 3, 1994. However, if adverse or critical comments are received by September 6, 1994, this action will be withdrawn and all public comments received will be addressed in a subsequent final rule based on the proposed rule (please see the proposed rule published, simultaneously, in the proposal section of this **Federal Register.**)

Under section 307(b)(1) of the CAA, 42 U.S.C. 7607(b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by (60 days from date of publication). Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and

shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. [See section 307(b)(2) of the CAA, 42 U.S.C. 7607 (b)(2)].

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993, memorandum from Michael Shapiro, Acting Assistant Administrator for Air and Radiation. A future document will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and 3 SIP revisions from the requirements of section 3 of Executive Order 12291 for 2 years. The EPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the waiver until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

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 small entities. 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 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).

List of Subjects in 40 CFR Part 52

Environmental protection, Emission statements, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Reporting and recordkeeping requirements, SIP requirements, Volatile organic compounds.

Dated: June 29, 1994.

Joe R. Franzmathes,

Regional Administrator.

Part 52 of chapter I, title 40, *Code of Federal Regulations*, is amended as follows:

PART 52—[AMENDED]

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

Authority: 42. U.S.C. 7401–7671(q).

Subpart B—Alabama

2. Section 52.50, is amended by adding paragraph (c)(65) to read as follows:

§ 52.50 Identification of plan.

* * * * *

(c) * * *

(65) Revisions to the State of Alabama State Implementation Plan (SIP) concerning emission statements were submitted on November 13, 1992, by the Alabama Department of Environmental Management.

(i) *Incorporation by reference.* The Addition of Section 11.2 of the Alabama Regulations was effective on November 13, 1992.

(ii) *Other material.* Letter dated November 13, 1992, from the Alabama Department of Environmental Management.

[FR Doc. 94–18953 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 52

[Region II Docket No. 127; SIPTRAX NY4–2–6503, FRL–5004–7]

Approval and Promulgation of Implementation Plans; Revision to the New York State Implementation Plan for Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is announcing the limited approval of a request by the State of New York to revise its State Implementation Plan (SIP) for ozone related to the control of volatile organic compound emissions from architectural coatings. EPA is also finding that the State has partially met a commitment made in its 1982 ozone and carbon monoxide SIP for the New York City Metropolitan Area to regulate architectural coatings. This revision deleted part 205 (1979 version) "Photochemically Reactive Solvents and Organic Solvents from Certain Processes-New York City Metropolitan Area" and added part 205 "Architectural Surface Coatings." This regulation will result in additional reductions in emissions of volatile organic compounds which will help to attain the national ambient air quality standard for ozone.

EFFECTIVE DATE: This action will be effective September 6, 1994.

ADDRESSES: Copies of the State submittal are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region II Office, Air Programs Branch, 26 Federal Plaza, Room 1034A, New York, New York 10278.

New York State Department of Environmental Conservation, Division of Air Resources, 50 Wolf Road, Albany, New York 12233.

Environmental Protection Agency, Air and Radiation Docket and Information Center (MC 6102), 401 M Street SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: William S. Baker, Chief, Air Programs Branch, Environmental Protection Agency, 26 Federal Plaza, Room 1034A, New York, New York 10278, (212) 264–2517.

SUPPLEMENTARY INFORMATION: On July 27, 1993 (58 FR 40107) the Environmental Protection Agency (EPA) proposed limited approval of a request by the State of New York to revise its State Implementation Plan (SIP) for ozone. This revision deleted part 205 (1979 version) "Photochemically Reactive Solvents and Organic Solvents from Certain Processes-New York City Metropolitan Area" and added new part 205 "Architectural Surface Coatings," effective September 15, 1988 to Title 6 of the New York Code of Rules and Regulations. EPA also proposed finding that the State has partially met a commitment made in its 1982 ozone and carbon monoxide SIP for the New York City Metropolitan Area (NYCMA) to regulate architectural coatings.

New part 205 provides for the regulation of architectural surface coatings, sold, offered for sale, or used in the NYCMA. Architectural surface coatings applied to stationary structures, buildings, houses, mobile homes,

pavement or curbs are regulated by part 205. These coatings are not applied in a factory or manufacturing operation. The regulation requires any architectural coating manufactured after July 1, 1989 that is to be sold, offered for sale or used in the NYCMA to meet the designated volatile organic compound (VOC) content limitations in part 205.

Paint manufacturers must include on the container the VOC content limitations, date of manufacture or date code, along with any instructions concerning thinning. Compliance with part 205 can be determined visually by checking the paint containers and by taking samples of the paint and calculating the volatile content of the coating and comparing it with the limit in the regulation. In some instances it is necessary to measure certain coating parameters. The EPA recommended test method for determining these parameters is EPA Reference Method 24 (40 CFR part 60 Appendix A). Part 205 inadvertently omitted this reference which New York uses in performing similar testing for other regulations. Therefore, EPA cannot fully approve the regulation. However, because EPA believes that the regulation strengthens the SIP by providing for additional reductions of VOCs, EPA is granting a limited approval to the regulation.

EPA also finds that the State has partially fulfilled its commitment in the SIP to adopt an architectural coatings control measure (contained in part 205). Adoption of a specific test procedure, as discussed above, is necessary to completely fulfill this commitment.

The basis for EPA's limited approval is further explained in the proposed rulemaking on July 27, 1993 (58 FR 40107). In that proposed rulemaking, EPA asked for comments on its proposed action. EPA received one comment, from the Consumer Policy Institute (CPI).

CPI raises three issues in its comments: the timeliness of New York's submission, the difference between the emission reductions New York committed to and the emission reductions actually obtained, and whether New York is enforcing the regulation.

First, CPI notes that New York has failed to meet the commitment made in its 1982 SIP in a timely manner, and questions whether New York will further "slip" in meeting other SIP requirements.

New York's 1982 SIP committed to develop and adopt an architectural regulation by January, 1986. New York did not meet this date for a variety of reasons. The Clean Air Act, as revised in 1977, provided limited remedies for a state which failed to meet Act and SIP requirements, but these were sufficient to result in New York adopting part 205 on August 15, 1988. The amendments of 1990 substantially strengthen EPA's enforcement abilities by providing specific procedures, time frames for SIP submittals and sanctions should a state fail to submit or implement their SIPs. The sanctions which the Act mandates are: restrictions on new growth of industries which generate air pollutants and a loss of federal highway funds. EPA believes these new strengthened procedures and sanctions will induce the states to fulfill their obligations.

Second, CPI notes that New York committed to obtaining 11,682 tons of reductions in VOCs in its 1982 SIP, yet New York now estimates that part 205 will only result in emission reductions of 3,000 tons per year. CPI questions how New York will meet this commitment for equivalent tonnage reductions in VOCs.

This comment raises concerns regarding the level of controls that have been required and the ability of New York to demonstrate attainment (i.e., rectify the shortfall). The Clean Air Act addresses both of these concerns. The Act uses a fundamental concept that sources should apply reasonably available control technology (RACT), as defined in control techniques guidelines (CTGs) or as determined by a state through a specific technical and economic review of the industry. As EPA explained in its proposed action, New York's original emission reduction was based on 1975 data which New York believes overestimated the amount of solvent based coatings used in the NYCMA, and on which the projected emission reductions were based. The present emission reduction estimate reflects current coating usage and solvent content which EPA believes is more accurate. EPA also notes that New York has regulated all the high volume coatings as well as most of the lower usage coatings that the original commitment intended. In addition, EPA has found that New York's VOC limitations are consistent with regulations of the limited number of states that have also regulated these coatings. Furthermore, section 183(e) of the Act requires EPA to regulate consumer products, which include architectural coatings. EPA has a major rule development effort underway to develop a national architectural coatings regulation that will provide more extensive and current data on coating content and usage. Once this data is available, New York will be able to reevaluate its rule to determine if additional reductions are achievable.

In terms of New York's ability to reach attainment, Congress, in recognizing that many states, including New York were having problems solving their air pollution problems, set forth a procedure for states to follow in the Act as amended in 1990. This procedure consists of requirements to develop accurate current emission inventories that can be used in selecting control strategies, to adopt specific control measures, to develop reasonable further progress plans, and to develop any additional control measures needed to attain the standard by the specified dates. These requirements will address any shortfalls that remain from the previously approved SIP and insure that states, like New York, attain the ozone standard in an expeditious manner.

Third, CPI raises its concern that, while New York State has adopted the regulation, it may not actually be enforcing it.

Part 205 contains labeling requirements with which manufacturers of architectural coatings must comply. This provides a quick method of screening the coatings being sold. In addition, after the regulation became effective, New York State performed random checks of retail stores to ensure that only compliant coatings were being sold. New York has continued to take action to ensure that retailers and manufacturers are complying with part 205.

In addition, by incorporating this regulation into New York's SIP, it becomes federally enforceable. Thus EPA has the authority to take enforcement action should EPA determine there is any lack of compliance.

Conclusion

The Agency has reviewed New York's request for revision of the federally-approved SIP for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment. The revision incorporates a control program consistent to the one committed to in the 1982 SIP and results in emission reductions. Therefore, New York's submittal meets the requirements of section 193. Beyond that, the revision will not interfere with the SIP's ability to meet the new Act's requirements, and thus it meets the test in section 110(i) of the Act.

Because of a missing test method, EPA cannot grant full approval to this

regulation under section 110(k)(3). Because the submitted regulation is not composed of separable parts which meet all the applicable requirements of the Act, EPA cannot grant partial approval for the rule under section 110(k)(3). However, EPA may grant limited approval of the submittal under section 110(k)(3) in light of EPA's authority pursuant to section 301(a) to adopt regulations necessary to further air quality by strengthening the SIP.

EPA also finds that the State has partially fulfilled its commitment in the SIP to adopt an architectural coatings control measure (contained in part 205). Adoption of the missing test procedure, as discussed above, is necessary to fulfill this commitment in whole.

Section 183(e)(3) of the Clean Air Act requires that EPA develop either national regulations or CTG for consumer and commercial products, which may include architectural coatings. If EPA promulgates a federal regulation for architectural coatings under this authority, then sources covered by New York's part 205 would also be required to comply with the federal regulation. New York does retain the right to promulgate regulations that are more stringent than either a federal regulation or a CTG.

Nothing in this rule should be construed as permitting, allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to any SIP shall be considered separately in light of specific technical, economic, and environmental factors, and in relation to relevant statutory and regulatory requirements.

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866 review.

Under section 307(b)(1) of the Act, petitions for judicial review of this rule must be filed in the United States Court of Appeals for the appropriate circuit within 60 days from date of publication. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This rule may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 13, 1994.

William J. Muszynski,

Deputy Regional Administrator.

Title 40, chapter I, part 52, Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401–7671q.

Subpart HH—New York

2. Section 52.1670 is amended by adding new paragraph (c)(87) to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

* * * * * *

(87) A revision to the New York State Implementation Plan (SIP) for attainment and maintenance of the ozone standard dated October 14, 1988, submitted by the New York State Department of Environmental Conservation.

(i) Incorporation by reference:

(A) New part 205 of title 6 of the New York Code of Rules and Regulations of the State of New York, entitled "Architectural Surface Coatings," effective on September 15, 1988.

(ii) Additional material.

(A) December 5, 1988 letter from Thomas Allen, to Conrad Simon, EPA, requesting EPA approval of the amendments to part 205.

3. Section 52.1679 is amended by revising the entry for part 205 in the table to read as follows:

§ 52.1679 EPA-approved New York State regulations.

New York State regulation	State effective date	Latest EPA approval date	Comments
* * *	* * *	* * *	* * *
Part 205 "Architectural Surface Coatings"	9/15/88	8/4/94, [insert citation of this notice]	Until EPA approves State adopted coating test method, EPA will use 40 CFR part 60, App. B, Method 24.
* * *	* * *	* * *	* * *

[FR Doc. 94–18957 Filed 8–3–94; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 52

[IL70–1–6254A; FRL–5013–4]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The United States Environmental Protection Agency (USEPA) is approving a February 11, 1993, State submittal requesting a revision to the Illinois State Implementation Plan (SIP) for carbon monoxide (CO). The revision pertains to a site-specific emission limit for an iron foundry operated by General Motors Corporation (GMC) and located adjacent to Interstate 74 at G Street in Vermilion County, Illinois. Vermilion County has been designated by USEPA as "unclassifiable/attainment" for carbon monoxide. In the proposed rules section of this **Federal Register**, USEPA is proposing approval of and soliciting public comment on this requested SIP revision. If adverse comments are received on this direct final rule, USEPA will withdraw this final rule and address the comments received in response to this final rule in a final rule on the related proposed rule which is being published in the proposed rules section of this **Federal Register**.

EFFECTIVE DATE: This action will be effective October 3, 1994 unless notice is received by September 6, 1994 that someone wishes to submit adverse comments. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments should be addressed to: J. Elmer Bortzer, Chief, Regulation Development Section, Regulation Development Branch (5AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the State's submittal and other information are available for inspection during normal business hours at the following location: Regulation Development Section, Regulation Development Branch (AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

A copy of the SIP revision is located at the Office of Air and Radiation (OAR) Docket and Information Center (Air Docket 6102), Room M1500, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 260–7548.

FOR FURTHER INFORMATION CONTACT: Fayette Bright, Regulation Development Section, Regulation Development Branch (AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6069.

SUPPLEMENTARY INFORMATION:

I. Background

On October 1, 1992, the Illinois Pollution Control Board (IPCB) adopted a Final Opinion and Order amending Title 35: Environmental Protection, Subtitle B: Air Pollution Chapter I: Pollution Control Board (35 IAC) section 216.381 revising the allowable emission limit of gases containing CO from 200 ppm to 2,000 ppm for the GMC iron foundry in Vermilion County, Illinois.

The GMC foundry manufactures iron castings for the automotive industry. The castings include brake drums, bearing caps, differential carriers, water pumps and brake rotors. The foundry is located approximately 1.5 miles from downtown Danville adjacent to Interstate 74 at G Street, in an area that is predominately agricultural, with some residential sections. This is the only iron foundry in Vermilion County. Vermilion County has been designated by USEPA as "unclassifiable/attainment" of the National Ambient Air Quality Standards (NAAQS) for CO (Refer to title 40 of the Code of Federal Regulations § 81.314, 1992).

The GMC foundry is presently using two cupolas, Number 2 and Number 3, in its foundry operation. A cupola is a vertical shaft furnace which is fed or "charged" with layers of metallics, coke and limestone. Cupola melting is used by GMC to melt scrap metal. Approximately 220,000 tons of scrap metal are remelted and made into castings each year. Typical cupola exhaust gases contain 13 to 27 percent CO. This is the equivalent of 130,000 to 270,000 parts per million (ppm). In a cupola, high CO levels and specific carbon dioxide ratios are important to the metallurgical properties of the iron. These levels can be minimized by proper selection of fuels, charge material, and by major facility changes, but cannot be eliminated.

In July 1988, emission tests of the cupolas showed CO emissions from both cupolas were in excess of 200 ppm. CO was present at a concentration of 8,317 ppm for Cupola Number 3 and at 4,563 ppm for Cupola Number 2. Subsequent tests showed CO concentrations as high as 16,053 ppm for Cupola Number 3. As a result of these tests, GMC initiated an aggressive plan to modify the system beyond the state-of-the art contemplated by the regulation. In November 1988, GMC filed a petition for a variance in order to continue the operation of the foundry while it implemented corrective action to reduce the concentration of CO in its emissions. Although modifications have significantly reduced emissions, compliance with the 200 ppm limitation has not been achieved. However, emissions have dropped from a high concentration of approximately 18,000 ppm to below 2,000 ppm. A computer modeling study discussed below demonstrated that CO emissions at the rate of 2,000 ppm would not adversely affect the National Ambient Air Quality Standards (NAAQS). The purpose of this source specific SIP revision request is to permanently amend GMC's allowable emission limit of gases containing CO from 200 ppm to 2,000 ppm for this iron foundry.

II. Analysis of State Submittal

As previously stated, the IPCB has adopted a site-specific regulation revising the allowable emission limit of CO from GMC cupolas in Vermilion County from 200 ppm to 2,000 ppm. The new language reads as follows:

> The standard for CO for 35 IAC 216.381 shall not apply to the existing foundry located adjacent to Interstate 74 at G street in Vermilion County, owned by GMC on the effective date of this regulation. The emission of carbon monoxide from this foundry shall not exceed 2,000 ppm corrected to 50 percent excess air.

Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board of the Illinois Administrative Code (35 IAC) Part 216—Carbon Monoxide Emissions, contains the regulations regarding this SIP revision request. Section 216.101—Measurement Methods, contains measurement methods applicable to GMC's site-specific SIP revision request. This section states that carbon monoxide concentrations in an effluent stream shall be measured by the non-dispersive infrared method or by other methods approved by the Illinois Environmental Protection Agency (IEPA) according to the provisions of 35 IAC 201.

The USEPA had concerns about the test method and recordkeeping for this source. Specifically the test methods and recordkeeping requirements relied on in this requested SIP revision were not sufficient to ensure compliance with the limit and maintenance of the CO NAAQS. Further, because section 216.201 allows IEPA to modify the test methods utilized and because case law indicates that such State discretionary actions modify the SIP without Federal comment or approval USEPA would be required to disapprove this requested SIP revision since the possibility of modification without Federal approval would impede attainment and maintenance of the NAAQS. (See for example *United States of America* v. *Allsteel Inc.* (No. 87C4638 ND Illinois, August 30, 1989).

USEPA would ordinarily propose to disapprove this site-specific regulation and recommend that the State modify the regulations in the requested SIP revision to incorporate the appropriate test methods, recordkeeping and reporting requirements and to remove the discretionary provisions or at least to limit their effectiveness until they were approved as a SIP revision by USEPA. However, on December 17, 1992 (57 FR59928) Illinois' operating permit program was approved by USEPA and incorporated into the SIP for the purpose of issuing Federally Enforceable State Operating Permits (FESOP). As operating permits issued following the approved State requirements are federally enforceable, Illinois addressed USEPA's concerns by including adequate test methods and recordkeeping requirements as discussed in section 3 in a FESOP for the GMC iron foundry.

Modeling Results

The USEPA reviewed the dispersion modeling analysis performed by Versar Incorporated for this SIP revision request and has determined that the analysis is acceptable as a demonstration of attainment and maintenance of the NAAQS for CO. This attainment and maintenance

demonstration was performed in accordance with USEPA guidance.

III. Final Rulemaking Action

The USEPA approves the February 11, 1993, submittal as a revision to the Illinois CO SIP for the GMC iron foundry in Vermilion County amending 35 IAC section 216.381 because the deficiencies identified were corrected in a FESOP issued to the Source. Vermilion County is and has always been designated as attainment for CO and ozone and the emission limit set forth in the SIP revision was shown through the modeling analysis not to cause or contribute to a violation of the NAAQS for CO. Because the State included the following conditions in a FESOP, the SIP revision is now federally enforceable upon the effective date of this action.

1. Specific test method to be used;
2. Identification as to whether a continuous or integrated sample is to be used in the test method;
3. A compliance test that contains averaging times; and
4. The appropriate reporting and recordkeeping requirements to insure compliance.

Because USEPA considers this action noncontroversial and routine, we are approving it without prior proposal. This action will become effective on October 3, 1994. However, if the USEPA receives adverse comments by September 6, 1994, then the USEPA will publish a notice that withdraws the action, and will address the comments received in response to this final rule in the final rule on the requested SIP revision which has been proposed for approval in the proposed rules section of this **Federal Register**. The comment period will not be extended or reopened.

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future notice will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for 2 years. The USEPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on USEPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993. The OMB has exempted this regulatory action from Executive Order 12866 review.

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 the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, USEPA 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.

The SIP approvals under section 110 and subchapter I, Part D of the Act 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 Act, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The Act forbids USEPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *USEPA.*, 427 U.S. 246, 256–66 (1976).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide.

Authority 42 U.S.C. 7401–7671q.

Dated: June 16, 1994.

Valdas V. Adamkus,

Regional Administrator.

For the reasons stated in the preamble, part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart O—Illinois

2. Section 52.720 is amended by adding paragraph (c)(103) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *

(103) On February 11, 1993, Illinois submitted a site specific revision to its carbon monoxide State Implementation Plan for a General Motors Corporation iron foundry located adjacent to Interstate 74 at G Street in Vermilion County, Illinois.

(i) Incorporation by reference.

(A) Illinois Administrative Code; Title 35 Environmental Protection; Subtitle B: Air Pollution; Chapter I: Pollution Control Board; Subchapter C: Emission Standards and Limitations for Stationary Sources; P 216: Carbon Monoxide Emissions; Subpart O: Primary and Fabricated Metal Products; Section 216.382 Exception, General Motors Ferris Foundry in Vermilion County. Added at 16 Illinois Register 18075, effective November 13, 1992.

[FR Doc. 94–18955 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 52

[Region II Docket No. 130; NJ14–2–6524, FRL–5010–9]

Approval and Promulgation of Implementation Plans; New Jersey Emission Statement Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a request by New Jersey to revise its State Implementation Plan (SIP) for the purpose of implementing an Emission Statement Program for stationary sources in New Jersey. The SIP was submitted by New Jersey to satisfy the Clean Air Act requirements for stationary sources to report annually to the State their emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO_x) and for the State to make this data available to EPA and the public.

EFFECTIVE DATE: This action will be effective September 6, 1994.

ADDRESSES: Copies of New Jersey's submittals are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency,
Region II Office, Air Programs Branch,

26 Federal Plaza, Room 1034A, New York, New York 10278.
New Jersey Department of Environmental Protection and Energy, Office of Energy, Bureau of Air Quality Planning, Bureau of Air Pollution Control, 401 East State Street, CN027, Trenton, New Jersey 08625.
Environmental Protection Agency, Air and Radiation Docket and Information Center (MC 6102), 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: William S. Baker, Chief, Air Programs Branch, Environmental Protection Agency, 26 Federal Plaza, Room 1034A, New York, New York 10278, (212) 264–2517.

SUPPLEMENTARY INFORMATION:

Background

On April 4, 1994, the Environmental Protection Agency (EPA) published in the **Federal Register** (59 FR 15689) a Notice of Proposed Rulemaking proposing to approve a State Implementation Plan (SIP) revision submitted by the State of New Jersey for its Emission Statement Program. The SIP revision was submitted to satisfy Section 182(a) of the Clean Air Act which requires stationary sources to report on an annual basis their emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO_x).

Conclusion

The rationale for EPA's proposed approval was explained in the Notice of Proposed Rulemaking and will not be restated here since EPA's final action does not differ from the proposed action. EPA inadvertently omitted reference in the Proposed Rulemaking to Subchapter 1, "General Provisions"; Subchapter 8, "Permits and Certificates, Hearings, and Confidentiality"; and Subchapter 16, "Control and Prohibition of Air Pollution by Volatile Organic Compounds," but will take action on the changes made to these subchapters in a subsequent rulemaking. No public comments were received on the proposed action. Therefore, EPA is approving New Jersey's SIP revision incorporating Subchapter 21, "Emission Statements."

Nothing in this rule 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 any SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This rule makes final the action proposed at 59 FR 15689, April 4, 1994. As noted elsewhere in this notice, EPA received no adverse public comment on the proposed action. As a direct result, the Regional Administrator has reclassified this action from Table 2 to Table 3 under the processing procedures established at 54 FR 2214, January 19, 1989.

This rule has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future notice will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for a period of two years. The EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993. OMB has exempted this regulatory action from Executive Order 12866 review.

Under Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this rule must be filed in the United States Court of Appeals for the appropriate circuit within 60 days from date of publication. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This rule may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 27, 1994.

William J. Muszynski, P.E.,

Deputy Regional Administrator.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart FF—New Jersey

2. Section 52.1570 is amended by adding new paragraph (c)(53) to read as follows:

§ 52.1570 Identification of plan.

* * * * *

(c) * * *

* * * * *

(53) A revision to the New Jersey State Implementation Plan (SIP) for an Emission Statement Program dated February 19, 1993, submitted by the New Jersey Department of Environmental Protection and Energy.

(i) Incorporation by reference:

(A) Title 7, Chapter 27, Subchapter 21, of the New Jersey Administrative Code entitled, "Emission Statements," effective March 15, 1993.

(ii) Additional information:

(A) May 24, 1993 letter from John Elston to Conrad Simon, EPA, transmitting supporting documentation necessary for approval of the SIP revisions. These items included:

(*1*) Notice of Adoption, March 15, 1993.

(*2*) Justification of Gasoline Dispensing Facility Exemption.

(B) October 29, 1993 letter from John Elston to Conrad Simon, EPA, transmitting legislative language to reflect change in New Jersey's Air Pollution Control Act regarding confidentiality provisions.

(C) February 3, 1994 letter from John Elston to Conrad Simon, EPA, requesting the use of EPA's Emission Statement waiver provision.

3. Section 52.1605 is amended by adding the entry for Subchapter 21 under the heading "Title 7, Chapter 27" to the table in numerical order to read as follows:

§ 52.1605 EPA-approved New Jersey State regulations.

State regulation	State effective date	EPA approved date	Comments
* * * * * * *			
Title 7, Chapter 27			
* * * * * * *			
Subchapter 21, "Emission Statements;".	Mar. 15, 1993	[insert date and citation of this action].	
* * * * * * *			

[FR Doc. 94–18991 Filed 8–3–94; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 52

[CA 38–1–6542; FRL–5010–2]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; Ventura County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final rulemaking (NFRM).

SUMMARY: EPA is finalizing the approval of revisions to the California State Implementation Plan (SIP) proposed in the **Federal Register** on December 20, 1993. The revisions concern rules from the Ventura County Air Pollution Control District (VCAPCD). This approval action will incorporate these rules into the federally approved SIP. The intended effect of approving these rules is to regulate emissions of volatile organic compounds (VOCs) in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). The revised rules control VOC emissions from hospital sterilizers and petroleum production, processing, storage, and transfer. Thus, EPA is finalizing the approval of these revisions into the California SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards and plan requirements for nonattainment areas.

EFFECTIVE DATE: This action is effective on September 6, 1994.

ADDRESSES: Copies of the rule revisions and EPA's evaluation report for each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revisions are available for inspection at the following locations:

Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Environmental Protection Agency, Jerry Kurtzweg ANR 443, 401 "M" Street, S.W., Washington, D.C. 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95814.

Ventura County Air Pollution Control District, 702 County Square Drive, Ventura, California 93003.

FOR FURTHER INFORMATION CONTACT: Mae Wang, Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1200.

SUPPLEMENTARY INFORMATION:

Background

On December 20, 1993 in 58 FR 66324, EPA proposed to approve the following VCAPCD rules into the California SIP: Rule 62.6, Ethylene Oxide-Sterilization and Aeration; Rule 71.1, Crude Oil Production and Separation; and Rule 71.3, Transfer of Reactive Organic Compound Liquids. These rules were adopted by VCAPCD on July 16, 1991 and June 16, 1992. The rules were submitted by the California Air Resources Board (CARB) to EPA on October 25, 1991 and September 14, 1992. These rules were submitted in response to EPA's 1988 SIP-Call and the CAA section 182(a)(2)(A) requirement that nonattainment areas fix their reasonably available control technology (RACT) rules for ozone in accordance with EPA guidance that interpreted the requirements of the pre-amendment Act. A detailed discussion of the background for each of the above rules and nonattainment areas is provided in the notice of proposed rulemaking (NPRM) cited above.

EPA has evaluated all of the above rules for consistency with the requirements of the CAA, EPA regulations, and EPA interpretation of these requirements as expressed in the various EPA policy guidance documents referenced in the NPRM cited above. EPA has found that the rules meet the applicable EPA requirements. A detailed discussion of the rule provisions and evaluations has been provided in 58 FR 66324 and in technical support documents (TSDs) available at EPA's Region IX office.

Response to Public Comments

A 30-day public comment period was provided in 58 FR 66324. EPA received no comments regarding the NPRM.

EPA Action

EPA is finalizing this action to approve the above rules for inclusion into the California SIP. EPA is approving the submittal under section 110(k)(3) as meeting the requirements of section 110(a) and Part D of the CAA. This approval action will incorporate these rules into the federally approved SIP. The intended effect of approving these rules is to regulate emissions of VOCs in accordance with the requirements of the CAA.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Regulatory Process

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866 review.

List of Subjects in 40 CFR Part 52

Environmental Protection Agency, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Note: Incorporation by reference of the State Implementation Plan for the State of

California was approved by the Director of the Federal Register on July 1, 1982.

Dated: June 29, 1994.

Felicia Marcus,

Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c)(186)(i)(D)(*1*) and (c)(189)(i)(B)(*1*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(186) * * *

(i) * * *

(D) Ventura County Air Pollution Control District.

(*1*) Rule 62.6, adopted on July 16, 1991.

* * * * *

(189) * * *

(i) * * *

(B) Ventura County Air Pollution Control District.

(*1*) Rule 71.1 and Rule 71.3, adopted on June 16, 1992.

* * * * *

[FR Doc. 94–18992 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 52

[CA 46–3–6525; FRL–5010–3]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final rulemaking (NFRM).

SUMMARY: EPA is finalizing the approval of a revision to the California State Implementation Plan (SIP) proposed in the **Federal Register** on January 12, 1994. The revisions concern a rule from the Sacramento Air Quality Management District (SMAQMD). This rule is intended to control volatile organic compound (VOC) emissions from degreasing (cleaning) operations. This final action notice will incorporate this rule into the federally approved SIP. The intended effect of approving this rule is to regulate VOC emissions in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). Thus, EPA is finalizing the approval of this revision into the California SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards, and plan requirements for nonattainment areas.

On October 22, 1991, the sanctions and FIP clocks were started when EPA determined that the State failed to make a complete submittal. The mandatory sanctions clock was stopped on April 28, 1993 when EPA determined that the State had made a complete submittal. This final action will incorporate this rule into the federally approved SIP and stop the Federal Implementation Plan clock.

EFFECTIVE DATE: This action is effective on September 6, 1994.

ADDRESSEES: Copies of the rule revision and EPA's evaluation report for the rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revision are available for inspection at the following locations:

Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Environmental Protection Agency, Jerry Kurtzweg ANR 443, 401 "M" Street, SW., Washington, DC 20460.

California Air Resources Board, Stationary Source Division, 2020 L Street, Sacramento, CA 95814.

Sacramento Metropolitan Air Quality Management District, 8411 Jackson Road, Sacramento, CA 95826.

FOR FURTHER INFORMATION CONTACT: Chris Stamos, Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1152.

SUPPLEMENTARY INFORMATION:

Applicability

The rule being approved into the California SIP is Sacramento Metropolitan Air Quality Management District (SMAQMD) Rule 454, Degreasing Operations. This rule was submitted to EPA by the California Air Resources Board (CARB) on April 6, 1993.

Background

On January 12, 1994 in 59 FR 1699, EPA proposed to approve the following rule into the California SIP: SMAQMD's Rule 454, Degreasing Operations. Rule 454 was adopted by SMAQMD on February 23, 1993. This rule was submitted in response to EPA's 1988 SIP-Call and the CAA section 182(a)(2)(A) requirement that nonattainment areas fix their reasonably available control technology (RACT) rules for ozone in accordance with EPA guidance that interpreted the requirements of the pre-amendment Act. A detailed discussion of the background for the above rule and nonattainment area is provided in the notice of proposed rulemaking (NPRM) cited above.

EPA has evaluated the above rule for consistency with the requirements of the CAA and EPA regulations and EPA interpretation of these requirements as expressed in the various EPA policy guidance documents referenced in the NPRM cited above. EPA has found that the rule meets the applicable EPA requirements. A detailed discussion of the rule provisions and evaluations has been provided in 59 FR 1698 and in a technical support document (TSD) available at EPA's Region IX office (TSD dated June 10, 1993 for Rule 454).

Response to Public Comments

A 30-day public comment period was provided in 59 FR 1698. No comments were received by EPA on the notice.

EPA Action

EPA is finalizing action to approve the above rule for inclusion into the California SIP. EPA is approving the submittal under section 110(k)(3) as meeting the requirements of section 110(a) and Part D of the CAA. This approval action will incorporate this rule into the federally approved SIP. The intended effect of approving this rule is to regulate emissions of VOCs in accordance with the requirements of the CAA.

This approval action will incorporate this rule into the federally approved SIP and also stop the Federal Implementation Plan (FIP) clock. The sanctions and FIP clocks were started on October 22, 1991 when EPA determined that the State failed to make a complete submittal. The mandatory sanctions clock was stopped on April 28, 1993 when EPA determined that the State made a complete submittal.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Regulatory Process

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993, memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future notice will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions (54 FR 222) from the requirements of Section 3 of Executive Order 12291 for 2 years. The EPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Note: Incorporation by reference of the State Implementation Plan for the State of California was approved by the Director of the Federal Register on July 1, 1982.

Dated: June 29, 1994.

Felicia Marcus,

Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c)(192)(i)(A)(*2*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(192) * * *

(i) * * *

(A) * * *

(*2*) Rule 454, adopted on February 23, 1993.

* * * * *

[FR Doc. 94–18993 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Parts 52 and 81

[TN 132–6436a; FRL–5009–3]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Tennessee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On November 12, 1992, the State of Tennessee through the Memphis and Shelby County Health Department (MSCHD), submitted a maintenance plan and a request to redesignate the Memphis and Shelby County area (classified as a marginal nonattainment area) from nonattainment to attainment for ozone (O_3). The O_3 nonattainment area specifically consists of Shelby County. Under the Clean Air Act, designations can be changed if sufficient data are available to warrant such changes and the redesignation request satisfies the criteria set forth in the Clean Air Act for redesignations. In this action, EPA is approving the State of Tennessee's submittal because it meets the maintenance plan and redesignation requirements. The approved maintenance plan will become a federally enforceable part of the SIP for the Memphis and Shelby County area.

On January 15, 1993, in a letter from Patrick M. Tobin to Governor Ned McWherter, the EPA notified the State of Tennessee that the EPA had made a finding of failure to submit required programs for the nonattainment area. EPA's redesignation of the Memphis and Shelby County area to attainment abrogates those requirements for this area. Therefore, the sanctions and federal implementation plan clocks begun by those findings are stopped at the time of the redesignation.

EFFECTIVE DATE: This final rule will be effective October 3, 1994 unless adverse or critical comments are received by September 6, 1994. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Written comments should be sent to Karen Borel at the EPA address in Atlanta, Georgia listed below. Copies of the redesignation request and the State of Tennessee's submittal are available for public review during normal business hours at the addresses listed below. EPA's technical support document (TSD) is available for public review during normal business hours at the EPA addresses listed below.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street N.E., Atlanta, GA, 30365.

Memphis and Shelby County Health Department, 814 Jefferson Avenue, Memphis, TN 38105.

FOR FURTHER INFORMATION CONTACT: Karen Borel of the EPA Region IV Air Programs Branch at (404) 347–2864 and at the Region IV address.

SUPPLEMENTARY INFORMATION:

I. Background

On November 15, 1990, the Clean Air Act Amendments of 1990 (CAA) were enacted. (Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q). Under section 107(d)(1), in conjunction with the Governor of Tennessee, EPA designated the Memphis and Shelby County area as nonattainment because the area violated the O_3 standard during the period from 1987 through 1989. Furthermore, upon designation, the Memphis and Shelby County area was classified as marginal under section 181(a)(1). (See 56 FR 56694 (Nov. 6, 1991) and 57 FR 56762 (Nov. 30, 1992), codified at 40 CFR 81.343.)

The Memphis and Shelby County area more recently has ambient monitoring data that show no violations of the O_3 National Ambient Air Quality Standards (NAAQS), during the period from 1990 through 1992. Therefore, in an effort to comply with the CAA and to ensure continued attainment of the NAAQS, on November 12, 1992, the State of Tennessee submitted for parallel processing an O_3 maintenance SIP for the Memphis and Shelby County area and requested redesignation of the area to attainment with respect to the O_3 NAAQS. On May 14, 1993, the MSCHD submitted evidence that a public hearing was held on the requests to redesignate Memphis and Shelby County from nonattainment of the NAAQS for both CO and O_3 to attainment of the NAAQS for these pollutants. In addition, there have been no violations reported for the 1993 O_3 season. The request for redesignation submittal was approved by the TN Air Pollution Control Board on March 9, 1994.

II. Evaluation Criteria

The 1990 Amendments revised section 107(d)(1)(E) to provide five specific requirements that an area must meet in order to be redesignated from nonattainment to attainment.

1. The area must have attained the applicable NAAQS;
2. The area has met all applicable requirements under section 110 and part D of the CAA;
3. The area has a fully approved SIP under section 110(k) of the CAA;
4. The air quality improvement must be permanent and enforceable; and,
5. The area must have a fully approved maintenance plan pursuant to section 175A of the CAA.

III. Review of State Submittal

On May 19, 1993, Region IV determined that the information received from the MSCHD constituted a complete redesignation request under the general completeness criteria of 40 CFR 51, appendix V, sections 2.1 and 2.2. However, for purposes of determining what requirements are applicable for redesignation purposes, EPA believes it is necessary to identify when the MSCHD first submitted a redesignation request that meets the completeness criteria. EPA noted in a previous policy memorandum that parallel processing requests for submittals under the CAA, including redesignation submittals, would not be determined complete. See the memorandum entitled "State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (Act) Deadlines" from John Calcagni to Air Programs Division Directors, Regions I-X, dated October 28, 1992 (Memorandum). The rationale for this conclusion was that the parallel processing exception to the completeness criteria (40 CFR 51, appendix V, section 2.3) was not intended to extend statutory due dates for mandatory submittals. (See Memorandum at 3–4). However, since requests for redesignation are not mandatory submittals under the CAA, EPA believed it appropriate to change its policy with respect to redesignation submittals to conform to the existing completeness criteria. (See 58 FR 38108 (July 15, 1993)). Therefore, EPA believes, the parallel processing exception to the completeness criteria may be applied to redesignation request submittals, at least until such time as the EPA decides to revise that exception. MSCHD submitted a redesignation request on November 12, 1992. In the November 12 submittal, MSCHD submitted the maintenance plan, thereby including the final element to make the November 12, 1992, request for parallel processing complete under the parallel processing exception to the completeness criteria. When the maintenance plan became state effective on March 9, 1994, the State of Tennessee no longer needed parallel processing for the redesignation request and maintenance plan.

The Tennessee redesignation request for the Memphis and Shelby County area meets the five requirements of section 107(d)(3)(E) for redesignation to attainment. The following is a brief description of how the State of Tennessee has fulfilled each of these requirements. Because the maintenance plan is a critical element of the redesignation request, EPA will discuss its evaluation of the maintenance plan under its analysis of the redesignation request.

1. The Area Must Have Attained the O_3 NAAQS

The State of Tennessee's request is based on an analysis of quality assured ambient air quality monitoring data which is relevant to the maintenance plan and to the redesignation request. Ambient air quality monitoring data for calendar year 1989 through calendar year 1992 show an expected exceedance rate of less than or equal to 1.0 per year of the O_3 NAAQS in the Memphis and Shelby County area. (See 40 CFR 50.9 and appendix H.) One of the two ozone monitoring sites had no exceedances over this period of time while the other monitor had one exceedance. That exceedance occurred in 1989. The design value, or the "fourth highest high," of the two monitors for the calendar year period of 1990 through 1992 was 0.117 ppm, down from 0.140 ppm in the period of calendar year 1988 through calendar year 1990, and 0.121 ppm for the calendar year period of 1989 through 1991. The ozone monitoring year for 1993 ended on October 31, 1993. One monitor recorded an exceedance of the 0.120 ppm NAAQS during the 1993 season. The State of Tennessee has committed to continue monitoring in this area in accordance with 40 CFR 58. Because the Memphis and Shelby County area has complete quality-assured data showing no violations of the standard over the most recent consecutive three calendar year period, the Memphis and Shelby County area has met the first statutory criterion of attainment of the O_3 NAAQS.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D of the Act

On February 6, 1980, and on September 2, 1981, EPA fully approved Tennessee's SIP as meeting the requirements of section 110(a)(2) and part D of the 1977 CAA (45 FR 26038 and 45 FR 59578). The amended CAA, however, revised section 110(a)(2) and, under part D, revised section 172 and added new requirements for all nonattainment areas. Therefore, for purposes of redesignation, to meet the requirement that the SIP contain all applicable requirements under the CAA, EPA reviewed the Tennessee SIP to ensure that it contained all measures due under the amended CAA prior to or at the time the State of Tennessee submitted its redesignation request.

A. Section 110 Requirements

Although section 110 was amended, the Memphis and Shelby County area SIP meets the requirements of amended section 110(a)(2). A number of the requirements did not change in substance and, therefore, EPA believes that the pre-amendment SIP met these requirements. As to those requirements that were amended, see 57 FR 27936 and 57 FR 27939 (June 23, 1992), many are duplicative of other requirements of the CAA. EPA has analyzed the SIP and determined that it is consistent with the requirements of amended section 110(a)(2).

B. Part D Requirements

Before the Memphis and Shelby County area may be redesignated to attainment, it also must have fulfilled the applicable requirements of part D. Under part D, an area's classification indicates the requirements to which it will be subject. Subpart 1 of part D sets forth the basic nonattainment requirements applicable to all nonattainment areas, classified as well as nonclassifiable. Subpart 2 of part D establishes additional requirements for O_3 nonattainment areas classified under table 1 of section 181(a). The Memphis and Shelby County area is classified as marginal (See 56 FR 56694, codified at 40 CFR 81.334). The State of Tennessee submitted their request for redesignation of the Memphis and Shelby County area prior to November 15, 1992. Therefore, in order to be redesignated to attainment, the State of Tennessee must meet the applicable requirements of subpart 1 of part D, specifically sections 172(c) and 176, and the requirements of subpart 2 of part D, which became due on or before November 12, 1992, the date the State submitted a complete redesignation request. EPA interprets section 107(d)(3)(E)(v) to mean that, for a redesignation request to be approved, the State must have met all requirements that became applicable to the subject area prior to or at the time of the submission of the redesignation request. Requirements of the CAA that come due subsequent to the submission of the redesignation request continue to

be applicable to the area (*see* section 175A(c)) and, if the redesignation is disapproved, the State remains obligated to fulfill those requirements.

B1. Subpart 1 of Part D—Section 172. Section 172(c) sets forth general requirements applicable to all nonattainment areas. Under section 172(b), the section 172(c) requirements are applicable as determined by the Administrator but no later than three years after an area is designated as nonattainment. EPA had not determined that these requirements were applicable to classified O_3 nonattainment areas on or before November 12, 1992, the date that the State of Tennessee submitted a complete redesignation request for the Memphis and Shelby County area. Therefore, the State of Tennessee was not required to meet these requirements for purposes of redesignation.

Upon redesignation of this area to attainment, the Prevention of Significant Deterioration (PSD) provisions contained in part C of title I are applicable. On June 24, 1982, the EPA approved the State of Tennessee's PSD program (47 FR 27269).

B2. Subpart 1 of Part D—Section 176 Conformity Plan Provisions. Section 176(c) of the CAA requires States to revise their SIPs to establish criteria and procedures to ensure that federal actions, before they are taken, conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under Title 23 U.S.C. or the Federal Transit Act ("transportation conformity"), as well as to all other federal actions ("general conformity"). Section 176 further provides that the conformity revisions to be submitted by states must be consistent with federal conformity regulations that the CAA required EPA to promulgate. Congress provided for the state revisions to be submitted one year after the date for promulgation of final EPA conformity regulations. When that date passed without such promulgation, EPA's "General Preamble for the Implementation of title I" informed states that its conformity regulations would establish a submittal date (see 57 FR 13498, 13557 (April 16, 1992)).

The EPA promulgated final transportation conformity regulations on November 24, 1993, (58 FR 62188) and general conformity regulations on November 30, 1993, (58 FR 63214). These conformity rules require that states adopt both transportation and general conformity provisions in the SIP for areas designated nonattainment or subject to a maintenance plan approved under CAA section 175A. Pursuant to section 51.396 of the transportation conformity rule and section 51.851 of the general conformity rule, the State of Tennessee is required to submit a SIP revision containing transportation conformity criteria and procedures consistent with those established in the federal rule by November 25, 1994. Similarly, Tennessee is required to submit a SIP revision containing general conformity criteria and procedures consistent with those established in the federal rule by December 1, 1994. Because the deadlines for these submittals have not yet come due, they are not applicable requirements under section 107(d)(3)(E)(v) and, thus, do not affect approval of this redesignation request.

B3. Subpart 2 of Part D. Under section 182(a)(2)(A) areas that retained a designation of nonattainment for O_3 under the amended CAA and that are classified as marginal or above were required to fix their pre-amendment VOC RACT SIPs. Tennessee submitted the VOC RACT fixups for purposes of redesignating the Memphis and Shelby County area. These were published in the **Federal Register** on April 18, 1994, and became effective on June 17, 1994.

Under section 182(b), several requirements were due for marginal O_3 nonattainment areas on November 15, 1992, such as VOC RACT catch-ups, Gasoline Vapor Recovery, New Source Review, and Emission Statements. Tennessee failed to submit these measures for the Memphis and Shelby County area. On January 15, 1993, EPA made a finding of failure to submit these measures by letter from Patrick M. Tobin, Acting Regional Administrator, to Ned McWherter, Governor of Tennessee. However these requirements are not applicable for purposes of considering the State's redesignation request. For purposes of redesignation, EPA must consider whether the State has met all requirements that were applicable prior to the time the state submitted the redesignation request. Since Tennessee submitted the redesignation request for Memphis and Shelby County on November 12, 1992, these measures are not relevant for purposes of redesignation. Therefore, all subpart 2 requirements that were applicable at the time the State submitted its redesignation request have been met. The VOC RACT fixups and the Alternate Emission Standards were published in the **Federal Register** on April 18, 1994, and were effective on June 17, 1994. The PSD regulations were approved on June 24, 1982.

3. The Area Has a Fully Approved SIP Under Section 110(k) of the CAA

Based on the approval of provisions under the pre-amended CAA and EPA's prior approval of SIP revisions under the amended CAA, EPA has determined that the Memphis and Shelby County area has a fully approved SIP under section 110(k), which also meets the applicable requirements of section 110 and part D as discussed above.

4. The Air Quality Improvement Must Be Permanent and Enforceable

Several control measures have come into place since the Memphis and Shelby County area violated the O_3 NAAQS. The State of Tennessee believes that the predominance of the emission reductions that have occurred, as demonstrated by a comparison of previous emission inventories versus the 1990 base year emission inventory that was presented in their supplemental submittal of March 31, 1994 (as attachment E), that air quality has been improved in the Memphis and Shelby County area as a result of permanent and enforceable emission reductions through local, state and federal programs. Of significance are emission reductions of point source VOC's from 49,000 tons per year (tpy) in 1979, to 27,633 tpy in 1983, to 14,986 tpy in 1990. The VOC reductions that have occurred are the result of several factors. These include federal emission limitations and fleet turnover, the Memphis vehicle inspection and maintenance (I&M) program to enforce the federal limitations and the implementation and enforcement of Shelby County regulations concerning the construction and operation of VOC emitting sources. These sources are regulated as they relate to new source requirements for best available control technology (BACT), lowest achievable emission rate (LAER) technology and offsets, and to existing source requirements calling for the installation of reasonably available control technology (RACT). The I&M program has been in operation since the mid-1980's and has been improved in its operation from a quality standpoint since that time. The Savings Clause For Vehicle Inspection and Maintenance [CAA section 187(a)(4)] insures, at a minimum, the continuation of I&M in the current configuration. Air pollution regulations have been in existence, in large part, since the 1970's and early 1980's with continued amendments and improvements since that time. Projections indicate that VOC emissions will not exceed the 1990 baseline inventory before the year 2005.

These reductions have occurred while Memphis has continued to pursue, expand and enhance accountability of sources both in quality and quantity. Also of significance are reductions in mobile source emissions which may not be readily apparent from comparisons of the different inventories. Road projects that make up the Transportation Improvement Plan (TIP) must have a positive impact on air quality. These projects, including some outlying area signal improvements, a Suburban Transit Center program for the Memphis Area Transit Authority (MATA) and a Land Use/Transportation Systems Integration Study, should provide some measure for reduction to the mobile source emission inventory. Finally, road construction or improvement projects, in order to meet conformity requirements, must provide a positive effect on air quality. The contribution of these projects to air quality is evaluated by computer modelling using MOBILE5A. This will be quantified annually in the conformity process for TIP approval. However, allowing for the increased vehicle population and increased vehicle miles travelled, strides have been made in reducing vehicular emissions.

In association with its emission inventory discussed below, the State of Tennessee has demonstrated that actual enforceable emission reductions are responsible for the recent air quality improvement and that the VOC emissions in the base year are not artificially low due to local economic downturn.

5. The Area Must Have a Fully Approved Maintenance Plan Pursuant to Section 175A of the Act

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. The plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan which demonstrates attainment for the ten years following the initial ten-year period. To provide for the possibility of future NAAQS violations, the maintenance plan must contain contingency measures, with a schedule for implementation, adequate to assure prompt correction of any air quality problems.

In this notice, EPA is approving the State of Tennessee's maintenance plan for the Memphis and Shelby County area because EPA finds that the State of Tennessee's submittal meets the requirements of section 175A.

A. Emissions Inventory—Base Year Inventory

On March 31, 1994, the State of Tennessee submitted comprehensive inventories of VOC, NO_X, and CO emissions from the Memphis and Shelby County area. The inventories included biogenic, area, stationary, and mobile sources using 1990 as the base year for calculations to demonstrate maintenance. The 1990 inventory is considered representative of attainment conditions because the NAAQS was not violated during 1990. The 1990 Base Year Emission Inventory for point sources for the Memphis and Shelby County area has been submitted to EPA in SIP Air Pollutant Inventory Management Subsystem (SAMS) format. The remaining data has been submitted in tabular format.

The State of Tennessee submittal contains the detailed inventory data and summaries by source location and source category. This comprehensive base year emissions inventory was submitted in the SAMS format. Finally, this inventory was prepared in accordance with EPA guidance. A summary of the base year and projected maintenance year inventories is shown in the following three tables. The CO and the biogenic VOC values are included as a part of the 1990 base year emission inventory. This notice is approving the base year inventory. Refer to the TSD prepared for this notice for more in-depth details regarding the base year inventory for the Memphis and Shelby County area.

VOC Emission Inventory Summary

[Tons per day]

	1990	1993	1996	1999	2002	2004
Point	74.61	78.11	81.66	85.07	88.31	90.42
Area	76.13	77.51	78.92	80.34	81.80	82.78
Mobile	91.53	66.65	64.90	64.94	64.70	64.38
Total	284.77	222.27	225.48	230.35	234.81	237.58

NO_X Emission Inventory Summary

[Tons per day]

	1990	1993	1996	1999	2002	2004
Point	139.72	179.76	162.10	162.13	139.47	139.85
Area	4.04	4.12	4.19	4.27	4.34	4.40
Mobile	89.63	83.31	82.23	82.99	83.31	83.29
Total	233.39	267.19	248.52	249.39	227.12	227.54

CO Emission Inventory Summary for 1990

[Tons per day]*

	Area	Non-road	Mobile	Point	Total
Emissions for 1990	94.41	168.46	295.00	5.69	563.56

*Projections were not made for these categories.

BIOGENICS EMISSION INVENTORY SUMMARY FOR 1990

[Tons per day]*

	Biogenics
1990	42.50

*Projections were not made for these categories.

B. Demonstration of Maintenance—Projected Inventories

Total VOC, NO_X, and CO emissions were projected from the 1990 base year out to 2004. These projected inventories were prepared in accordance with EPA guidance. Refer to EPA's TSD prepared for this notice for more in-depth details regarding the projected inventory for the Memphis and Shelby County area.

On March 31, 1994, the State of Tennessee submitted supplemental projection inventories. The data submitted for 1993 showed a higher level of NO_X emissions than the base year, however, the Memphis/Shelby County nonattainment area was still in attainment during 1993. All following years' data is below the 1993 level, therefore, continued attainment is expected. The projected emissions for 1993 closely approximate actual 1993 data. The NO_X levels projected for 1996 and 1999, although higher than the base year levels, are significantly lower than the 1993 levels, which, as noted above, did not cause a violation of the standard. The levels for 2002 and 2004 projected as less than the attainment year. Although approval of NO_X increases above a de minimis level is a departure from EPA guidance, EPA believes that the emissions projections demonstrate that the area will continue to maintain the O_3 NAAQS because this area achieved attainment through VOC controls and reductions. The projected emission inventories were submitted in the SAMS format.

C. Verification of Continued Attainment

Continued attainment of the O_3 NAAQS in the Memphis and Shelby County area depends, in part, on the State of Tennessee's efforts toward tracking indicators of continued attainment during the maintenance period. The Memphis and Shelby County area will utilize the several plan elements to maintain current acceptable ozone levels. The air quality monitoring network will continue to operate in accordance with 40 CFR Part 58, with no reductions to the existing monitoring network. Any relocation of monitors will be agreed upon by the EPA prior to their relocation. Existing stationary source control will continue. Additional companies subject to RACT regulations will be added to the source listing, and will be required to comply with emission standards. Sources wishing to locate in Shelby County will continue to undergo new source review requirements to include the installation of best available control technology. A triennial emissions inventory will be performed to include area, mobile and point sources of volatile organic compounds and nitrogen oxides. This inventory will be developed in conjunction with emission inventories for Carbon Monoxide. The first year for inclusion as an inventory year is 1993, with said inventory to be accomplished by December 31, 1994 and submitted for approval to the State of Tennessee by January 31, 1995. Successive inventories are to be accomplished using the same procedure. When the triennial inventory exceeds the projected inventory by more than ten percent, then the inventory development will be increased to an annual event. Inspection and Maintenance (I & M) of the automobile will continue in the City of Memphis with an increased emphasis on enforcement to assure vehicle owner participation.

D. Contingency Plan

The level of VOC and NO_X emissions in the Memphis and Shelby County area will largely determine its ability to stay in compliance with the O_3 NAAQS in the future. Despite the State's best efforts to demonstrate continued compliance with the NAAQS, the ambient air pollutant concentrations may exceed or violate the NAAQS. Therefore, the State of Tennessee has provided contingency measures with a schedule for implementation in the event of a future O_3 air quality problem. The State of Tennessee's contingency plan is triggered by a violation of the Ozone NAAQS of 0.12 ppm that occurs after redesignation to attainment. Plan implementation would begin upon confirmation of an ozone violation. The plan contains a contingency to implement pre-adopted additional control measures such as Reasonable Available Control Technology (RACT) level control for not previously controlled VOC sources. Development of requirements to lower emissions of NO_X from stationary fuel burning sources would also begin immediately. These pre-adopted additional measures for RACT will be implemented within 90 days of the date the State certifies to EPA that the air quality data which demonstrates a violation of the O_3 NAAQS is quality assured. NO_X regulations would be implemented within two years of the ozone violation. A complete description of these contingency measures and their triggers can be found in the TSD prepared for this notice. EPA finds that the contingency measures provided in the State of Tennessee submittal meet the requirements of section 175A(d) of the CAA.

E. Subsequent Maintenance Plan Revisions

In accordance with section 175A(b) of the CAA, the State of Tennessee has agreed to submit a revised maintenance SIP eight years after the area is redesignated to attainment. Such revised SIP will provide for maintenance for an additional ten years.

Final Action

In this final action, EPA is approving the Memphis and Shelby County O_3 maintenance plan, including the 1990 base year emission inventory, because it meets the requirements of section 175A. In addition, the EPA is redesignating the Memphis and Shelby County area to attainment for O_3 because the State of Tennessee has demonstrated compliance with the requirements of section 107(d)(3)(E) for redesignation. This action stops the sanctions and federal implementation plan clocks that were triggered for the Memphis and Shelby County area by the January 15, 1993, findings letter.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective October 3, 1994 unless, within 30 days of its publication, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective October 3, 1994.

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 the SIP shall be

considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

The O_3 SIP is designed to satisfy the requirements of part D of the CAA and to provide for attainment and maintenance of the O_3 NAAQS. This final redesignation should not be interpreted as authorizing the State of Tennessee to delete, alter, or rescind any of the VOC or NO_X emission limitations and restrictions contained in the approved O_3 SIP. Changes to O_3 SIP VOC regulations rendering them less stringent than those contained in the EPA approved plan cannot be made unless a revised plan for attainment and maintenance is submitted to and approved by EPA. Unauthorized relaxations, deletions, and changes could result in a finding of nonimplementation (section 179(a) of the CAA) or in a SIP deficiency call made pursuant to sections 110(a)(2)(H) and 110(k) of the CAA.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

Redesignation of an area to attainment under section 107(d)(3)(E) of the CAA does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any regulatory requirements on sources. The Administrator certifies that the approval of the redesignation request will not affect a substantial number of small entities.

Under section 307(b)(1) of the CAA, 42 U.S.C. 7607 (b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 3, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the CAA, 42 U.S.C. 7607(b)(2).)

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989, (54 FR 2214–2225) as revised by a Memorandum from Michael H. Shapiro to Regional Administrators, dated October 4, 1993. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for two years. The U.S. EPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, and Ozone.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, and Wilderness areas.

Dated: June 28, 1994.

John H. Hankinson, Jr.,

Regional Administrator.

Parts 52 and 81 of chapter I, title 40, Code of Federal Regulations, is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart RR—Tennessee

2. Section 52.2220 is amended by adding paragraph (c)(122) to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

(122) The maintenance plan and emission inventory for the Memphis and Shelby County Area which includes Shelby County and the City of Memphis submitted by the Tennessee Department of Environment and Conservation on November 12, 1992, and March 31, 1994, as part of the Tennessee SIP.

(i) *Incorporation by reference.* (A) Amendment to the Original Submittal of Nonregulatory Amendment to State Implementation Plan for Shelby County Redesignation from Nonattainment to Attainment Classification for Ozone submitted March 31, 1994, and prepared by the Memphis and Shelby County Health Department, Pollution Control Section for the Tennessee Department of Conservation. The effective date is March 9, 1994 for the following provisions:

Section I—Requirement One—Air Quality Data Shows Area Meets NAAQS

Section IV—Requirement Four—Maintenance Plan

Attachment F:

Shelby County Emission Projections Volatile Organic Compounds (Summer Season)

Shelby County Emissions Projections 1990–2004 Nitrogen Oxides (Summer Season)

(ii) Other material. None

PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42.U.S.C. 7401–7671q.

2. Section 81.343 is amended by revising the attainment status designation table for ozone to read as follows:

§ 81.343 Tennessee.

* * * * *

TENNESSEE—OZONE

Designation area	Designated		Classification	
	Date [1]	Type	Date [1]	Type
Knoxville Area:				
Knox County	1/6/92	Nonattainment	1/6/92	Marginal.
Nashville Area:				
Davidson County	1/6/92	Nonattainment	1/6/92	Moderate.
Rutherford County	1/6/92	Nonattainment	1/6/92	Moderate.

TENNESSEE—OZONE—Continued

Designation area	Designated		Classification	
	Date [1]	Type	Date [1]	Type
Sumner County	1/6/92	Nonattainment	1/6/92	Moderate.
Williamson County	1/6/92	Nonattainment	1/6/92	Moderate.
Wilson County	1/6/92	Nonattainment	1/6/92	Moderate.
Rest of State	1/6/92	Unclassifiable/Attainment.	1/6/92	Moderate.
Anderson County				
Bedford County				
Benton County				
Bledsoe County				
Blount County				
Bradley County				
Campbell County				
Cannon County				
Carroll County				
Carter County				
Cheatham County				
Chester County				
Claiborne County				
Clay County				
Cocke County				
Coffee County				
Crockett County				
Cumberland County				
DeKalb County				
Decatur County				
Dickson County				
Dyer County				
Fayette County				
Fentress County				
Franklin County				
Gibson County				
Giles County				
Grainger County				
Greene County				
Grundy County				
Hamblen County				
Hamilton County				
Hancock County				
Hardeman County				
Hardin County				
Hawkins County				
Haywood County				
Henderson County				
Henry County				
Hickman County				
Houston County				
Humphreys County				
Jackson County				
Jefferson County				
Johnson County				
Lake County				
Lauderdale County				
Lawrence County				
Lewis County				
Lincoln County				
Loudon County				
Macon County				
Madison County				
Marion County				
Marshall County				
Maury County				
McMinn County				
McNairy County				
Meigs County				
Monroe County				
Montgomery County				
Moore County				
Morgan County				
Obion County				
Overton County				

TENNESSEE—OZONE—Continued

Designation area	Designated		Classification	
	Date [1]	Type	Date [1]	Type
Perry County				
Pickett County				
Polk County				
Putnam County				
Rhea County				
Roane County				
Robertson County				
Scott County				
Sequatchie County				
Sevier County				
Shelby County	10/3/94			
Smith County				
Stewart County				
Sullivan County				
Tipton County				
Trousdale County				
Unicoi County				
Union County				
Van Buren County				
Warren County				
Washington County				
Wayne County				
Weakley County				
White County				

[1] This date is November 15, 1990, unless otherwise noted.

* * * * *

[FR Doc. 94–18994 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Parts 52 and 81

[WA–19–1–6140a; FRL–5007–2]

Approval and Promulgation of Designation of Areas for Air Quality Planning Purposes; Washington

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) approves the redesignation of Tacoma, Washington, from unclassifiable to attainment for sulfur dioxide (SO_2). On September 22, 1993, the State of Washington, through the Washington State Department of Ecology, submitted a request to redesignate Tacoma from unclassifiable to attainment for sulfur (SO_2). The state has met the applicable requirements for redesignation contained in the Clean Air Act, as amended in 1990 (CAA).

EFFECTIVE DATE: This action will be effective on October 3, 1994 unless adverse or critical comments are received by September 6, 1994. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Written comments should be addressed to: Montel Livingston, SIP Manager, Air & Radiation Branch (AT–082), EPA, Docket WA–19–1–6140, 1200 Sixth Avenue, Seattle, Washington 98101.

Documents which are incorporated by reference are available for public inspection at the Air and Radiation Docket and Information Center, Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460. Copies of material submitted to EPA may be examined during normal business hours at the following locations: EPA, Region 10, Air & Radiation Branch, 1200 Sixth Avenue (AT–082), Seattle, Washington 98101, and Washington State Department of Ecology, 300 Desmond Drive, Lacey, Washington 98504.

FOR FURTHER INFORMATION CONTACT: Kelly McFadden, Air and Radiation Branch (AT–082), EPA, Seattle, Washington 98101, (206) 553–1059.

SUPPLEMENTARY INFORMATION:

I. Background

Prior to the 1990 Clean Air Act Amendments the parabolic shaped area of Tacoma extending approximately 3½ miles SSW from the American Smelting and Refining Company (ASARCO) Plant was designated nonattainment for sulfur dioxide (SO_2) in relation to the national ambient air quality standards (NAAQS). 43 FR 9043 (March 3, 1978). The primary source of the pollutant in the Tacoma area was the ASARCO copper smelter, emitting an average of 100 tons of SO_2 per year. On August 6, 1979, based on a stipulated agreement between EPA and ASARCO which was entered in the United States Court of Appeals for the Ninth Circuit (No. 78–1929), EPA proposed redesignation of Tacoma from nonattainment to unclassifiable for SO_2 (44 FR 45970). EPA revoked the nonattainment designation on November 30, 1979 (44 FR 68834). The redesignation was intended to defer the requirement for a Part D (Plan Requirements for Nonattainment Areas) SIP revision. Part D of the CAA requires an applicable implementation plan within 18 months of the designation to nonattainment. The redesignation to unclassifiable allowed EPA to complete rulemaking action under Section 123 of the Act which would allow the use of meteorological curtailment programs to meet ambient air quality standards if the program was in place before 1970. The final rules interpreting Section 123 were published by EPA on April 2, 1986. Through that publication, EPA met the terms of the settlement agreement and was qualified to redesignate Tacoma under Section 107 of the Act.

On September 22, 1993, the State of Washington, on behalf of the Governor, submitted to the EPA Regional Administrator a request to redesignate the Tacoma area from unclassifiable to attainment. The CAA does not set forth specific requirements for areas seeking redesignation from unclassifiable to

attainment. However, the CAA provides that an attainment area is an area that meets the national ambient air quality standard (NAAQS) for a specific pollutant and does not contribute to poor air quality in a nearby area that does not meet the NAAQS for that pollutant. Therefore, at a minimum, an area needs to meet the NAAQS in order to be redesignated from unclassifiable to attainment.

Ambient air quality monitoring from 1980 through 1993 shows attainment of the SO_2 NAAQS in the Tacoma area. The National Air Monitor System (NAMS) and State/Local Air Monitor System (SLAM) monitoring locations changed throughout the 11 years. The NAMS locations include 54th Ave NE, Alexander Ave, 26th and Pearl, Mt Tacoma High School, and Benny's Nursery. Moreover, the state and local standards for air quality are more stringent than the NAAQS, and exceedances have not been recorded for either of these standards since the ASARCO copper smelter plant ceased operation as of March 1984. Therefore, EPA has determined that the SO_2 NAAQS in the Tacoma area has been attained.

EPA is further assured that the area will remain in attainment because the ASARCO Copper Smelter, the primary source of SO_2 emissions, permanently ceased operations in March 1984. ASARCO's permanent closure is strengthened by the stack demolition that occurred on January 17, 1993. After the copper smelter ceased operation there was a considerable decrease in sulfur dioxide emissions, as indicated by the continuing emission monitoring of the Tacoma area.

II. This Action

EPA, in this action, is redesignating Tacoma from unclassifiable to attainment for sulfur dioxide. This action is being taken without prior proposal because the changes are noncontroversial, the State has demonstrated that the area has attained the standard and that the primary source of SO_2 emissions has permanently ceased operation. Therefore, EPA anticipates no adverse comments on this action.

III. Administrative Review

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et. seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

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 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. 7410(a)(2).

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective October 3, 1994 unless, within 30 days of its publication, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent notice that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective October 3, 1994.

The EPA has reviewed this request for revision of the federally-approved SIP for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. The EPA has determined that this action conforms with those requirements.

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 the SIP shall be considered separately in light of specific technical, economic and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. The OMB has exempted this regulatory action from E.O. 12866 review.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 3, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2), 42 U.S.C. 7607(b)(2).

List of Subjects in 40 CFR Parts 52 and 81

Environmental protection, Air pollution control, Incorporation by reference, Sulfur oxides, National parks, Wilderness areas.

Dated: June 23, 1994.

Gerald A. Emison,

Acting Regional Administrator.

Note: Incorporation by reference of the Implementation Plan for the State of Washington was approved by the Director of the Office of Federal Register on July 1, 1982.

Parts 52 and 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart WW—Washington

2. Section 52.2470 is amended by adding paragraph (c)(44) to read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

(44) On September 22, 1993, the state of Washington, through the Washington State Department of Ecology, submitted a request to redesignate Tacoma to attainment for sulfur dioxide (SO_2).

(i) Incorporation by reference.

(A) September 22, 1993 letter from Washington State Department of Ecology to EPA Region 10 submitting a

redesignation request for the Tacoma SO_2 Air Quality Maintenance Area (AQMA).

PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7407, 7501–7515, 7601.

2. Section 81.348 is amended in the table for "Washington-SO_2" by removing the indication, X, in the column "Cannot be classified" and adding it in the column "Better than national standards" for Tacoma to read as follows:

§ 81.348 Washington.

* * * * *

WASHINGTON—SO_2

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
* * *	*	*	*	*
Puget Sound Intrastate AQCR 229:				
Tacoma-a parabolic shaped area extending approximately 3½ miles SSW from the ASARCO copper smelter.	.....	.....	.....	x
* * *	*	*	*	*

* * * * *

[FR Doc. 94–18996 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43–CFR Public Land Order 7070

[NV–930–4210–06; N–54955]

Withdrawal of Public Mineral Estate Within the Desert National Wildlife Range; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws 769,543 acres of public mineral estate from location and entry under the mining laws to protect the Desert National Wildlife Range. The land has been and will remain open to mineral leasing.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Dennis J. Samuelson, BLM Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, 702–785–6507.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is hereby ordered as follows:

1. Subject to valid existing rights, the public mineral estate in the following described lands, under the jurisdiction of the Secretary of the Interior, is hereby withdrawn from location and entry under the United States mining laws (30 U.S.C. Ch. 2 (1988)) for protection of the Desert National Wildlife Range:

Mount Diablo Meridian

T. 15 S., R. 54 E., unsurveyed,
  Secs. 1 to 3, inclusive, excluding area covered by Executive Order No. 8578;
  Sec. 4, E½, excluding area covered by Executive Order No. 8578;
  Sec. 9, E½;
  Secs. 10 to 15, inclusive;
  Sec. 16, E½;
  Sec. 21, E½;
  Secs. 22 to 27, inclusive;
  Sec. 28, E½;
  Sec. 33, E½;
  Secs. 34 to 36, inclusive.
T. 15 S., R. 55 E., unsurveyed.
T. 16 S., R. 57 E., partially surveyed,
  Sec. 7, NW¼ and S½.
T. 16 S., R. 58 E., unsurveyed,
  Secs. 11 to 14, inclusive;
  Secs. 23 to 26, inclusive;
  Secs. 35 and 36.
T. 15 S., R. 59 E., unsurveyed,
  Secs. 2 to 11, inclusive;
  Secs. 14 to 23, inclusive;
  Secs. 26 to 35, inclusive.
T. 16 S., R. 59 E., unsurveyed,
  Secs. 2 to 11, inclusive;
  Secs. 14 to 23, inclusive;
  Secs. 26 to 35, inclusive.
T. 17 S., R. 59 E.,
  Secs. 1 to 5, inclusive;
  Sec. 7, lots 3 and 4, NE¼, and S½;
  Secs. 8 to 18, inclusive;
  Secs. 21 to 26, inclusive;
  Sec. 27, N½;
  Secs. 28 and 33;
  Sec. 34, S½S½ and NE¼SE¼;
  Secs. 35 and 36.
Tps. 9, 10, 11, 12, 12½, 13, 14, 15, and 16 S., R. 60 E., unsurveyed.
T. 17 S., R. 60 E.
T. 18 S., R. 60 E.,
  Secs. 1 to 18, inclusive;
  Secs. 22 to 24, inclusive;
  Sec. 25, N½;
  Sec. 26, N½;
  Sec. 27, N½.
Tps. 9, 10, 11, 12, 12½, 13, 14, 15, and 16 S., R. 61 E., unsurveyed.
Tps. 17 and 18 S., R. 61 E.
T. 9 S., R. 62 E.,
  Sec. 4, S½S½;
  Sec. 5, NW¼SW¼ and S½S½;
  Sec. 6, lots 2 to 7, inclusive, and S½NE¼, SE¼NW¼, E½SW¼, and SE¼;
  Secs. 7, 8, and 9;
  Sec. 10, W½E½ and W½;
  Sec. 15, W½E½ and W½;
  Secs. 16 to 21, inclusive;
  Sec. 22, W½E½ and W½;
  Sec. 27, W½E½ and W½;
  Secs. 28 to 33, inclusive;
  Sec. 34, lots 1 to 3, inclusive, W½NE¼, NW¼, N½SW¼, and NW¼SE¼.
T. 10 S., R. 62 E.,
  Secs. 3 to 10, inclusive;
  Sec. 14, SE¼NW¼, W½W½, and E½SW¼;
  Secs. 15 to 22, inclusive;
  Sec. 23, W½ and W½SE¼;
  Secs. 26 to 35, inclusive;
  Sec. 36, W½W½.
T. 11 S., R. 62 E., partially surveyed,
  Sec. 1, W½W½;
  Secs. 2 to 12, inclusive;
  Sec. 13, E½, NE¼NW¼, W½W½, and E½SW¼;
  Secs. 14 to 36, inclusive.
T. 12 S., R. 62 E., partially surveyed.
Tps. 12½, 13, 14, 15, and 16 S., R. 62 E., unsurveyed.
Tps. 17 and 18 S., R. 62 E.

The areas described aggregate 769,543 acres in Clark and Lincoln Counties, Nevada.

2. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: July 18, 1994.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 94–19044 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–HC–P

43 CFR Public Land Order 7076

[MT–930–4210–06; MTM 40641]

Partial Revocation of Executive Order Dated July 9, 1910; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order partially revokes an Executive order insofar as it affects 640 acres of National Forest System land withdrawn for the Bureau of Land Management's Coal Reserve Montana No. 1. The land is no longer needed for the purpose for which it was withdrawn. The revocation is needed to finalize the Forest Service exchange provided for in Public Law 103–91, which mandated that the exchange be completed and clear title issued. This action will open the land to surface entry and mining. The land has been and will remain open to mineral leasing.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Sandra Ward, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406–255–2949.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Executive Order dated July 9, 1910, which withdrew National Forest System land for Coal Reserve Montana No. 1, is hereby revoked insofar as it affects the following described land:

Principal Meridian, Montana

T. 7 S., R. 3 E.,
Sec. 20.

The area described contains 640 acres in Madison County.

2. The land described above is hereby opened to surface entry thus allowing the land exchange and issuance of clear title as mandated by Public Law 103–91.

Dated: July 22, 1994.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 94–19043 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–DN–P

43 CFR Public Land Order 7074

[MT–930–4210–06; MTM 072057]

Partial Revocation of Public Land Order No. 4484, as Corrected by Public Land Order No. 4535; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order partially revokes a public land order insofar as it affects 79.82 acres of National Forest System land withdrawn by the Department of the Army, Corps of Engineers, for the Libby Dam Project in the Kootenai National Forest. The land is no longer needed for the purpose for which it was withdrawn. This action will permit the Forest Service to dispose of the land through exchange. This action will open the land to mining. The land has been and remains open to surface entry and mineral leasing.

EFFECTIVE DATE: September 6, 1994.

FOR FURTHER INFORMATION CONTACT: Sandra Ward, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406–255–2949.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Public Land Order No. 4484, as corrected by Public Land Order No. 4535, which withdrew National Forest System land for the Department of the Army, Corps of Engineers' Libby Dam Project, is hereby revoked insofar as it affects the following described land:

Principal Meridian, Montana

Kootenai National Forest

T. 30 N., R. 26 W.,
Sec. 8, lot 6 and NE¼SW¼.

The area described contains 79.82 acres in Lincoln County.

2. At 9 a.m. on September 6, 1994, the land described above shall be opened to such forms of disposition as may by law be made of National Forest System land, including location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of 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: July 18, 1994.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 94–19042 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–DN–M

43 CFR Public Land Order 7075

[AK–932–4210–06; AA–3060]

Withdrawal of National Forest System Land for Protection of the Cooper Lake Recreation Area; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws approximately 175 acres of National Forest System land from surface entry and mining for a period of 20 years for the Department of Agriculture, Forest Service, to protect the Cooper Lake Recreation Area. The land has been and remains open to mineral leasing.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Sue A. Wolf, BLM Alaska State Office, 222 W. 7th Avenue, No. 13, Anchorage, Alaska 99513–7599, 907–271–5477.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System land is hereby withdrawn from settlement, sale, location, or entry under the general land laws, including the United States mining laws (30 U.S.C. Ch. 2 (1988)), but not from leasing under the mineral leasing laws, to protect the recreational values of the Cooper Lake Recreation Area:

Seward Meridian

Chugach National Forest

T. 3 N., R. 3 W., unsurveyed,
Sec. 1, S½SW¼ (fractional), and SW¼SE¼;
Sec. 12, NW¼NE¼, and N½NW¼ (fractional).

The area described contains approximately 175 acres.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of National Forest System land under lease, license, or permit, or governing

the disposal of its mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: July 22, 1994.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 94–19041 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–JA–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 0

[FCC 94–193]

Ethics

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission has amended its rules regarding the appointment of the Designated Agency Ethics Official (DAEO) and the Alternate Designated Agency Ethics Official (ADEO). Personnel in the Office of General Counsel have been designated to be the DAEO and ADEO. This change will consolidate management of the ethics program established by the February 3, 1993 regulations of the Office of Government Ethics that established new uniform standards of ethical conduct for officers and employers of the executive branch of the Federal Government.

EFFECTIVE DATE: July 20, 1994.

FOR FURTHER INFORMATION CONTACT: Marjorie S. Bertman, Office of General Counsel (202) 418–1740.

SUPPLEMENTARY INFORMATION:

Order

In the matter of: Amendment of Parts 0 and 19 of the Commission's Rules of Commission Organization and Governing Employee Standards of Ethical Conduct.

Adopted: July 20, 1994.

Released: July 28, 1994.

By the Commission:

1. On February 3, 1993, regulations of the Office of Government Ethics (OGE) that establish new uniform standards of ethical conduct for officers and employees of the executive branch of the Federal Government became effective. See 5 CFR 2635, 57 FR 35006 August 7, (1992).[1] OGE regulations also require the Commission to formally designate an agency official to be the "designated agency ethics official" or "DAEO" to coordinate and manage the Commission's ethics program. In addition, these regulations require the agency to appoint an alternate DAEO or "ADAEO" to serve in an acting capacity in the absence of the primary designated agency ethics official. See 5 CFR 2638.201–2638.202. The purpose of this Order is to designate personnel in the Office of General Counsel to those positions and to make the necessary changes in the Commission's rules to effect that designation. Specifically, this Order delegates authority to the General Counsel to assume the responsibilities of the DAEO and to implement the ethics program established in the new OGE regulations.

2. Under the OGE regulations, the DAEO is required to be qualified to counsel agency personnel concerning the new OGE ethics standards and to counsel departing and former agency officials on post-employment conflict of interest standards. 5 CFR 2638.202(b)(3)–(4). In addition, the DAEO has responsibility for managing the agency's ethics program, including liaison with OGE, reviewing financial disclosure reports, monitoring ethics training, and monitoring administrative actions and sanctions. The DAEO may appoint "deputy" ethics officials to perform any of these functions, but such deputies work under the DAEO's supervision. *See* 5 CFR 2638.204.

3. Under current Commission rules, the General Counsel has broad delegated authority to provide ethics counseling, and other duties that are very similar to the principal functions performed by the DAEO under OGE's regulations. Specifically, the General Counsel now has overall delegated authority to act as "legal counselor for the Commission to provide guidance on matters relating to ethical conduct," and to serve as the "Commission's designee to the Office of Personnel Management" on matters covered by the OPM (now OGE) rules governing ethical conduct. 47 CFR 19.735–105(a)(1). In fact, most of the responsibilities set forth in the OGE regulations, with the exception of the management of the financial disclosure statements, are already delegated to the Commission's General Counsel.[2]

Our informal survey of other agencies also indicates that designating the senior legal official as the DAEO is consistent with the general practice of agencies of similar size. In light of these factors, we think it is appropriate to designate the General Counsel as the DAEO.

4. Accordingly we shall add a new § 0.251(a) to delegate authority to the General Counsel to act as the "designated agency ethics official." The rule will delegate authority to the Associate General Counsel for Administrative Law to act as the "alternate designated agency ethics official."[3]

5. The amendments adopted in this Order are rules of agency organization and therefore the Administrative Procedure Act's prior notice and effective date requirements do not apply. 5 U.S.C. 553(b)(3)(A). Authority for the amendments adopted herein is contained in sections 4(i) and 5(c)(1) of the Communications Act. 47 U.S.C. 154(j) and 155(c)(1).

6. It Is Ordered, effective July 20, 1994, that Part 0 of the Rules and Regulations is amended as set forth below.

List of Subjects in 47 CFR Part 0

Organization and functions (Government agencies).

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Title 47 of the Code of Federal Regulations, Part 0, amended as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

§ 0.231 [Amended]

2. Section 0.231 is amended by removing and reserving and inserting paragraph (h).

3. Section 0.251 is amended by adding paragraph (a) to read as follows:

§ 0.251 Authority delegated.

(a) The General Counsel is delegated authority to act as the "designated

[1] Under the scheme established in the new OGC regulations, most of the Commission's existing Part 19 rules have been superseded by OGE'S regulations. We will restructure Part 19 to remove the superseded sections and to renumber the provisions that may be retained in accordance with the OGE regulations in a future order.

[2] The current Commission rules give the Chief, Operations Support Division authority to serve as the designated agency ethics official for the purpose of receiving, reviewing and certifying financial disclosure statements. See 47 CFR 0.231(h).

[3] A conforming amendment will be made to § 0.231(h), 47 CFR 0.231(h).

agency ethics official." The Associate General Counsel for Administrative Law is delegated authority to act as the "alternate designated agency ethics official."

* * * * *

[FR Doc. 94–18943 Filed 8–3–94; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 24

[GEN Docket No. 90–314, FCC 94–195]

New Personal Communications Services in the 2 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *Further Order on Reconsideration*, the Commission adopts a multiplier for use to determine whether interests in cellular and broadband PCS licensees held indirectly through intervening corporate entities should be attributed for purposes of the Commission's broadband PCS/cellular cross-ownership rule and broadband PCS spectrum cap rule. This action is taken so that these rules can be more effectively enforced consistent with their intent, which is to ensure that broadband PCS licensees lack any incentive to impede the development of full competition with the cellular licensees or with other broadband PCS licensees in the same geographic area.

EFFECTIVE DATES: September 6, 1994.

FOR FURTHER INFORMATION CONTACT: Jonathan Cohen, Office of Plans and Policy, (202) 418–2030.

SUPPLEMENTARY INFORMATION: This *Further Order on Reconsideration* is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street N.W., Washington, D.C. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC. 20037, telephone (202) 857–3800.

Further Order On Reconsideration

In the matter of: Amendment of the Commission's Rules to Establish New Personal Communications Services in the 2 GHz Band.

Adopted: July 22, 1994.

Released: July 22, 1994.

By the Commission:

1. In the Commission's *Memorandum Opinion and Order* in this proceeding, FCC 94–144, 59 FR 32830 (June 24, 1994) ("*Memorandum Opinion and Order*"), we reaffirmed our bright-line cross-ownership attribution standards, which apply to common ownership of licenses in the Domestic Public Cellular Radio Telecommunications Service ("cellular") and the Personal Communications Services in the 2 GHz band ("broadband PCS"). We also ruled that no entity would be permitted to hold broadband PCS licenses comprising more than 40 MHz of spectrum in a particular PCS service area. The purpose of both the broadband PCS/cellular cross-ownership rule and the broadband PCS spectrum cap rule is to ensure that broadband PCS licensees lack any incentive to impede the development of full competition with the cellular licensees or with other broadband PCS licensees in the same geographic area.

2. We determined that an interest of 20 percent or more in a cellular license will be attributable,[1] and that an interest of 5 percent or more in a broadband PCS license will be attributable. See *Memorandum Opinion and Order* at ¶¶109–110. Under the broadband PCS/cellular cross-ownership rule, entities with attributable ownership of a cellular license covering 10 percent or more of the population of a broadband PCS service area are limited to holding one 10 MHz broadband PCS license in that broadband PCS service area until January 1, 2000. *See* 47 CFR 24.204. Under the broadband PCS spectrum cap rule, parties are not permitted to hold attributable interests in licenses covering more than 40 MHz in the same PCS service area. See 47 CFR 24.229(c). In determining how to calculate a party's interest in a cellular licensee when it is held through multiple tiers of entities, we stated that the interest of a subsidiary is attributed in full to the parent. See *Memorandum Opinion and Order* at ¶116. The same rule would apply to interests held in broadband PCS licenses through multiple tiers of entities.

3. Herein we reconsider, on our own motion, the issue of whether to use a "multiplier" to determine how interests in cellular and broadband PCS licensees held indirectly through intervening corporate entities should be attributed. A multiplier is currently used by the Commission in our attribution rules in the broadcast context. *See* 47 CFR 73.3555, note 2(d). To determine the "true" ownership interest of a party whose interest in a broadcast licensee is held through intervening entities, each non-majority, non-controlling interest is multiplied together. For example, a party that owns a 25 percent non-controlling interest in a corporation that has a 10 percent non-controlling interest in a licensee would be deemed to have a 2.5 percent interest in the licensee. As we concluded in adopting a multiplier for broadcast attribution, use of a multiplier allows the Commission to accurately take account of a party's "actual involvement with the ultimate licensee" as well as its ability to exert control over the actions of the licensee. *See* Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 FCC 2d 997, 1018 (1984), *recon.*, 58 RR 2d 604 (1985), *further recon.*, 1 FCC Red 802 (1986), 52 FR 1630 (Jan. 15, 1987). We concluded that "use of a multiplier would more realistically reflect a party's attenuated interest in a licensee where there are intervening corporations, than does the present practice of fully attributing any interest above the benchmark through each intervening corporation. *Id.*

4. In the *Memorandum Opinion and Order*, we favored a bright-line test because we believed that it would result in a faster, less burdensome licensing process. *Memorandum Opinion and Order* at ¶ 113. On reconsideration, however, we have concluded that adding use of a multiplier will allow us to more effectively enforce the broadband PCS/cellular cross-ownership and broadband PCS spectrum cap rules consistent with their intent. We also conclude that using a multiplier is consistent with our policy goal of promoting full competition in wireless markets, because it will not cause the exclusion of firms that pose no threat to competition. Without a multiplier, parties that have neither the ability to exert control nor a substantial financial stake in the cellular or broadband PCS license could be unduly restricted in acquiring interests in such license. Furthermore, absent a multiplier, anomalous and unintended results occur. For example, if Company A holds a 21 percent non-controlling interest in Company B, which in turn holds a 30 percent non-controlling interest in Company X, a cellular licensee, Company A's attributable interest in Company X would be deemed to be 30 percent, in excess of the 20 percent threshold applicable to broadband PCS/cellular cross-ownership. Company A would thus be limited to acquiring a 10 MHz broadband PCS license in Company X's cellular service area, even though it has neither the ability to exert control or

[1] Certain entities are permitted to hold up to a 40 percent interest in a cellular license without attribution. See 47 CFR 24.204(d)(2)(ii).

significant influence over the operations of Company X's cellular system nor a financial stake in Company X so substantial as to give rise to an incentive to engage in anticompetitive conduct. In comparison, by using a multiplier, Company A's attributable interest in Company X would be 6.3 percent (0.21×0.3), under the 20 percent attribution threshold, and Company A would not be restricted to 10 MHz broadband PCS licenses in Company X's cellular service area.

5. Considerations of "actual involvement" with, true economic interest in, and ability to control a licensee are crucial in determining whether a particular indirect ownership interest should be attributed to the holder for purposes of our cross-ownership and multiple ownership rules. These considerations apply with equal force in the broadcast, broadband PCS and cellular contexts; thus, we conclude that a multiplier similar to that used in applying our attribution rules in the broadcast area should be adopted for purposes of determining attributable interests in cellular and broadband PCS licensees. We therefore will amend § 24.204 of our Rules to include use of a multiplier to determine whether an entity holding indirect non-controlling interests in a cellular licensee or a broadband PCS applicant or licensee has an attributable interest for purposes of our broadband PCS/cellular cross-ownership rule and our broadband PCS spectrum cap rule. For purposes of applying the multiplier, where an entity's ownership interest in any particular link in the ownership chain is greater than 50 percent or is controlling, the interest will be treated as if it were 100 percent.

6. Accordingly, *It Is Ordered* That Part 24 of the Commission's Rules is amended as set forth below.

7. *It Is Further Ordered* That the rules changes made herein Will Become Effective 30 days after their publication in the **Federal Register.** This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 309(j).

List of Subjects in 47 CFR Part 24

Personal communications services, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Final Rules

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 24—PERSONAL COMMUNICATIONS SERVICES

1. The authority citation of Part 24 continues to read as follows:

Authority: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.204 of the Commission's Rules is amended by adding paragraph (d)(2)(viii):

§ 24.204 Cellular eligibility.

* * * * *

(d) * * *

(2) * * *

(viii) Ownership interests in a cellular licensee or a broadband PCS applicant or licensee that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. [For example, if A owns 10 percent of Company X, which owns 35 percent of, and controls, Company Y, which owns 25 percent of Licensee, then Company X's attributable interest in Licensee would be 25 percent, and A's attributable interest in Licensee would be 2.5 percent (0.1×0.25).]

* * * * *

[FR Doc. 94–18942 Field 8–3–94; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 229

FRA Docket No. RSGC–2, Notice No. 7

[RIN 2130–AA80]

Locomotive Conspicuity; Minimum Standards for Auxiliary External Lights; Correction

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Correction to interim rule.

SUMMARY: This document contains a correction to the interim rule (IR–2) which was published Friday, May 13, 1994, (59 FR 24960; pp. 24960–24964). IR–2 contained detailed and specific performance standards regarding color, intensity, operation, mounting location and flash rate for ditch lights, crossing lights; strobe lights and oscillating lights.

EFFECTIVE DATE: May 13, 1994.

FOR FURTHER INFORMATION CONTACT: Gordon Davids, Bridge Engineer, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone: 202–366–9186); or Marina C. Appleton, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., Washington, D.C. 20590 (telephone: 202–366–0628).

Need for Correction

As published, the interim rule (IR–2) contains an error regarding placement of strobe lights on locomotives which is in need of clarification.

Correction of Publication

Accordingly, the publication on May 13, 1994 of the interim rule (IR–2), which was the subject of FR Doc. 59–24960, is corrected as follows:

§ 229.133(b)(2)(iii) [Corrected]

On page 24964, in column one, paragraph (b)(2)(iii), in lines three and four, " * * * and at most 36 inches above the top of the rail." is changed to " * * * and at least 36 inches above the top of the rail."

* * * * *

Issued in Washington, D.C., on July 28, 1994.

Jolene M. Molitoris,

Federal Railroad Administrator.

[FR Doc. 94–19031 Filed 8–3–94; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 672

[Docket No. 931199–4042; I.D. 080194A]

Groundfish of the Gulf of Alaska

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

ACTION: Prohibition of retention.

SUMMARY: NMFS is prohibiting retention of thornyhead rockfish in the Gulf of Alaska (GOA) and is requiring that incidental catches be treated in the same manner as prohibited species and discarded at sea with a minimum of injury. This action is necessary because the thornyhead rockfish total allowable catch (TAC) in this area has been reached.

EFFECTIVE DATE: 12 noon, Alaska local time (A.l.t.), August 1, 1994, until 12 midnight, A.l.t., December 31, 1994.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, 907–586-7228.

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

In accordance with § 672.20(c)(1)(ii)(B), the TAC for thornyhead rockfish in the GOA was established by the final 1994 specifications (59 FR 7647, February 16, 1994), as 1,180 metric tons.

The Director, Alaska Region, NMFS, has determined in accordance with § 672.20(c)(3), that the TAC for thornyhead rockfish in the GOA has been reached. Therefore, NMFS is requiring that further catches of thornyhead rockfish in the GOA be treated as prohibited species in accordance with § 672.20(e), effective from 12 noon, A.l.t. August 1, 1994, until 12 midnight, A.l.t., December 31, 1994.

Classification

This action is taken under 50 CFR 672.20 and is exempt from OMB review under E.O. 12866.

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

Dated: August 1, 1994.

David S. Crestin,

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

[FR Doc. 94–19035 Filed 8–1–94; 3:43 pm]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 59, No. 149
Thursday, August 4, 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 AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1413

RIN 0560–AD37

1995 Feed Grain Acreage Reduction Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the regulations: to set forth the acreage reduction percentage for each of the 1995 feed grain crops; to require that producers of malting barley comply with acreage reduction requirements to maintain eligibility for feed grain loans, purchases, and payments; and to provide that a paid land diversion (PLD) program will not be in effect. Producers who participate in the Feed Grain Acreage Reduction Program (ARP) would be eligible for benefits such as price support loans and deficiency payments. This action is required by section 105B of the Agricultural Act of 1949, as amended (the 1949 Act).

DATES: Comments must be received on or before September 14, 1994, in order to be assured of consideration.

ADDRESSES: Comments must be mailed to Director, Grains Analysis Division, Agricultural Stabilization and Conservation Service (ASCS), U.S. Department of Agriculture (USDA), P.O. Box 2415, room 3742–S, Washington, DC 20013–2415.

FOR FURTHER INFORMATION CONTACT: Philip W. Sronce, Director, Grains Analysis Division, ASCS, USDA, room 3742–S, P.O. Box 2415, Washington, DC 20013–2415 or call 202–720–4418.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule is issued in accordance with Executive Order 12866. Based on information compiled by the USDA, this proposed rule has been determined to be "economically significant" because it would have an annual effect on the economy of more than $100 million and would materially alter the budgetary impact of entitlement, or loan programs or rights and obligations of recipients thereof. Budget outlays for deficiency payments are expected to range from $1.5 to $3.5 billion annually. This proposed rule would not 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; would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; and would not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in Executive Order 12866.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is applicable to this proposed rule since the Commodity Credit Corporation (CCC) is required by section 105B(o) of the 1949 Act to request comments with respect to the subject matter of this rule. An Initial Regulatory Flexibility Analysis was prepared, which determined that this regulation will have no significant impact on a substantial number of small entities because the particular acreage reduction percentages considered will not affect the paperwork, reporting, or compliance burdens of the small entities in the program. CCC thus certifies that the rule will have no significant economic impact on a substantial number of small entities.

Preliminary Regulatory Impact Analysis

The Preliminary Regulatory Impact Analysis describing the options considered in developing this proposed rule and the impact of the implementation of each option is available on request from the above-named individual.

Environmental Evaluation

It has been determined by an environmental evaluation that this action will not have a significant impact on the quality of the human environment. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Federal Assistance Program

The title and number of the Federal Assistance Program, as found in the Catalog of Federal Domestic Assistance, to which this rule applies are: Feed Grain Production Stabilization—10.055.

Executive Order 12778

This proposed rule has been reviewed in accordance with Executive Order 12778. The provisions of this proposed rule do not preempt State laws, are not retroactive, and do not require the exhaustion of any administrative appeal remedies.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Paperwork Reduction Act

The amendments to 7 CFR part 1413 set forth in this proposed rule do not contain information collections that require clearance by the Office of Management and Budget under the provisions of 44 U.S.C. 35.

Public Comments

Comments are requested with respect to this proposed rule and such comments shall be considered in developing the final rule.

Statutory Background

In accordance with section 105B of the 1949 Act, an ARP is required to be implemented for the 1995 crops of corn, grain sorghum, or barley if it is determined that the total supply of each respective feed grain would otherwise be excessive

Land diversion payments also may be made to producers if needed to adjust the total national acreage of feed grains to desirable goals. A PLD program is not being considered because, given the allowed ARP percentages, it is not needed.

If an ARP is announced, the reduction shall be achieved by applying a uniform percentage reduction to the respective feed grain acreage base for the farm. In making such a determination, the number of acres placed into the agricultural resources conservation program established under subtitle D of title XII of the Food Security Act of

1985, as amended, must be taken into consideration.

Producers who knowingly produce feed grains in excess of the respective permitted acreage for the farm plus any respective feed grain acreage planted in accordance with the flexibility provisions are ineligible for loans and purchases and all payments with respect to that crop on the farm. If an ARP program for the 1995 crop is in effect, the program must be announced no later than September 30, 1994. Adjustments in the announced program may be made if it is determined that there has been a significant change in the total supply of feed grains since the program was first announced. These adjustments must be made no later than November 15, 1994.

In accordance with section 105B of the 1949 Act, not less than 60 days before the program is announced for a crop of feed grains, proposals for public comment on various program options for the crop of feed grains are required to be set forth. Each option must be accompanied by an analysis that includes the estimated planted acreage, production, domestic and export use, ending stocks, season average producer price, program participation rate, and cost to the Federal Government that would likely result from each option.

In determining the 1995 corn ARP, the Secretary will choose a specific ARP reduction percentage from within a range established by the estimated ending stocks-to-use (S/U) ratio for the 1994/95 corn marketing year. If it is estimated that the 1994/95 ending S/U ratio in percentage terms will be:

(1) More than 25 percent, the ARP shall not be less than 10 percent or more than 20 percent; or

(2) Equal to or less than 25 percent, the ARP may not be more than 12.5 percent.

The S/U for the 1994/95 marketing year is estimated to be 15.1 percent. Based on this estimate, the 1995 ARP may be not more than 12.5 percent. In the case of grain sorghum and barley, the Secretary may choose a 1995 ARP percentage in the range from 0 to 20 percent. For oats, the 1995 ARP is statutorily mandated not to exceed 0 percent.

Section 1104 of the Agricultural Reconciliation Act of 1990 provides that the acreage reduction factor for the 1995 crops of corn, grain sorghum, and barley may not be less than 7.5 percent unless the estimated corn S/U for the 1994/95 marketing year is less than 20 percent.

Currently the S/U of corn for the 1993/94 corn marketing year is less than 20 percent. Thus, the minimum 7.5-percent-ARP provision is not currently applicable. The final ARP decision process could consider higher ARP percentages up to 20 percent if the S/U exceeds 25 percent. The ARP options included in this analysis are the most likely possibilities, based on May 1994 data. If ending stocks increase, due to weaker demand or higher than expected yields, and raise the S/U ratio to 25 percent or higher, ARP levels between 12.5 and 20 percent may be considered before a final decision is made. The 1995 ARP options considered are shown in table 1.

TABLE 1.—PROPOSED 1995 FEED GRAIN ARP OPTIONS

Item	Option		
	1	2	3
	Percent		
Corn	0	5	12.5
Grain Sorghum	0	0	5
Barley	0	0	5
Oats	0	0	0

For grain sorghum and barley, ARP percentages higher than 5 percent are not considered because expected sorghum and barley S/U's are low compared with historical levels. The 1994/95 grain sorghum S/U is forecast at 20.1, which with the exceptions of 1991/92 and 1993/94, the lowest level since 1976/77 (17.3 percent). The 1994/95 barley S/U is forecast at 29.1, a level reached only one other time since 1974/75. ARP levels above 5 percent would limit supplies of barley and grain sorghum to the point of not allowing export and domestic needs to be met. However, ARP levels above 5 percent will be considered when making the final ARP decision if feed grain supply and demand changes are large enough to warrant their consideration.

The estimated impacts of the ARP options are shown in tables 2 through 4.

TABLE 2.—CORN SUPPLY AND DEMAND ESTIMATES

Item	1995 ARP options		
	1	2	3
	Percent		
ARP	0	5	12.5
Participation	79	76	68
	Million acres		
Planted acreage	80.0	78.5	75.0
Production	9,200	9,025	8,600
Domestic use	7,280	7,250	7,140
Exports	1,475	1,450	1,400
Ending stocks, 8/31	1,977	1,867	1,607
	Dollars per bushel		
Season average producer price	2.20	2.25	2.40
	Million dollars		
Deficiency payments	3,008	2,474	1,406

TABLE 2.—CORN SUPPLY AND DEMAND ESTIMATES—Continued

Item	1995 ARP options		
	1	2	3
	Million bushels		
Production	8,970	8,805	8,385
Domestic use	7,280	7,250	7,140
Exports	1,475	1,450	1,400
Ending stocks, 8/31	1,477	1,367	1,107
	Dollars per bushel		
Season average producer price	2.20	2.25	2.40
	Million dollars		
Deficiency payments	3,008	2,474	1,406

TABLE 3.—GRAIN SORGHUM SUPPLY AND DEMAND ESTIMATES

Item	1995 ARP options		
	1	2	3
	Percent		
ARP	0	0	5
Participation	79	78	72
	Million acres		
Planted acreage	10.2	10.0	9.7
	Million bushels		
Production	605	600	580
Domestic use	393	388	403
Exports	200	200	190
Ending stocks, 8/31	124	124	95
	Dollars per bushel		
Season average producer price	2.00	2.05	2.25
	Million dollars		
Deficiency payments	297	269	151

TABLE 4.—BARLEY SUPPLY AND DEMAND ESTIMATES

Item	1995 ARP options		
	1	2	3
	Percent		
ARP	0	0	5
Participation	78	78	75
	Million acres		
Planted acreage	7.8	7.8	7.5
	Million bushels		
Production	425	425	405
Domestic use	390	390	400
Exports	60	60	60
Ending stocks, 5/31	146	146	121
	Dollars per bushel		
Season average producer price	2.05	2.10	2.25
	Million dollars		
Deficiency payments	157	143	100

Accordingly, comments are requested as to whether the 1995 acreage reduction percentage for: (1) Corn should be 0, 5, or 12.5 percent or any percentage less than 12.5 percent; (2) Grain sorghum should be 0 or 5 percent or any percentage in the range of 0 to 20 percent; and (3) Barley should be 0 or 5 percent or any percentage in the range of 0 to 20 percent. The final determination of these percentages will be set forth at 7 CFR part 1413.

In accordance with section 105B(e)(2)(G) of the 1949 Act, with respect to feed grains, the Secretary may exempt producers of malting barley, as a condition of eligibility for feed grain loans, purchases, and payments, from complying with the acreage reduction requirements. It is proposed that malting barley not be exempted from the feed grain acreage reduction requirements for the 1995 crop.

List of Subjects in 7 CFR Part 1413

Acreage allotments, Cotton, Disaster assistance, Feed grains, Price support programs, Reporting and recordkeeping requirements, Rice, Soil conservation, Wheat.

Accordingly, it is proposed that 7 CFR part 1413 be amended as follows:

PART 1413—FEED GRAIN, RICE, UPLAND AND EXTRA LONG STAPLE COTTON, WHEAT AND RELATED PROGRAMS

1. The authority citation for 7 CFR part 1413 continues to read as follows:

Authority: 7 U.S.C. 1308, 1308a, 1309, 1441–2, 1444–2, 1444f, 1445b–3a, 1461–1469; 15 U.S.C. 714b and 714c.

2. Section 1413.54 is amended by adding a new paragraph (a)(2)(v); adding a new paragraph (d)(5); and revising paragraph (e) to read as follows:

§ 1413.54 Acreage reduction program provisions.

(a) * * *

(2) * * *

(v) For the 1995 crop:

(A) Corn, grain sorghum, and barley shall be no more than 12.5 percent, as determined and announced by CCC; and

(B) Oats shall be 0 percent.

* * * * *

(d) * * *

(5) For the 1995 crop:

(i) [Reserved]

(ii) Shall not be made available to producers of feed grains, as determined and announced by CCC.

(e) With respect to the 1991, 1992, 1993, 1994, and 1995 crop years, in order to receive feed grain loans, purchases, and payments in accordance with this part and part 1421 of this title, producers of malting barley must comply with the acreage reduction requirements of this part.

Signed this 27th day of July 1994 in Washington, DC.

Bruce R. Weber,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 94–19020 Filed 8–1–94; 3:33 pm]

BILLING CODE 3410–05–P

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Regulation Y; Docket No. R–0843]

Revisions Regarding Tying Restrictions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Board is seeking public comment on a proposed amendment to the anti-tying provisions of Regulation Y. The proposed amendment would permit a bank holding company or its nonbank subsidiary to discount any of its products or services on condition that a customer obtain another product or service from that company or subsidiary or from any of its nonbank affiliates, provided that all products offered in the package arrangement are separately available for purchase. This exception would not apply when any product in the arrangement is offered by a bank. The board believes that this will increase the efficiency with which banking organizations can deliver banking services.

DATES: Comments must be submitted on or before September 17, 1994.

ADDRESSES: Comments should refer to Docket No. R–0843, and may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. Comments also may be delivered to room B–2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays, or to the guard station in the Eccles Building courtyard on 20th Street, N.W. (between Constitution Avenue and C Street) at any time. Comments may be inspected in room MP–500 between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in 12 CFR 261.8 of the Board's rules regarding availability of information.

FOR FURTHER INFORMATION CONTACT: Robert deV. Frierson, Assistant General Counsel (202/452–3711); Gregory A. Baer, Managing Senior Counsel (202/452–3236), or David S. Simon, Attorney (202/452–3611), Legal Division; or Anthony Cyrnak, Economist, (202/452–2917), Division of Research and Statistics, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION:

Background

Section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972) generally prohibits a bank from tying a product or service to another product or service offered by the bank or by any of its affiliates.[1] In 1971, the Board applied these tying restrictions to bank holding companies and their nonbank subsidiaries as if they were banks. 12 CFR 225.4(d)(1); 36 FR 10777, 10778 (1971).

On March 11, 1994, the Board requested public comment on proposed

[1] A prohibited tie-in occurs if a bank: (1) varies the consideration for a product or service (the "tying product") on the condition that the customer obtain some additional product or service (the "tied product") from the bank or from any of its affiliates; or (2) as a condition for providing a customer a product or service, requires the customer to purchase another product or service from the bank or from any of its affiliates.

amendments to Regulation Y, including an extension of the so-called traditional bank product exception of section 106 to package arrangements with affiliates. 59 FR 12202 (March 16, 1994). In addition to comments on the proposed rule, which is being made final in a separate document published elsewhere in this issue of the **Federal Register**, the Board received various requests for interpretation or extension of regulatory exceptions to the tying restrictions imposed by section 106 and Regulation Y. In particular, commenters urged the Board to reconsider its extension of the tying restrictions of section 106 to bank holding companies and their nonbank subsidiaries.

Proposed Amendments

After considering those requests, the Board has decided to propose an amendment to its anti-tying regulation to conform it more closely to section 106 and its focus on tying by banks. Under the proposed rule, bank holding companies and their nonbanking subsidiaries would be permitted to offer discounts on packaged products when: (1) Both the tying and tied products[2] are offered by bank holding companies or their nonbanking subsidiaries—in other words, where no affiliated bank is involved in the arrangement; and (2) both the tying and tied products are separately available.[3] In cases that do not qualify for this (or some other) exception, the general restrictions of section 106 and Regulation Y would continue to apply; for example, if the package arrangement involved a product offered by an affiliated bank, the exception would not apply and the nonbanking subsidiary could only offer discount package arrangements involving exclusively traditional bank products or securities brokerage services, under exceptions recently adopted by the Board and to take effect in thirty days. The antitrust laws also would continue to apply in all cases.

The Board believes that the proposed exception is consistent with the terms and purposes of section 106, is justified by the competitive environment in which nonbanking subsidiaries generally operate, and is potentially beneficial both to banking organizations and consumers.

Consistency With Section 106

By its terms, section 106 applies only when a *bank* offers the tying product—that is, when a bank is varying the consideration or conditioning the availability of a product in order to create an incentive for the customer to purchase another product from the bank or an affiliate. This coverage was consistent with the stated purpose of section 106: To prevent banks from using their market power over certain products to gain an unfair competitive advantage in other products. See, e.g., S. Rep. No. 1084, 91st Cong., 2d Sess., 16 (1970) (section 106 was "intended to provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition or unfair competitive practices"). The proposed exception would apply only when nonbanks are offering the packaged products. Such arrangements are not covered by the terms of section 106; nor do they raise the specific concerns that section 106 was intended to address.

Consistency With Regulation Y

The tying restrictions of section 106 were imposed by the Bank Holding Company Act Amendments of 1970 in conjunction with an extension of new nonbanking powers to bank holding companies and their nonbank subsidiaries. The potential for anticompetitive behavior by such subsidiaries—which were then uncommon—was uncertain pending implementation of the Act, and the Board therefore adopted a prophylactic rule in applying the restrictions of section 106 to bank holding companies and their nonbank subsidiaries.

Much has changed, however, since adoption of that rule. Competition in most financial markets has increased substantially since 1971, and through its experience in the supervision of nonbank subsidiaries of bank holding companies, the Board has been able to assess the role of nonbanking subsidiaries in those markets. The Board believes that neither bank holding companies nor their nonbanking subsidiaries generally appear to possess sufficient market power in the products that they offer to impair competition. For example, the "laundry list" activities in which bank holding companies and their nonbanking subsidiaries are permitted to engage are generally conducted in competitive national or regional markets that are characterized by large numbers of actual or potential competitors and low barriers to entry.[4] In such markets, the potential for a market participant to gain a competitive advantage through tying is substantially reduced.

Moreover, if the Board's proposal were adopted, ties involving bank holding companies and their nonbanking subsidiaries would, as noted, continue to be restricted by the federal antitrust laws (primarily the Clayton and Sherman Acts)—the same restrictions that bind their competitors. In addition, section 106 would continue to restrict tying by banks, and the Board would continue to apply special restrictions to tying by a nonbank when the tied product is offered by an affiliated bank. As a final protection, the Board would retain the authority to terminate or modify any exception that resulted in anticompetitive practices.

Furthermore, the Board is proposing to rescind its special restrictions on tying between nonbanks only where the products are separately available and a discount is being offered.[5] These conditions prevent the conditioning of the availability of one product on the purchase of another and allow consumers to compare prices. The Board recognizes that to the extent that the market for products offered by bank holding companies and their nonbanking subsidiaries is competitive, these conditions should not be strictly necessary. The Board seeks comment on whether these conditions should be retained as a precaution against any anti-competitive practices. The Board also seeks comment on a clarification to the requirement of separate availability, applicable to all the regulatory exceptions, that would provide that products must be separately available "at competitive prices." This amendment would clarify that if a product is available outside a package arrangement only at a non-competitive price, it is not truly separately available.

Costs of Tying Restrictions

The special tying restrictions imposed on nonbank subsidiaries of bank holding companies not only appear to be unnecessary to prevent those companies from gaining an unfair competitive advantage, but also place those companies at a competitive disadvantage with other providers of the same products and services. As a result of Regulation Y's current prohibition, a

[2] The "tying" product is the product whose consideration is being varied or whose availability is being conditioned. The "tied" product is the product that must be purchased in order to receive a discount on the tying product or become eligible to purchase the tying product.

[3] The Board recognizes that requiring the products to be separately available effectively requires that the exception be limited to discounting, and vice versa, but is proposing both conditions in order to avoid any ambiguity.

[4] The "laundry list" activities are specified by regulation. See 12 CFR 225.25.

[5] Under antitrust law, concerns over tying arrangements are substantially reduced where the buyer is free to take either product by itself, even though the seller may also offer the two items as a unit at a single price. *Northern Pacific R. Co. v. Unites States*, 356 U.S. 1, 6 n.4 (1958).

nonbanking company is generally prohibited from offering discounted packages of its own products or discounted packages that include its own products and those of other affiliated nonbanking companies. Their competitors who are not affiliated with banks are not similarly constrained. Several commenters in the Board's recent rulemaking noted that brokerage firms and other nonbank competitors are offering the types of discounts currently prohibited by Regulation Y, which are not generally illegal for purposes of the federal antitrust laws.

The inability of nonbanks in a holding company structure to offer discounts not only diminishes their competitiveness but also deprives their customers of an opportunity to receive discounts. The Board believes that under the proposed rule, customers would be presented with more choices and potentially lower costs.

Congressional Intent

The Board notes that this proposed treatment of tying by nonbanking subsidiaries is consistent with recent Congressional action in the tying area. In applying anti-tying restrictions to savings associations in the Garn-St. Germain Depository Institutions Act, Public Law No. 97–320, section 331, 96 Stat. 1496, Congress closely paralleled section 106 in applying the restriction only when the tying product was offered by the savings association. An extension of the restrictions to non-savings association affiliates of the type adopted by the Board was neither included by Congress nor subsequently adopted by the Office of Thrift Supervision.

Other Issues

Finally, the Board is proposing to amend Regulation Y to clarify that the Board's retained authority to revoke an exception that is resulting in anti-competitive practices includes authority to halt such practices at an individual institution.

Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) are contained in the proposed rule.

Regulatory Flexibility Act

It is hereby certified that this proposed rule, if adopted as a final rule, will not have a significant economic impact on a substantial number of small entities that would be subject to the regulation.

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, banking, Holding companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR Part 225 as set forth below:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for 12 CFR part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3907, 3909, 3310, and 3331–3351.

2. In section 225.7, a new paragraph (b)(3) is added and paragraph (c) is revised to read as follows:

§ 225.7 Tying Restrictions.

* * * * *

(b) * * *

(3) *Discounts on tie-in arrangements not involving banks.* A bank holding company or any nonbank subsidiary thereof may vary the consideration for any extension of credit, lease or sale of property of any kind, or service, on the condition or requirement that the customer obtain some additional credit, property, or service from itself or a nonbank affiliate, provided that all products and services offered in the arrangement also are separately available for purchase by the customer.

(c) *Limitations on exceptions.* (1) The exceptions of this section shall apply only if all products involved in the tying arrangement are separately available for purchase at competitive prices.

(2) Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anti-competitive practices. The eligibility of a bank holding company or bank or nonbank subsidiary thereof to operate under any exception granted pursuant to this section shall terminate upon a finding by the Board that its exercise of this authority is resulting in anti-competitive practices.

* * * * *

By order of the Board of Governors of the Federal Reserve System, July 27, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94–18723 Filed 8–3–94; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 36 and 91

[Docket No. 25109, Notice No. 86–16]

RIN 2120–AC22

Civil Supersonic Airplane Noise Type Certification Standards and Operating Rules

AGENCY: Federal Aviation Administration, DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Aviation Administration (FAA) is withdrawing a previously published Notice of Proposed Rulemaking (NPRM) that proposed to amend the Federal Aviation Regulations to revise the airplane type certification standards and operating rules. The proposed amendments would have required that future civil supersonic airplanes meet noise limits consistent with those required for future civil subsonic airplanes. The FAA is postponing development of a final rule because it cannot ensure that the final rule would be economically reasonable and technologically practical at this time. The FAA will continue to gather technical information and analyze suggested recommendations for test and measurement conditions.

FOR FURTHER INFORMATION CONTACT: Ms. Laurette Fisher, Policy and Regulatory Division (AEE–300), Office of Environment and Energy, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3561.

SUPPLEMENTARY INFORMATION: On October 30, 1986, the FAA published Advance Notice of Proposed Rulemaking No. 86–16 (51 FR 39663), announcing its tentative intention to amend 14 CFR parts 36 and 91. The comment period for Notice No. 86–16 was reopened on March 12, 1987 (52 FR 7618) to allow interested parties additional time to comment.

On May 30, 1990, the FAA published Notice of Proposed Rulemaking (NPRM) No. 86–16 (55 FR 22020), proposing to amend 14 CFR parts 36 and 91. These revisions were intended to aid the development of next-generation supersonic airplanes by establishing a notice standard for supersonic airplanes that is consistent with noise limits for conventional (subsonic) airplanes. In the NPRM, the FAA requested that the public comment on the following issues. (1) Requirement that future supersonic airplanes (SST) meet noise limits

consistent with those required for future subsonic airplanes, (2) recommendations on test and measurement conditions and operational characteristics appropriate for future SST's, and (3) cost of the proposed rule.

After analyzing the comments received on the NPRM, the FAA has determined that further investigation and research is necessary before developing the final rule. The FAA will continue to gather technical information and analyze suggested recommendations for test and measurement conditions. A statement concerning FAA policy on this matter is published elsewhere in this issue of the **Federal Register**. Accordingly, Notice No. 86–16, Docket No. 25109, published in the **Federal Register** on May 30, 1990 (55 FR 22020), is withdrawn.

Issued in Washington, DC on July 29, 1994.

Paul R. Dykeman,

Acting Director of Environment and Energy.

[FR Doc. 94–18905 Filed 8–3–94; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 206

RIN 1010–AB57

Valuation of Oil and Gas From Indian Leases

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Minerals Management Service (MMS) is considering amending its regulations regarding the valuation of gas produced from Indian leases to ensure that Indian mineral lessors receive the maximum revenues from mineral resources on their land consistent with the Secretary of the Interior's (Secretary) trust responsibility and lease terms.

Most Indian leases provide that the value of production for royalty purposes be determined by the Secretary. In making this determination, the Secretary must consider his trust responsibility. In the exercise of this responsibility, value in the discretion of the Secretary may be determined by taking the highest of several values. This notice describes several alternatives to establish these values and solicits comments before publishing proposed new regulations governing the value of gas production from Indian lands.

The MMS is not currently proposing changes to the oil valuation regulations for Indian leases. The MMS may consider changes following study of oil valuation for Indian leases.

DATES: Comments must be received on or before October 3, 1994.

ADDRESSES: Written comments, suggestions, or objections regarding alternative valuation methods should be mailed to the Minerals Management Service, Royalty Management Program, Rules and Procedures Staff, Denver Federal Center, Building 85, P.O. Box 25165, Mail Stop 3101, Denver, Colorado 80225–0165, Attention: David S. Guzy, telephone (303) 231–3432.

FOR FURTHER INFORMATION CONTACT: David S. Guzy, Chief, Rules and Procedures Staff, MMS Royalty Management Program at (303) 231–3432.

SUPPLEMENTARY INFORMATION:

I. Background

All Indian leases contain provisions for the determination of royalty obligations. Some Indian leases or agreements negotiated under the 1982 Indian Mineral Development Act contain explicit methodologies for determining royalty obligations. The MMS does not intend to alter these express valuation methodologies.

Most Indian leases were entered into under the authority of earlier statutes, and these leases reserve to the Secretary considerable discretion in determining value for royalty purposes. This Advance Notice of Proposed Rulemaking is intended to solicit comments on new methodologies being considered to establish value for these leases. Comments that are received in response to this Advance Notice will be considered in the development of a proposed rulemaking that will be published in the **Federal Register** at a future date.

Most Indian leases also provide that royalty obligations be based on the value of hydrocarbon substances produced and saved. A royalty obligation is incurred when hydrocarbon substances are produced and saved and not solely as the result of a sale.

Section 3(c) of a standard Indian lease covers leasee rental and royalty payment requirements and states:

> (c) Rental and royalty. To pay, beginning with the date of approval of the lease by the Secretary of the Interior or his duly authorized representative, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 16⅔ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: *Provided*, that the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: *And provided further*, that the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in section 4(c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the payee designated by the Area Director. All such rental and royalty payments shall be mailed to the oil and gas supervisor for transmittal to the payee designated by the Area Director. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

In conjunction with the lease terms, the valuation of gas production from Indian leases is subject to the regulations at 30 CFR Part 206. The present regulations govern the valuation of production from both Federal and Indian (Tribal and allotted) leases (except leases on the Osage Indian Reservation, Oklahoma) (Revision of Gas Royalty Valuation Regulations and

Related Topics; Final Rule, published in the Federal Register on January 15, 1988 (53 FR 1230).

MMS now believes that it may be able to better perform the trust responsibilities of the United States with respect to the administration of Indian oil and gas leases by issuing separate regulations for the valuation of gas from these leases. Also, MMS believes that it could provide an improved regulatory framework in which these lease terms can be strictly enforced while economizing on the information needed by a lessee. MMS is seeking to adopt valuation procedures that could be compiled with by the lessee in a timely manner.

The Secretary is obligated to act as a fiduciary in the administration of Indian oil and gas leases. As a fiduciary, charged with supervising the disposition of nonrenewable resources from Indian lands, the Secretary must ensure that Indians receive the maximum revenues from mineral resources on their lands. To ensure maximum revenues, the value of production for royalty purposes from an Indian lease should be determined considering the highest values provided by the terms of the standard lease, quoted above. MMS believes this is consistent with the terms of these Indian oil and gas leases, with statutes delegating to the Secretary the administration of Indian affairs, with the statutes governing Indian oil and gas leases, with the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), with court decisions providing judicial guidance in the interpretation and administration of Indian oil and gas leases, and with the law of trusts and fiduciary operations.

MMS has considered that maximizing royalty revenues from Indian leases might affect the economics of mineral resource development and believes that this should not result in the reduction of the value of production for royalty purposes. This issue should be examined in the context of an adjustment of lease terms by the Bureau of Indian Affairs and the Indian lessor.

II. Current Regulations

The current valuation regulations incorporate the terms of the standard Indian leases in the ways listed below.

(a) The value of production is never less than the gross proceeds accruing to the lessee. This provision is contained in valuation regulations at 30 CFR 206.102(h), 206.152(h), and 206.153(h), which state:

> Notwithstanding any other provision of this section, under no circumstances shall the value of production, for royalty purposes, be less than the gross proceeds accruing to the lessee for lease production, less applicable allowances determined pursuant to this subpart.

(b) The value of production will be the higher of the major portion value and the otherwise applicable value. This provision is contained in valuation regulations at 30 CFR 206.102(a)(2)(i), 206.152(a)(3)(i), and 206.153(a)(3)(i), which state:

> For any Indian leases which provide that the Secretary may consider the highest price paid or offered for a major portion of production (major portion) in determining value for royalty purposes, if data are available to compute a major portion, MMS will, where practicable, compare the value determined in accordance with this section with the major portion. The value to be used in determining the value of production, for royalty purposes, shall be the higher of those two values.

(c) The value of production will be the greater of (1) the combined value, for royalty purposes, of the residue gas and gas plant products resulting from processing the gas, or (2) the value, for royalty purposes, of the gas prior to processing determined in accordance with 30 CFR §§ 206.152 and 206.155.

III. Discussion

The Secretary's responsibility to determine value for royalty purposes of production from Indian lands has not changed, although the industry and marketplace have changed dramatically over the years. One of the objectives MMS hopes to achieve is to develop a set of regulations to permit the Secretary to discharge this responsibility in an environment of continuing and accelerating change in the industry and the marketplace. The trust responsibility of the Secretary and the changing marketplace require that the Secretary develop flexible valuation methodologies for Indian production that can be complied with accuracy and on time. MMS seeks to improve several areas of Indian gas valuation including: major portion analysis, accounting for comparison (dual accounting), and Percentage-of-Proceeds (POP) contracts. Following is a discussion of each of these areas.

(a) Major Portion Value

Section 3(c) of most Indian leases provides that value may be based on the highest price paid or offered for a major portion of oil or gas or similar substances. Many lessees have stated that there are difficulties encountered in complying with major portion valuation requirements and the timeliness of major portion analyses performed by MMS.

Indian mineral owners assert the median pricing methodology in the present regulations does not always achieve the highest price paid for a major portion of production provided by the lease terms. Since the Secretary has considerable discretion in establishing value for royalty purposes, the Secretary has been urged to be more flexible in establishing major portion methodologies.

(b) Dual Accounting

Section 3(c) of most Indian leases provides for "dual accounting"—the requirement to pay royalties on the greater of the combined value of the residue gas and plant products resulting from processing the gas or the value of the gas prior to processing. Dual accounting is required whether gas is sold prior to processing or after processing. In either case, the lessees may have difficulty in gathering the data necessary to comply, which delays the proper payment of royalties to the Indian lessors. Improvement in the regulations that will permit lessees to timely and completely comply with the lease's dual accounting requirement is desirable.

(c) Percentage-of-Proceeds (POP) Contracts

This class of contracts for the sale of gas from Indian leases presents a different problem in determining value for royalty purposes. Under a POP contract, the seller is paid based upon a value determined after processing. As the name given to this class of contract suggests, the seller is paid an agreed-upon percentage of the purchaser's proceeds from the sale of residue gas and usually a different and much smaller percentage of the proceeds from the sale of gas plant products. Lessees have objected to the dual accounting requirement for gas sold pursuant to a POP contract because of a lack of wellhead sales. Regulations that permit lessees to timely and accurately comply with POP contract valuation requirements are desirable.

In summary MMS's goal is to develop simplified methods for determining the highest price paid or offered for a major portion of like-quality production from the field or area, for determining the greater of the processed value or the unprocessed value, and for properly valuing POP contract production, on a more contemporaneous basis. This would simplify the accounting and enhance the administrative workability for both Tribal and MMS royalty personnel as well as the oil and gas industry. It would allow more contemporaneous automated accounting

comparisons and reduce the reliance on audits conducted years after production occurs to verify royalty compliance.

IV. Description of Alternatives and Solicitation of Comments

MMS invites specific comments on the following alternatives that is currently considering for valuation under the major portion and dual accounting requirements for gas produced, saved, or sold from tribal and allotted Indian Lands.

(a) Major Portion Scenarios

(1) Use of Gas Price Indices

MMS is considering using published indices of natural gas prices as a means to determine the price at which a major portion of gas is sold from a given field or area. It is contemplated that any index or indices used would be widely used by industry, have a history of publication, and generally be expected to continue to be published. It is likewise contemplated that any regulation that uses published indices would provide for the use of substitute indices if necessary. MMS is aware that gas-index-price-based major portion systems are currently being successfully utilized.

MMS is soliciting comments on what publications are most widely used by industry for gas price indices. MMS also seeks input from companies that are successfully using gas price index-based formulas to determine the major portion value, and the ways the gas price indices are used to arrive at a value. MMS is also particularly interested in perspectives regarding the extent to which published prices reflect actual values of production, and perspectives regarding the accuracy of published prices and indices.

MMS would also appreciate comments on the extent to which the use of published prices would promote: The certainty and reliability of payments, the timeliness of royalty reporting, ease of compliance, enforceability, and the reduction of costs to both industry and government.

(2) Major Portion Analysis Using Price Data Reported to Indian Tribes and States.

MMS has used gas prices obtained from the Oklahoma Tax Commission severance tax report to do a major portion calculation for allotted Indian leases in the Anadarko area of Oklahoma. MMS requests comments on the feasibility of MMS doing the major portion calculation using pricing data obtained from Tribes, States, or other outside sources (that have information available).

(3) Major Portion Analysis Using Price Data Reported on the Report of Sales and Royalty Remittance (Form MMS–2014).

Information reported on Form MMS–2014 has been used to do major portion calculations for gas produced from the Southern Ute Tribal and Allotted Indian leases. MMS requests comments on the feasibility of MMS calculating the major portion price from data on Form MMS–2014.

(4) Requirement That All Purchasers Provide Sales Data to MMS

MMS is considering implementing a new regulation (under the authority of FOGRMA) that would require all purchasers of Federal and/or Indian gas in fields or areas in which Indian production occurs to provide volume and pricing data to MMS. MMS would then calculate major portion prices and provide these to the lessees. MMS seeks comments on the feasibility of such an approach.

(5) Flexibility To Negotiate a Method to do a Major Portion Analysis on a Case-By-Case Basis

MMS is considering adding new regulatory language that would allow lessees the flexibility to negotiate with Indian Tribes and allottees a method of fulfilling the value of a major portion of production from a field or area. MMS seeks comments on the feasibility of such an approach.

(b) Dual Accounting Scenarios

(1) Wellhead Sale of Gas and the Gas Is Processed (Seller Not Owner in Gas Plant)

Under this scenario, the lessee typically sells gas prior to processing in a gas plant. The lessee should know the gross proceeds accruing under the sale of gas at the wellhead. To fulfill the dual accounting requirement, the lessee is also required to obtain the actual sales values of the residue gas and gas plant products after processing. Lessees have made MMS aware of the difficulty, in some instances, in obtaining all of the information necessary to determine accurately the value of production. On July 27, 1992, MMS issued a letter to payors describing a theoretical dual accounting method that can be used to approximate the value of gas after processing. Although this method has helped, MMS has been made aware that there are still problems in obtaining information that is both timely and accurate.

To facilitate the process of obtaining all of the information (such as gas plant efficiencies, processing charges, plant fuel and flare volumes, and fractionation costs) necessary to accurately do dual accounting, MMS is considering the following alternatives:

- MMS could draft regulations requiring owners of plants that process Federal and/or Indian gas to report the processing information directly either to MMS, the lessee, or both.
- MMS could attempt to obtain information on plants that process Indian gas from State agencies.

MMS requests comments on the feasibility of requiring plant owners to make processing information available to lessees or MMS. MMS also welcomes suggestions for any other possible alternatives for obtaining this information.

MMS is also considering establishing a single basin-wide processing allowance that would be used by all lessees or could be used when the lessee does not have actual processing plant information. MMS requests comments on using basin-wide allowances that the MMS would periodically calculate and publish.

(2) Gas Is Sold at the Tailgate of a Gas Plant

In this situation, the lessee should have all of the data pertaining to the sale of the processed gas. To fulfill the dual accounting requirement, the lessee must determine the value of the unprocessed gas at the wellhead. When there is no sale of gas at the wellhead, the wellhead unit value ($/MMBtu) of the gas for royalty purposes could be determined by using: (1) Gross proceeds under arm's-length contracts for like-quality gas in the same field or nearby fields or areas; (2) the unit value of the residue gas; (3) gas price indices posted in publicly available national publications; or (4) the price arrived at by performing a major portion analysis.

MMS seeks comments on the availability of information and the accuracy of the above methods in determining the value for royalty purposes of unprocessed gas at the wellhead. MMS further seeks comments on what specific publications are used by industry for index prices. MMS also seeks comments on using the highest price in the range, the index price, the average price, or some combination of prices if index pricing were used in dual accounting.

(3) Gas Is Sold Under a POP Contract

MMS requests comments on the following methods of determining value of gas at the wellhead under a POP contract when doing dual accounting:

(i) Gross proceeds under the POP contract,

(ii) The unit value of the residue gas,

(iii) Gas price indices posted in publicly available national publications,

(iv) The price arrived at by performing a major portion analysis; and

(v) Prices received under arm's-length wellhead sales in the field or area.

MMS also seeks suggestions on other possible methods to arrive at a value of unprocessed gas at the wellhead for comparison purposes under dual accounting.

(4) Percentage Increase to Value in Lieu of Dual Accounting

In situations where lessees have made a reasonable effort to do dual accounting but nonetheless cannot establish an accurate comparison of values, MMS is considering allowing a percentage increase to the otherwise determined value of production in lieu of dual accounting. Analysis has shown that the difference between the greater of the combined value of the residue gas and plant products resulting from processing the gas or the value of the gas prior to processing has exceeded 40 percent of the lower value in some cases. MMS seeks comments on the feasibility of applying a percentage increase and the amount of such an increase to comply with dual accounting requirements.

(c) Integration of Major Portion Scenarios and Dual Accounting Scenarios

MMS seeks comments on how to integrate any selected scenarios on major portion with the scenarios on dual accounting. For example, one way to integrate these is the following:

If the index scenario is selected for major portion analysis and the percentage increase is selected for dual accounting, then a way to integrate these concepts is to apply the percentage increase to the higher of index or gross proceeds.

Dated: July 18, 1994.

Bob Armstrong,

Assistant Secretary for Land and Minerals Management.

[FR Doc. 94–19053 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–MR–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IL70–1–6254B; FRL–5027–3]

Approval and Promulgation of Implementation Plan; Illinois

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The United States Environmental Protection Agency (USEPA) proposes to approve a February 11, 1993, State submittal requesting a revision to the Illinois State Implementation Plan (SIP) for carbon monoxide (CO). The revision pertains to a site-specific emission limit for a iron foundry operated by General Motors Corporation (GMC) and located adjacent to Interstate 74 at G Street in Vermilion County, Illinois. Vermilion County has been designated by USEPA as "unclassifiable/attainment" for carbon monoxide. In the final rules section of this **Federal Register**, the USEPA is approving the State's SIP revision as a direct final rule without prior proposal because USEPA views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If USEPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. USEPA will not institute a second comment period on this notice. Any parties interested in commenting on this notice should do so at this time.

DATES: Comments on this proposed rule must be received on or before September 6, 1994.

ADDRESSES: Written comments should be mailed to: J. Elmer Bortzer, Chief, Regulation Development Section, Regulation Development Branch (5AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60606.

Copies of the State submittal and USEPA's analysis of it are available for inspection at: Regulation Development Section, Regulation Development Branch (5AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Fayette Bright, Environmental Protection Specialist, Regulation Development Branch (5AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule published in the rules section of this **Federal Register**.

Dated: June 16, 1994.

Valdas V. Adamkus,

Regional Administrator.

[FR Doc. 94–18956 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 52

[TN 132–6436b; FRL–5009–4]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Tennessee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve the State implementation plan (SIP) revision submitted by the State of Tennessee for the purpose of redesignation of the Memphis and Shelby County area (classified as a marginal nonattainment area) from nonattainment to attainment for ozone (O_3). In the final rules section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule.

The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: To be considered, comments must be received by September 6, 1994.

ADDRESSEES: Written comments should be sent to Karen Borel at the EPA address in Atlanta, Georgia listed below. Copies of the redesignation request and the State of Tennessee's submittal are available for public review during normal business hours at the addresses listed below. EPA's technical support document (TSD) is available for public review during normal business hours at the EPA addresses listed below.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street NE, Atlanta, GA 30365.

Memphis and Shelby County Health Department, 814 Jefferson Avenue, Memphis Tennessee 38105.

FOR FURTHER INFORMATION CONTACT: Karen Borel of the EPA Region IV Air Programs Branch at (404) 347–2864 and at the Region IV address.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the rules section of this **Federal Register**.

Dated: June 28, 1994.

John H. Hankinson, Jr.,

Regional Administrator.

[FR Doc. 94–18995 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 52

[AL–37–2–5926b; FRL–5009–8]

Clean Air Act Approval and Promulgation of Emission Statement Implementation Plan for Alabama

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve the State implementation plan (SIP) revision submitted by the State of Alabama for the purpose of establishing an emission statement program. In the final rules section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rational for the approval is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: To be considered, comments must be received by September 6, 1994.

ADDRESSES: Written comments should be addressed to:

Joey LeVasseur, Regulatory Planning and Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region IV Environmental Protection Agency, 345 Courtland Street, NE., Atlanta, Georgia 30365.

Copies of the material submitted by the State of Alabama may be examined during normal business hours at the following locations:

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Environmental Protection Agency, Region IV Air Programs Branch, 345 Courtland Street, NE., Atlanta, Georgia 30365.

Alabama Department of Environmental Management, Office of General Counsel, 1751 Cong. W. L. Dickinson Drive, Montgomery, Alabama 36130.

FOR FURTHER INFORMATION CONTACT: Joey LeVasseur, Regulatory Planning and Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region IV Environmental Protection Agency, 345 Courtland Street, NE., Atlanta, Georgia 30365. The telephone number is 404/347–2864.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the rules section of this **Federal Register**.

Dated: June 29, 1994.

Joe R. Franzmathes,

Acting Regional Administrator.

[FR Doc. 94–18954 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 52

[WA–19–1–6140b; FRL–5007–3]

Approval and Promulgation of State Implementation Plans: Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve the state implementation plan (SIP) revision submitted by the State of Washington for the purpose of establishing redesignation of Tacoma from unclassifiable to attainment for sulfur dioxide (SO_2). In the Final rules Section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If the EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this notice.

DATES: Comments on this proposed rule must be received in writing by September 6, 1994.

ADDRESSES: Written comments should be addressed to Montel Livingston, Environmental Protection Specialist (AT–082), Air Programs Section, at the EPA Regional Office listed below. Copies of the documents relevant to this proposed rule are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day:

U.S. Environmental Protection Agency, Region 10, Air Programs Section, 1200 6th Avenue, Seattle, WA 98101.

The Washington State Department of Ecology, P.O. Box 47600, PV–11, Olympia, Washington 98504–7600.

FOR FURTHER INFORMATION CONTACT: Kelly McFadden, Air Programs Branch (AT–082), EPA, 1200 6th Avenue, Seattle, WA 98101, (206) 553–1059.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action which is located in the Rules Section of this **Federal Register**.

Dated: June 23, 1994.

Gerald A. Emison,

Acting Regional Administrator.

[FR Doc. 94–18997 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 940701–4201; I.D. 113093B]

Designated Critical Habitat; Johnson's Seagrass

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

ACTION: Proposed rule.

SUMMARY: NMFS is proposing to designate critical habitat for Johnson's seagrass (*Halophila johnsonii*) pursuant to section 4 of the Endangered Species Act (ESA). Because the subject matter of this proposed rule is closely related to a proposal published on September 15, 1993 (58 FR 48326), to list Johnson's seagrass as a threatened species, NMFS is announcing a public hearing to consider both proposed rules. NMFS is also reopening the comment period for the proposed rule to list Johnson's

seagrass. The hearing will be held September 20, 1994, in Vero Beach, FL.

Johnson's seagrass is found on the east coast of Florida from Sebastian Inlet to central Biscayne Bay. Within this range, five areas in proximity to Sebastian Inlet, Ft. Pierce Inlet, St. Lucie Inlet, Jupiter Inlet and Lake Worth Inlet are proposed for critical habitat. In addition, the proposed critical habitat designation identifies those physical and biological features of the habitat that are essential to the conservation of the species and that may require special management consideration or protection. The economic and other impacts resulting from this critical habitat designation, over and above those arising from the listing of the species under the ESA, are expected to be minimal. The designation of proposed critical habitat provides explicit notice to Federal agencies and the public that these areas and features are vital to the conservation of the species.

DATES: Comments on both proposed rules must be received by October 13, 1994. The public hearing will be held on Tuesday, September 20, 1994, at 7:30 p.m.

ADDRESSES: Send comments and requests for the environmental assessment on the proposed designation of critical habitat and the status review for listing Johnson's seagrass to Dr. William W. Fox, Jr., Director, Office of Protected Resources, NMFS, 1335 East-West Highway, Silver Spring, MD 20910.

The public hearing will be held in the Commission Chambers of the Indian River County Administration Building, 1840 25th Street, Vero Beach, FL.

FOR FURTHER INFORMATION CONTACT: Margaret C. Lorenz, Office of Protected Resources, NMFS, 301/713–2322, or Colleen Coogan, Southeast Region, NMFS, 813/893–3366.

SUPPLEMENTARY INFORMATION:

Background

NMFS published a proposed rule to list Johnson's seagrass as a threatened species on September 15, 1993 (58 FR 48326). Critical habitat was not proposed for designation at that time because the analysis of impacts of the proposed designation, as required by section 4(b)(2) of the ESA, had not been completed.

NMFS has now completed an environmental assessment (EA), pursuant to the National Environmental Policy Act (NEPA), to evaluate both the environmental and economic impacts of the proposed critical habitat designation (See **ADDRESSES**).

The proposed designation identifies those physical and biological features of the habitat that are essential to the conservation of the species and that may require special management consideration or protection. The direct economic and other impacts resulting from designating critical habitat, over and above those that result from listing the species, are expected to be minimal.

Definition of Critical Habitat

Critical habitat is defined in section 3(5)(A) of the ESA as "(i) the specific areas within the geographical 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 * * * upon a determination by the Secretary that such areas are essential for the conservation of the species." Areas outside the current range of a species can only be designated if a designation limited to the species' present distribution would be inadequate to ensure the conservation of the species. The term conservation, as defined in section 3(3) of the ESA, means "* * * to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."

The criteria to be considered in designating critical habitat are specified under 50 CFR 424.12. When designating critical habitat, NMFS considers physical and biological features that are essential to the conservation of the species and that may require special management consideration or protection, including but 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 or rearing of offspring; and, generally, (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of the species.

In addition, NMFS must list the known physical and biological features (primary constituent elements) within the designated area(s) that are essential to the conservation of the species and that may require special management considerations or protection. These essential features may include, but are not limited to, food resources, water quality or quantity and vegetation and sediment types and stability.

Consideration of Economic and Other Factors

The economic, environmental and other impacts of a designation must also be evaluated and considered. NMFS must identify present and future activities that may adversely modify the proposed critical habitat or be affected by a designation. An area may be excluded from a critical habitat designation if NMFS determines that the overall benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the species.

The impacts considered in this analysis are only those incremental impacts that specifically result from designating critical habitat, above the economic and other impacts attributable to listing the species. These incremental impacts are expected to be minimal (See Significance of Designating Critical Habitat section). In general, the designation of critical habitat duplicates and reinforces the substantive protection resulting from the listing itself.

Impacts attributable to listing include those resulting from the taking prohibitions under section 9 and associated regulations. With respect to fish and wildlife, "taking" as defined in the ESA includes harm to a listed species. Harm can occur through destruction or modification of habitat (whether or not designated as critical) that significantly impairs essential behaviors, including breeding, feeding or sheltering.

With respect to plants, section 9 of the ESA makes it unlawful for any person subject to U.S. jurisdiction to "remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law." Although this provision does not prohibit takings, such as harm or harassment of a species of fish or wildlife, it does provide protection for plants in areas under Federal jurisdiction and under state laws. As with the takings prohibition for fish and wildlife, these protections are triggered when a species is listed. Therefore, generally, the critical habitat designation will duplicate these protections. This is particularly true with respect to acts that "remove, cut, dig up or damage or destroy listed

plants in knowing violation of any law or regulation of any state."

Impacts attributable to listing also include those resulting from the responsibility of all Federal agencies under section 7 to ensure that their actions are not likely to jeopardize endangered or threatened species. An action could be likely to jeopardize the continued existence of a listed species through the destruction or adverse modification of its habitat, whether or not that habitat has been designated as critical.

Significance of Designating Critical Habitat

The designation of critical habitat does not, in itself, restrict state or private activities within the area. A critical habitat designation contributes to conservation of the species primarily by identifying critically important areas and describing the features within the areas that are essential to the species, thus alerting public and private entities to the importance of the area. Under the ESA, the only direct impact of a critical habitat designation is through the provisions of section 7. Section 7 applies only to actions with Federal involvement and does not affect state or private activities unless there is Federal involvement.

Under the section 7 provisions, a designation of critical habitat would require Federal agencies to ensure that any action they authorize, fund, or carry out is not likely to destroy or adversely modify the designated critical habitat. Activities that adversely modify critical habitat are defined as those actions that "appreciably diminish the value of critical habitat for both the survival and recovery" of the species (50 CFR 402.02). However, if no critical habitat has been designated, Federal agencies still must ensure that their actions are not likely to jeopardize the continued existence of the listed species. Activities that jeopardize a species are defined as those actions that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery" of the species (50 CFR 402.02). Using these definitions, activities that destroy or adversely modify critical habitat also are likely to jeopardize the species. Therefore, the protection provided by a critical habitat designation usually only duplicates the protection provided under the section 7 jeopardy provision. Critical habitat may provide additional benefits to a species where areas outside of the species' current range have been designated. In these cases, it is expected that Federal agencies would consult on actions occurring in these areas for which they would otherwise not need to consult.

A designation of critical habitat provides a clearer indication to the Federal agencies as to when consultation under section 7 is required, particularly in cases where the action would not result in direct mortality or injury to individuals of a listed species (e.g., an action occurring within the critical area when a migratory species is not present). The critical habitat designation, describing the essential features of the habitat, also assists in determining which activities conducted outside the designated area are subject to section 7 (i.e., activities that may affect essential features of the designated area). For example, disposal of waste material in water adjacent to a critical habitat area may affect an essential feature of the designated habitat (water quality) and would be subject to the provisions of section 7 of the ESA.

A critical habitat designation also assists Federal agencies in planning future actions, since the designation establishes, in advance, those habitats that will be given special consideration in section 7 consultations. This is particularly true in cases where there are alternative areas that would provide for the conservation of the species. With a designation of critical habitat, potential conflicts between projects and endangered or threatened species can be identified and possibly avoided early in the agency's planning process.

Another indirect benefit of designating critical habitat is that it helps focus Federal, state and private conservation and management efforts in those areas. Recovery efforts may address special considerations needed in critical habitat areas, including conservation regulations to restrict private as well as Federal activities. The economic and other impacts of these actions would be considered at the time of proposal, and, therefore, are not considered in the critical habitat designation process. Other Federal, state and local laws or regulations, such as zoning or wetlands protection, may also provide special protection for critical habitat areas.

Process for Designating Critical Habitat

Developing a proposal for critical habitat designation involves three main considerations. First, the biological needs of the species are evaluated and essential habitat areas and features are identified. If there are alternative areas that would provide for the conservation of the species, these alternatives are also identified. Second, the need for special management considerations or protection of the area(s) or features is evaluated. Finally, the probable economic and other impacts of designating these essential areas as "critical habitat" are evaluated. After considering the requirements of the species, the need for special management, and the impacts of the designation, the proposed critical habitat is published in the **Federal Register** for comment. The final critical habitat designation, considering comments on the proposal and impacts assessment, should be published within 1 year of the proposal. Section 4 (a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, NMFS designate critical habitat concurrently with a determination that a species is endangered or threatened. Final critical habitat designations may be revised, using the same process, as new data become available.

A description of the essential habitat, need for special management considerations, and impacts of designating critical habitat for Johnson's seagrass, as well as the proposed action, are described in the following sections.

Essential Habitat of Johnson's Seagrass

The biology of Johnson's seagrass is discussed in the proposed rule to list the species as threatened (58 FR 48326, September 15, 1993) and includes information on the status of the species, its life history characteristics and habitat requirements, as well as projects, activities and other factors affecting the species. The current status of Johnson's seagrass is presented in the EA prepared for this critical habitat designation.

The physical habitat that supports Johnson's seagrass includes both shallow intertidal as well as deeper subtidal zones. The species prospers and is able to colonize and maintain stable populations either in water that is clear and deep (2–5 m) or in water that is shallow and turbid. In tidal channels, it inhabits coarse sand substrates.

Based on published reports and discussions with seagrass experts, the distributional range of Johnson's seagrass is limited to the east coast of Florida from central Biscayne Bay (25°45′ N. lat.) to Sebastian Inlet (27°50′ N. lat.). There have been no reports of healthy populations of this species outside the presently known range. Although the species occurs throughout the Indian River Lagoon and Lake Worth, the five specific areas proposed for critical habitat encompass the largest known contiguous populations of Johnson's seagrass. While a population within Biscayne Bay has been confirmed by literature and observation,

it is discontinuous from the other areas where the species is found, and the area has not been studied or delineated.

The species is patchily distributed within its range. The dimensions of patches range from a few square centimeters to approximately 327 square meters. The survival of the species likely depends on maintaining its existing viable populations, especially the areas where the larger patches are found. The Sebastian Inlet population is believed to be the northern limit of its distribution and includes the largest known patch of Johnson's seagrass. The other areas proposed for critical habitat designation represent the core range of the species.

Spread of the species into new areas is limited by its reproductive potential. Johnson's seagrass possesses only female flowers; thus vegetative propagation, most likely through asexual branching, appears to be its only means of reproduction and dispersal. If an established community is disturbed, regrowth and reestablishment is extremely unlikely. If extirpated from an area, it is doubtful that the species would be capable of repopulation. This species' method of reproduction impedes its ability to increase distribution as establishment of new vegetation requires considerable stability in environmental conditions and protection from human-induced disturbances.

Based on the best available information, the essential features of the areas proposed for critical habitat designation include adequate (1) water quality; (2) salinity levels; (3) water transparency; (4) and stable, unconsolidated sediments that are free from physical disturbance.

Need for Special Management Consideration or Protection

NMFS has determined that the essential areas and features described in the previous section are at risk and may require special management consideration or protection. Special management may be required because of the following activities: (1) Vessel traffic and the resulting propeller dredging and anchor mooring; (2) maintenance dredging; (3) dock and marina construction; (4) water pollution; and (5) land use practices.

Activities associated with recreational boat traffic account for the majority of human use associated with the proposed critical habitat areas. The destruction of the benthic community due to boating activities, propeller dredging, anchor mooring and dock and marina construction was observed at all sites during a study by NMFS from 1990–1992. These activities severely disrupt the benthic habitat, breaching root systems and severing rhizomes and significantly reducing the viability of the benthic community. Propeller dredging and anchor mooring in shallow areas is a major disturbance to even the most robust seagrasses. This destruction is expected to worsen with the predicted increase in boating activity (Pat Rose, Florida Department of Natural Resources, personal communication). Trampling of seagrass beds, a secondary effect of recreational boating, also contributes to disturbing seagrass habitat. Populations of Johnson's seagrass inhabiting shallow water close to inlets where vessel traffic is concentrated will be most affected.

The constant sedimentation patterns in and around inlets require frequent maintenance dredging, which could either directly remove essential seagrass habitat or indirectly affect it by redistributing sediments, burying plants and destabilizing the bottom structure. Altering benthic topography or burying the plants may remove them from the photic zone.

Decreased water transparency caused by suspended sediments, water color and chlorophylls could have significant detrimental effects on the distribution and abundance of the deeper water populations of Johnson's seagrass. Evidence from a distribution survey in Hobe and Jupiter Sounds indicates that the abundance of this seagrass diminishes in the more turbid interior portion of the lagoon where reduced photosynthetically active radiation (PAR) limits photosynthesis.

Other areas of concern include seagrass beds located in proximity to rivers and canal mouths where low salinity, highly colored water is discharged. Freshwater discharge into areas adjacent to seagrass beds may provoke physiological stress upon the plants by reducing the salinity levels. Additionally, colored waters released into these areas reduce the amount of sunlight necessary for photosynthesis by rapidly attenuating shorter wavelengths of PAR.

Also, continuing and increasing degradation of water quality due to increased land use and water management threatens the welfare of seagrass communities. Nutrient overenrichment caused by inorganic and organic nitrogen and phosphorous loading via urban and agricultural land run-off stimulates increased algal growth that may smother Johnson's seagrass, shade rooted vegetation and diminish the oxygen content of the water. Low oxygen conditions have a demonstrated negative impact on seagrasses and associated communities.

Special consideration and protection for these and other habitat features will be evaluated during the section 7 process and in development and implementation of a recovery plan. If adequate protection cannot be provided through consultation or through the recovery planning process, separate management actions with binding requirements may be considered.

Federal Activities that May Impact Essential Habitat and Features

A wide range of activities funded, authorized or carried out by Federal agencies may affect the essential habitat requirements of Johnson's seagrass. These include authorization by the U.S. Army Corps of Engineers for beach nourishment, dredging and related activities including construction of docks and marinas; actions by the U.S. Environmental Protection Agency to manage freshwater discharges into waterways; regulation of vessel traffic by the U.S. Coast Guard; authorization of oil and gas exploration by the Minerals Management Service; management of national refuges and protected species by the U.S. Fish and Wildlife Service; management of vessel traffic and other activities by the U.S. Navy; authorization of state coastal zone management plans by NOAA's National Ocean Service, and management of commercial fishing and protected species by NMFS.

Expected Impacts of Designating Critical Habitat

Under section 7 of the ESA, Federal agencies are required to ensure that actions that they authorize, fund or carry out are not likely to jeopardize the continued existence of listed species or to result in the destruction or adverse modification of listed species' critical habitat. Also, takings of Johnson's seagrass will be prohibited under the proposed regulations issued to list the species as threatened.

This designation will identify specific habitat areas that have been determined to be essential for the conservation of Johnson's seagrass and that may be in need of special management considerations or protection. It will require Federal agencies to evaluate their activities with respect to the critical habitat of this species and to consult with NMFS pursuant to section 7 of the ESA before engaging in any action that may affect the critical habitat.

However, if Johnson's seagrass is listed as proposed, Federal agencies active within the range of the species

will be required to consult with NMFS if projects and activities they authorize, fund or otherwise carry out may affect the species, regardless of whether critical habitat is designated. Therefore, it is unlikely that additional consultations will result from designating critical habitat for Johnson's seagrass.

In addition, it is not likely that designation of critical habitat for Johnson's seagrass will have any additional adverse economic impacts on Federal, state or private activities beyond those that would occur as a result of listing the species. As discussed in the section on activities that may impact essential habitat and features, the Federal activities that may affect critical habitat are the same activities that may affect the species itself. For plants, this is particularly true when analyzing the impacts of designating critical habitat. For example, the activities that affect water quality, an essential feature of critical habitat, also will be considered in terms of how they affect the species itself.

Should this proposed designation of critical habitat be adopted, Federal agencies will continue to engage in section 7 consultations to determine if the actions they authorize, fund or carry out are likely to jeopardize the continued existence of Johnson's seagrass; however, with designation, they would also need to address explicitly impacts to the species' critical habitat. This is not expected to affect materially the scope of future consultations or result in greater economic impacts, since the impacts to Johnson's seagrass habitat will already be considered in section 7 consultations.

The economic costs to be considered in a critical habitat designation are the incremental costs of designation above the economic impacts attributable to listing or attributable to authorities other that the ESA. NMFS has determined that there are no incremental net costs for areas within the species' current distribution, and no areas outside the current range are proposed for critical habitat designation.

Proposed Critical Habitat

Based on available information, NMFS proposes to designate critical habitat that is considered essential for the survival and recovery of Johnson's seagrass and that may require special management consideration or protection. The critical habitat designation proposed by this rule includes the largest contiguous areas that are currently utilized by Johnson's seagrass.

Although Johnson's seagrass is found throughout the Indian River Lagoon, Lake Worth and in some areas of Biscayne Bay, NMFS is not proposing to include these areas in the proposed designation until more information is available and the areas are delineated, and it can be determined that these areas meet the requirements for designation as critical habitat. For the same reason, NMFS is not including in the proposed designation any areas outside the species' currently known geographical area. NMFS has concluded that, at this time, proper management of the essential features of the areas in proximity to the five inlets will be sufficient to provide for the survival and recovery of this species. If the species is listed as proposed, Federal activities in any area occupied by Johnson's seagrass would be subject to the section 7 consultation process whether or not the area has been designated as critical habitat. In addition, NMFS may reconsider this evaluation and propose additional areas for critical habitat at any time.

The five areas proposed for critical habitat designation include the intertidal and subtidal areas in proximity to five inlets on the east coast of Florida. These areas are within 3 to 5 kilometers of the inlet and experience regular tidal flushing with salinity greater than 15 ppt. Maps are provided for reference purposes to guide Federal agencies and other interested parties in locating the general boundaries of the proposed critical habitat. They do not constitute the definition of the boundaries of critical habitat. Persons must refer to the regulations at 50 CFR 226.91 for the actual boundaries of the designated critical habitat.

Public Comments Solicited

NMFS is soliciting information, comments or recommendations on any aspect of this proposal from all interested parties. NMFS will consider all recommendations received before reaching a final decision. Because the proposed rule for adding this species to the List of Threatened and Endangered Species and designation of critical habitat are closely related, NMFS will hold a public hearing to receive comments on both rulings (see **DATES** and **ADDRESSES**).

Classification

This proposed rule has been determined to be not significant for purposes of E.O. 12866.

Pursuant to the Regulatory Flexibility Act, the General Counsel of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities since it is primarily Federal agencies that will be affected. Therefore, a regulatory flexibility analysis is not required.

The Assistant Administrator for Fisheries (NOAA) has determined that the proposed designation is consistent to the maximum extent practicable with the approved Coastal Zone Management Program of the State of Florida. This determination has been submitted for review by the responsible state agency under section 3.7 of the Coastal Zone Management Act.

NOAA Administrative Order 216–6 states that critical habitat designations under the ESA are categorically excluded from the requirement to prepare an environmental assessment (EA) or an environmental impact statement. However, in order to evaluate more clearly the impacts of the proposed critical habitat designation, NMFS has prepared an EA. Copies of the assessment are available on request (see **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: July 25, 1994.

Gary C. Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 226 is proposed to be amended as follows:

PART 226—DESIGNATED CRITICAL HABITAT

1. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

Subpart E—[Reserved]

2. A new subpart E is added to part 226 and reserved.

3. A new subpart F is added to part 226, consisting of § 226.91, to read as follows:

Subpart F—Critical Habitat for Marine Plants

§ 226.91 Johnson's seagrass (Halophila johnsonii).

(a) A portion of the Indian River Florida, within the following boundary: Beginning at the northwestern entrance of Sebastian Inlet, follow the shoreline north to the tip of Mud Hole; cross the Indian River at Mud Hole to the Intercoastal Waterway; follow the Intercoastal Waterway south for 7.5

miles; cross the Indian River and follow the shoreline north to the southwestern entrance of Sebastian Inlet (Sebastian, Fla., 1970, U.S.G.S. 7.5′ quad.).

(b) A portion of the Indian River, Florida, within the following boundary: Beginning at the northwestern entrance to Ft. Pierce Inlet, follow the shoreline north to the North Beach Causeway and the A1A Bridge; move west across the river at the causeway and bridge and follow the shoreline south for 1.5 miles; cross the Indian River to the shoreline of the Jensen Beach to Jupiter Inlet Aquatic Preserve; follow the shoreline north to the southwestern entrance of Ft. Pierce Inlet (Fort Pierce, Fla., 1983, U.S.G.S. 7.5′ quad.).

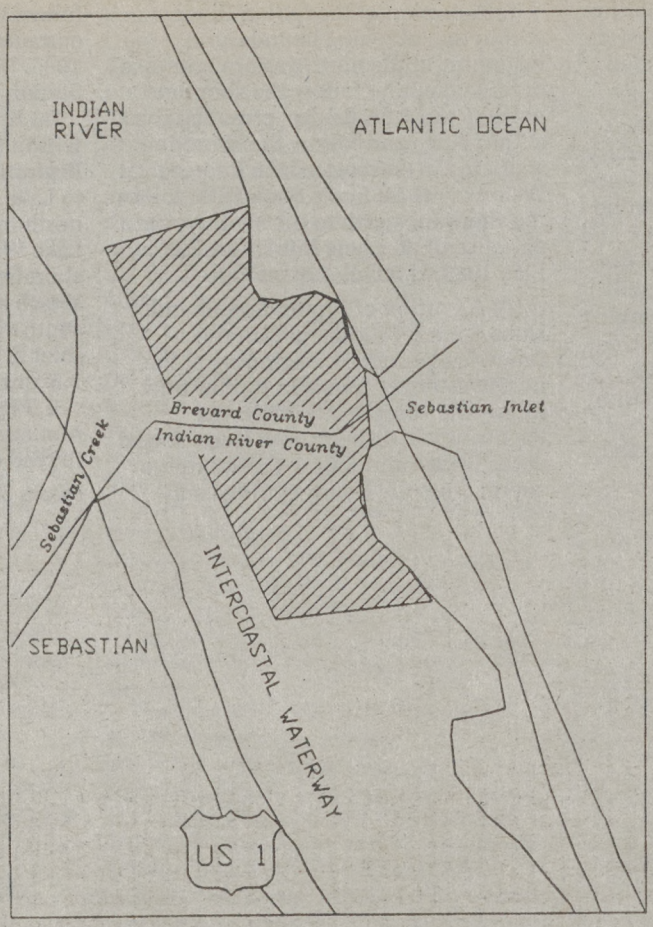
(c) A portion of the Indian River within the following boundary: Beginning at the northwestern entrance of St. Lucie Inlet follow the shoreline north to the A1A Bridge; cross the river at the bridge and follow the shoreline south to the entrance of the Intercoastal Waterway at St. Lucie State Park; follow the shoreline north to the southwestern entrance of St. Lucie Inlet (Fort Pierce, Fla., 1983, U.S.G.S. 7.5′ quad.).

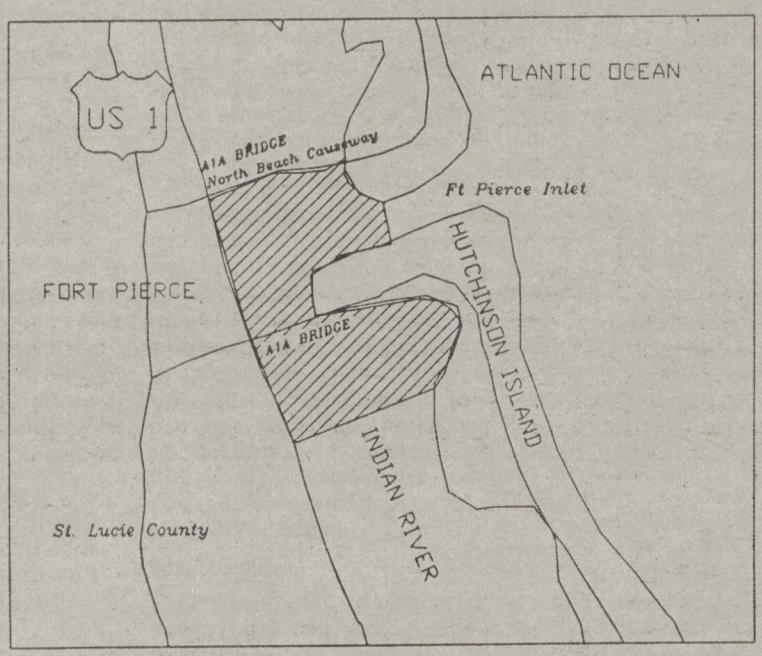
(d) A portion of Jupiter Sound and Hobe Sound, Florida, within the following boundary: Beginning at the northwestern entrance to Jupiter Inlet, follow the shoreline north to the Highway 707 Bridge; cross Hobe Sound at the bridge and follow the shoreline south; cross the Route 1 Bridge and follow the shoreline to the southwestern entrance of Jupiter Inlet (Jupiter, Fla, 1983, U.S.G.S. 7.5′ quad. and Hobe Sound, Fla., 1967, U.S.G.S. 7.5′ quad.).

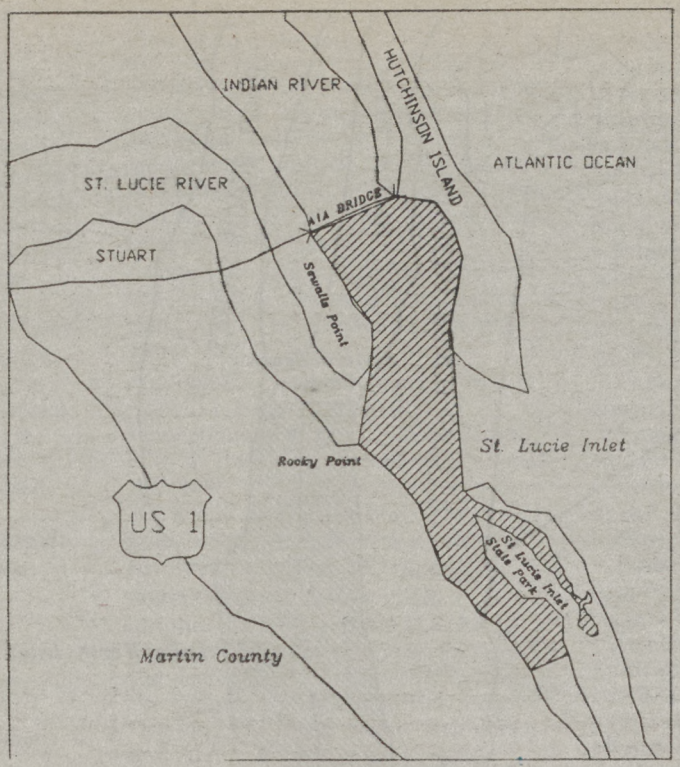
(e) A portion of Lake Worth, Florida, within the following boundary: Beginning at the northwestern entrance to Lake Worth Inlet, follow the shoreline north to the Riviera Beach bridge; cross Lake Worth at the bridge and follow the shoreline south for 2.5 miles; cross Lake Worth and follow the shoreline to the southwestern entrance of Lake Worth Inlet (Riviera Beach, Fla., 1983, U.S.G.S. 7.5′ quad).

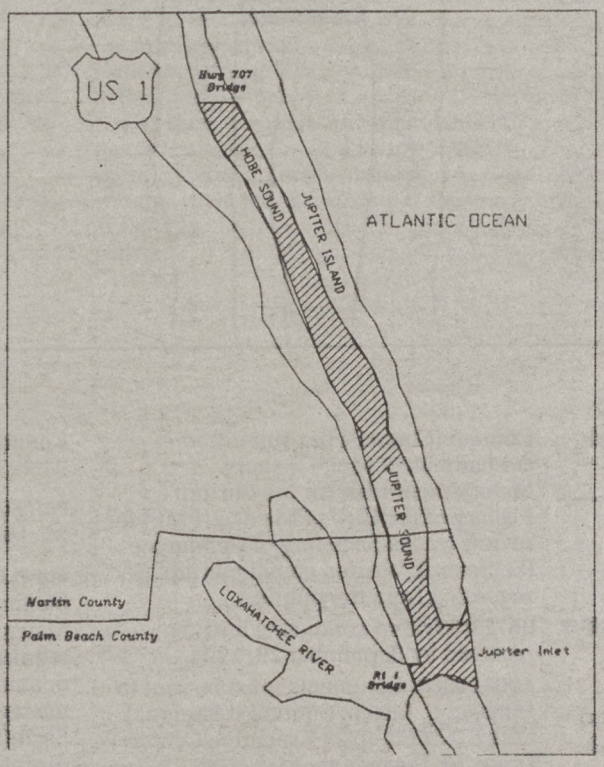
4. Figures 9 through 13 are added in numerical order to the end of part 226 to read as follows:

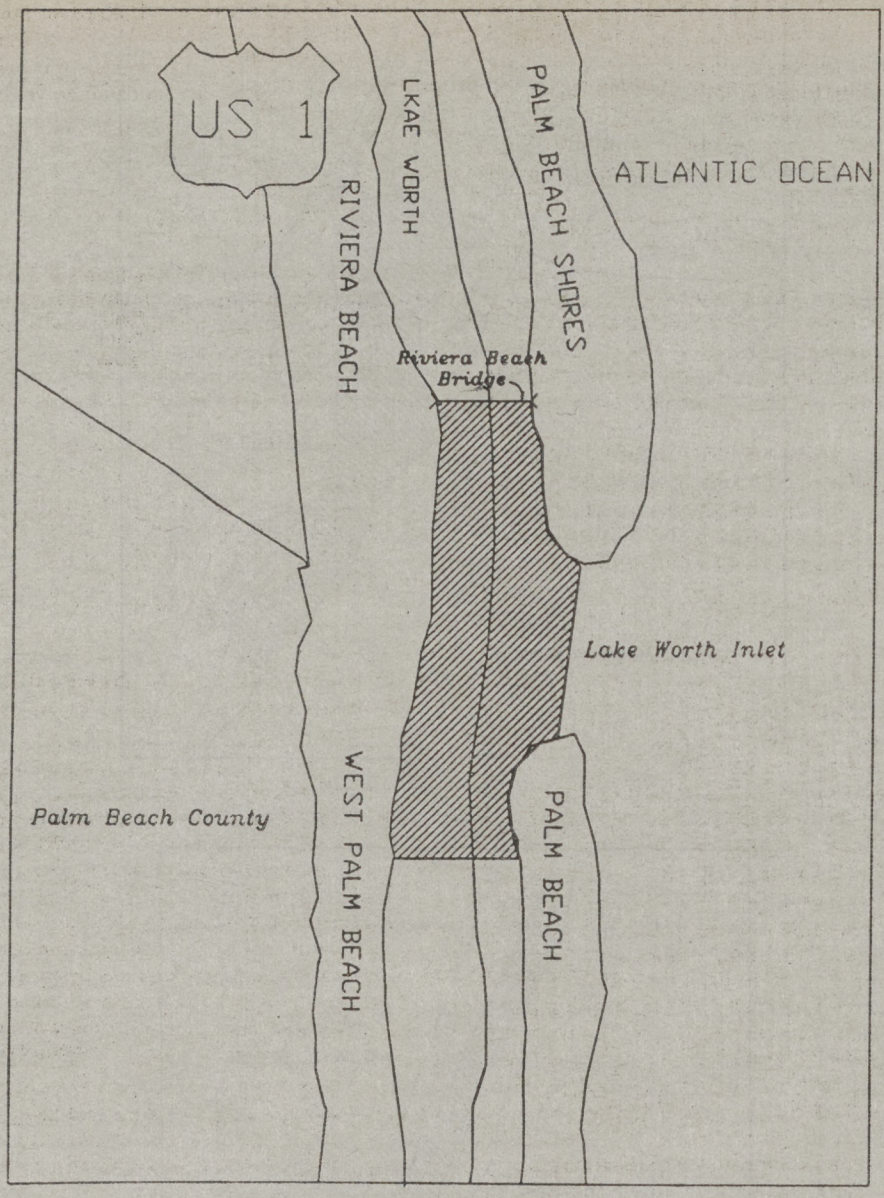
BILLING CODE 3510–22–W


INDIAN RIVER
ATLANTIC OCEAN
Brevard County
Indian River County
Sebastian Inlet
Sebastian Creek
INTERCOASTAL WATERWAY
SEBASTIAN
US 1


US 1
ATLANTIC OCEAN
A1A BRIDGE
North Beach Causeway
Ft Pierce Inlet
HUTCHINSON ISLAND
FORT PIERCE
A1A BRIDGE
INDIAN RIVER
St. Lucie County


INDIAN RIVER
HUTCHINSON ISLAND
ATLANTIC OCEAN
ST. LUCIE RIVER
A1A BRIDGE
STUART
Sewalls Point
St. Lucie Inlet
Rocky Point
US 1
St Lucie Inlet State Park
Martin County


US 1
Hwy 707 Bridge
HOBE SOUND
JUPITER ISLAND
ATLANTIC OCEAN
JUPITER SOUND
Martin County
Palm Beach County
LOXAHATCHEE RIVER
Jupiter Inlet
Rt 1 Bridge



[FR Doc. 94–18975 Filed 8–3–94; 8:45 am]
BILLING CODE 3510–22–P

50 CFR Part 611 and 658

[I.D. 080194C]

Foreign Fishing; Shrimp Fishery of the Gulf of Mexico

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

ACTION: Notice of availability of an amendment to a fishery management plan; request for comments.

SUMMARY: NMFS announces that the Gulf of Mexico Fishery Management Council (Council) has submitted Amendment 7 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (FMP) for review by the Secretary of Commerce (Secretary). Written comments are requested from the public.

DATES: Written comments must be received by September 29, 1994.

ADDRESSES: Comments must be sent to Michael E. Justen, Southeast Regional Office, NMFS, 9721 Executive Center Drive, St. Petersburg, FL 33702.

Requests for copies of Amendment 7, which includes a regulatory impact review and an environmental assessment, should be sent to the Gulf of Mexico Fishery Management Council, Lincoln Center, Suite 331, 5401 West Kennedy Boulevard, Tampa, FL 33609–2486, FAX 813–225–7015.

FOR FURTHER INFORMATION CONTACT: Michael E. Justen, 813–893–3161.

SUPPLEMENTARY INFORMATION: The Magnuson Fishery Conservation and Management Act (Magnuson Act) requires that a fishery management plan or amendment prepared by a fishery management council be submitted to the Secretary for review and approval, disapproval, or partial disapproval. The Magnuson Act also requires that the Secretary, upon receiving the document immediately publish a notice that the amendment is available for public review and comment. The Secretary will consider public comment in

determining approvability of the amendment.

Amendment 7 proposes to: (1) Increase the domestic quota for royal red shrimp harvested from the exclusive economic zone of the Gulf of Mexico and eliminate the total allowable level of foreign fishing for royal red shrimp from that area; (2) revise the definition of overfishing for royal red shrimp and provide a procedure for updating maximum sustainable yield of royal red shrimp; (3) define overfishing for white shrimp; (4) establish procedures for revising the overfishing indices for brown, white, and pink shrimp when new data become available; and (5) specify actions to be taken if overfishing for brown, white, pink, or royal red shrimp occurs.

Proposed regulations to implement Amendment 7 are scheduled for publication within 15 days.

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

Dated: August 1, 1994.

David S. Crestin,

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

[FR Doc. 94–19034 Filed 8–1–94; 3:43 pm]

BILLING CODE 3510–22–F

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50 CFR Part 675

[Docket No. 931100–4043; I.D. 072894A]

Groundfish of the Bering Sea and Aleutian Islands Area

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

ACTION: Apportionment of reserve; request for comments.

SUMMARY: NMFS proposes to apportion reserve to certain target species in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow for ongoing harvest and account for previous harvest of the total allowable catch (TAC).

DATES: Comments must be received at the following address no later than 4:30 p.m., Alaska local time, August 19, 1994.

ADDRESSES: Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, 709 W. 9th, Room 401, Juneau, AK 99801 or P.O. Box 21668, Juneau, AK 99802, Attention: Lori Gravel.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, 907–586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the U.S. BSAI exclusive economic zone is managed by the Secretary of Commerce according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 675.

The Director, Alaska Region, NMFS, has determined that the initial TACs specified for sablefish in the Bering Sea subarea (BS), for sablefish and the sharpchin/northern rockfish species category in the Aleutian Islands subarea (AI), and for Atka mackerel in the Central and Western Aleutian Districts, need to be supplemented from the non-specific reserve to continue operations and account for prior harvest. Therefore, in accordance with § 675.20(b), NMFS proposes to apportion from the reserve to TACs for the following species: (1) For the BS—81 metric tons (mt) to sablefish; (2) for the AI—420 mt to sablefish, and 850 mt to the sharpchin/northern rockfish species category; (3) for the Central Aleutian District—6,679 mt to Atka mackerel; and (4) for the Western Aleutian District—1,500 mt to Atka mackerel.

These proposed apportionments are consistent with § 675.20(a)(2)(i) and do not result in overfishing of a target species or the "other species" category because the revised TACs are equal to or less than specifications of acceptable biological catch.

Pursuant to § 675.24(c)(1)(i), the proposed apportionment of the BS sablefish is allocated 41 mt to vessels using hook-and-line or pot gear, and 40 mt to vessels using trawl gear. Pursuant to § 675.24(c)(1)(ii), the proposed apportionment of the AI sablefish is allocated 315 mt to vessels using hook-and-line or pot gear, and 105 mt to vessels using trawl gear.

Classification

This action is taken under 50 CFR 675.20 and 675.24 and is exempt from OMB review under E.O. 12866.

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

Dated: July 29, 1994.

Richard B. Stone,

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

[FR Doc. 94–18976 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 59, No. 149
Thursday, August 4, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Public Information Collection Requirements Submitted to OMB for Review

The Agency for International Development (A.I.D.) submitted the following public information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of the entry. Comments may also be addressed to, and copies of the submissions obtained from the Records Management Officer, Renee Poehls, (202) 736–4748, M/AS/ISS/RM, room 930B, NS., Washington, DC 20523.

Date Submitted: July 25, 1994.

Submitting Agency: Agency for International Development.

OMB Number: None.

Form Number: AID 610–25 and 610–27.

Type of Submission: New Collection.

Title: Inquiry for United States Government Use Only (Reference and Employment Inquiry).

Purpose: U.S.A.I.D. is required by Executive order that background investigations be conducted on all persons entering Federal Service. 5 U.S. Code 3301 and 5 CFR 5.2 require that investigations and derminations be made concerning the qualifications and fitness of applicants for Federal employment. A National Agency Check and Written Inquiries is the minimum investigation required for employment in any department or agency of the Government as prescribed in section 3(a) of Executive Order 10450.

Annual Reporting Burden: Respondents: 17,097, annual responses: 1; hours per response: .0833; annual burden hours: 14,366.

Reviewer: Jeffery Hill (202) 395–7340, Office of Management and Budget, room 3201, New Executive Office Building, Washington, DC 20503.

Dated: July 26, 1994.

Elizabeth Baltimore,

Bureau of Management, Administrative Service, Information Support Services Division.

[FR Doc. 94–18944 Filed 8–3–94; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 94–077–1]

Receipt of Permit Applications for Release Into the Environment of Genetically Engineered Organisms

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that three applications for permits to release genetically engineered organisms into the environment are being reviewed by the Animal and Plant Health Inspection Service. The applications have been submitted in accordance with 7 CFR part 340, which regulates the introduction of certain genetically engineered organisms and products.

ADDRESSES: Copies of the applications referenced in this notice, with any confidential business information deleted, are available for public inspection in room 1141, South Building, U.S. Department of Agriculture, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m, Monday through Friday, except holidays. Persons wishing to inspect an application are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. You may obtain copies of the documents by writing to the person listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Dr. Arnold Foudin, Deputy Director, Biotechnology Permits, BBEP, APHIS, USDA, room 850, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–7612.

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests," require a person to obtain a permit before introducing (importing, moving interstate, or releasing into the environment) into the United States certain genetically engineered organisms and products that are considered "regulated articles." The regulations set forth procedures for obtaining a permit for the release into the environment of a regulated article, and for obtaining a limited permit for the importation or interstate movement of a regulated article.

Pursuant to these regulations, the Animal and Plant Health Inspection Service has received and is reviewing the following applications for permits to release genetically engineered organisms into the environment:

APPLICATION NUMBER	APPLICANT	DATE RECEIVED	ORGANISMS	FIELD TEST LOCATION
94–172–01	Barham Seeds, Incorporated ...	6–21–94	*Brassica oleracea* (broccoli) plants genetically engineered to express male sterility and tolerance to phosphinothricin herbicides..	California.

APPLICATION NUMBER	APPLICANT	DATE RECEIVED	ORGANISMS	FIELD TEST LOCATION
94–180–02	Upjohn Company	6–29–94	Squash plants genetically engineered to express resistence to cucumber mosic virus, watermelon mosaic virus 2, and zucchini yellow mosaic virus.	Maryland, North Carolina.
94–196–01, revewal of permit 92–156–01, issued on 9/23/92.	Calgene, Incorporated	7–15–94	Canola plants genetically engineered to express oil modification genes.	Georgia.

Done in Washington, DC, this 28th day of July 1994.

Lonnie J. King,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–18884 Filed 8–3–94; 8:45 am]

BILLING CODE 3410–34–P

Soil Conservation Service

Hambrick Watershed, Tunica County, MS

AGENCY: Soil Conservation Service, Agriculture.

ACTION: Notice of a finding of no significant impact.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Regulations (40 CFR part 1500); and the Soil Conservation Service Regulations (7 CFR part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for Hambrick Watershed, Tunica County, Mississippi.

FOR FURTHER INFORMATION CONTACT: Homer L. Wilkes, Acting State Conservationist, Soil Conservation Service, suite 1321, A.H. McCoy,Federal Building, 100 West Capitol Street, Jackson, Mississippi 39269, telephone 601–965–5205.

SUPPLEMENTARY INFORMATION: The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Homer L. Wilkes, Acting State Conservationist, has determined that the preparation and review of an environmental impact statement are not needed for this project.

The project concerns a watershed plan for the purpose of reducing water quality and flood damages to the rural community of Hambrick. The planned works of improvement consists of 2.6 miles of channel enlargement and 21,500 feet of sewer system to connect the houses in Hambrick to an existing permitted waste treatment facility.

The Notice of a Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various Federal, State, and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment are on file and may be reviewed by contacting Homer L. Wilkes.

No administrative action on implementation of the proposal will be taken until 30 days after the date of this publication in the **Federal Register**.

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.904—Watershed Protection and Flood Prevention and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.)

Dated: July 25, 1994.

Homer L. Wilkes,

Acting State Conservationist.

[FR Doc. 94–19037 Filed 8–3–94; 8:45 am]

BILLING CODE 3410–16–M

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 Economic Analysis.

Title: Benchmark Survey of Financial Services Transactions Between U.S. Financial Services Providers and Unaffiliated Foreign Persons -- 1994.

Form Number(s): BE–80.

Agency Approval Number: None.

Type of Request: New collection.

Burden: 6,000 hours.

Number of Respondents: 800.

Avg Hours Per Response: 7.5 hours.

Needs and Uses: This survey will obtain universe data on financial services transactions between U.S. financial services providers and unaffiliated foreign persons in 1994. The data from the survey will provide benchmarks for deriving current universe estimates of such transactions from sample data collected in subsequent years. The information gathered is needed to support U.S. trade policy initiatives, including trade negotiations, and to compile the U.S. balance of payments and the national income and product accounts.

Affected Public: Businesses, state and local government agencies, or other institutions engaging in international financial services transactions.

Frequency: Quinquennially.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Paul Bugg, (202) 395–3093.

Copies of the above information collection proposal can be obtained by calling or writing Gerald Taché, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, room 5310, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Paul Bugg, OMB Desk Officer, room 10201, New Executive Office Building, Washington, D.C. 20503.

Dated: July 27, 1994.

Gerald Taché,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 94–18990 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–07–F

International Trade Administration

[A–570–830]

Preliminary Determination of Sales at Less Than Fair Value: Coumarin From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Commerce.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: David J. Goldberger or Michelle A.

Frederick, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–4136 or (202) 482–0186, respectively.

Preliminary Determination

We preliminarily determine that coumarin from the People's Republic of China (PRC) is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The estimated margins are shown in the "Suspension of Liquidation" section of this notice. We have also determined that critical circumstances exist.

Case History

Since the initiation of this investigation on January 19, 1994, (59 FR 3841, January 27, 1994), the following events have occurred.

On January 31, 1994, we sent a survey to the PRC's Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and certain companies in the PRC requesting information on production and sales of coumarin exported to the United States. The names of the companies were found in the petition and in data supplied by the Port Import Export Reporting Service (PIERS). We requested MOFTEC's assistance in forwarding the survey to all exporters and producers of coumarin and in submitting complete responses on their behalf.

On February 14, 1994, the U.S. International Trade Commission (ITC) notified the Department of Commerce (the Department) of its preliminary determination that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of coumarin from the PRC that are alleged to be sold at less than fair value.

On February 26 and 27, 1994, responses to the survey were received from Tianjin No. 1 Perfumery Factory (Tianjin Perfumery) and Shanghai Perfumery General Factory (Shanghai Perfumery), both of whom manufacture coumarin. These responses helped us identify other producers and exporters of coumarin.

On February 28, 1994, MOFTEC and those PRC producers and exporters identified in the course of this proceeding, for which we had addresses, were sent full questionnaires. Additionally, during the month of March, the Department held a questionnaire presentation with MOFTEC and company officials in Beijing.

In a March 28, 1994, filing, MOFTEC advised the Department that the following companies produced or exported the subject merchandise to the U.S. during the POI: Tianjin Perfumery, Shanghai Perfumery, Gaoyo Perfumery Factory (Gaoyo Perfumery), Changzhou No. 2 Chemical Plant (Changzhou Chemical) (producers); China Foreign Trade Development Companies (CFTD), Tianjin Chemicals Import & Export (Tianjin Chemicals), Tianjin Native Produce Import & Export Corporation (Tianjin Native), Jiangsu Native Produce Import & Export (Jiangsu Native), and China Tuhsu Flavors and Fragrances Import and Export Corporation (China Tuhsu) (exporters).

In March and April, 1994, responses to section A of our questionnaire were received from the following producers and exporters: Shanghai Perfumery and CFTD, Tianjin Chemicals and Gaoyo Perfumery, Tianjin Perfumery and Tianjin Native, and Jiangsu Native and Changzhou Chemical.

On April 13, 1994, pursuant to section 353.15(c) of the Department's regulations, we postponed the preliminary determination in this investigation (see, 59 FR 19692, April 25, 1994).

In April 1994, we received responses to section C of our questionnaire from Tianjin Chemicals, Tianjin Native, CFTD, and Jiangsu Native; and responses to section D of our questionnaire from Gaoyo Perfumery, Tianjin Perfumery, Shanghai Perfumery, and Changzhou Chemical. China Tuhsu did not respond to any portion of our questionnaire.

On April 28, 1994, counsel for Shanghai Perfumery and CFTD submitted public information concerning surrogate values for factors of production for coumarin. On May 20, 1994, petitioners provided the Department with Indian prices for certain factors used in the production of coumarin, and on July 15, 1994, counsel for the remaining participating respondents submitted information regarding surrogate values.

On May 13 and 19, 1994, the Department issued supplemental questionnaires to all producers and exporters in the investigation except China Tuhsu. On June 9, 1994, counsel for Shanghai Perfumery and CFTD advised the Department that it was withdrawing its representation of the companies. On May 27 and June 9, we received responses to our supplemental questionnaires from all respondents except Shanghai Perfumery, CFTD, and China Tuhsu. On June 23, 1994, Changzhou Chemical submitted minor revisions to its factors of production data.

On May 27, 1994, the Department issued a questionnaire to all respondents except China Tuhsu regarding the issue of separate rates. Responses were received from Jiangsu Native, Tianjin Native, and Tianjin Chemical on June 13, 1994 (see, "Separate Rates" section below).

On June 20, 1994, petitioners, pursuant to section 353.16 of the Department's regulations, amended the petition in this investigation to allege the existence of critical circumstances with respect to imports of coumarin from the PRC. On June 22, 1994, the Department sent letters to Jiangsu Native, Tianjin Chemicals, and Tianjin Native requesting information on volume and value of shipments of the subject merchandise to the United States. We received their responses on July 12, 1994.

On July 15, 1994, we sent supplemental "Separate Rates" questionnaires to Jiangsu Native, Tianjin Chemicals, and Tianjin Native.

Scope of Investigation

The product covered by this investigation is coumarin. Coumarin is an aroma chemical with the chemical formula $C_9H_6O_2$ that is also known by other names, including 2H-1-benzopyran-2-one, 1,2-benzopyrone, cis-o-coumaric acid lactone, coumarinic anhydride, 2-Oxo-1,2-benzopyran, 5,6-benzo-alpha-pyrone, ortho-hydroxyc innamic acid lactone, cis-ortho-coumaric acid anhydride, and tonka bean camphor.

All forms and variations of coumarin are included within the scope of the investigation, such as coumarin in crystal, flake, or powder form, and "crude" or unrefined coumarin (*i.e.* prior to purification or crystallization). Excluded from the scope are ethylcoumarins ($C_{11}H_{10}O_2$) and methylcoumarins ($C_{10}H_8O_2$). Coumarin is classifiable under subheading 2932.21.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is July 1, 1993, through December 31, 1993.

Separate Rates

Jiangsu Native, Tianjin Chemicals, and Tianjin Native have each requested a separate, company-specific rate. Their

respective business licenses each indicate that they are owned "by all the people." As stated in the Final Determination of Sales at Less than Fair Value: Silicon Carbide from the People's Republic of China (59 FR 22585, 22586, May 2, 1994) ("Silicon Carbide"), and the Final Determination of Sales at Less than Fair Value: Sebacic Acid from the People's Republic of China (59 FR 28053, May 31, 1994 ("Sebacic Acid"), "ownership of a company by all the people does not require the application of a single rate." Accordingly, these three respondents are eligible for consideration for separate rates.

To establish whether a firm is sufficiently independent to be entitled to a separate rate, the Department analyzes each exporting entity under a test arising out of the Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China (56 FR 20588, May 6, 1991) ("Sparklers") and amplified in Silicon Carbide. Under the separate rates criteria, the Department assigns separate rates only where respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities.

1. Absence of De Jure Control

The respondents in this investigation have submitted a number of documents to demonstrate absence of *de jure* control, including three enactments indicating that the responsibility for managing enterprises "owned by all of the people" is with the enterprises themselves and not with the government. These are the "Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People," adopted on April 13, 1988 ("1988 Law"); "Regulations for Transformation of Operational Mechanism of State-Owned Industrial Enterprises," approved on August 23, 1992 ("1992 Regulations"); and the "Temporary Provisions for Administration of Export Commodities," approved on December 21, 1992 ("Export Provisions").

The 1988 Law and 1992 Regulations shifted control from the government to the enterprises themselves. The 1988 Law provides that enterprises owned "by the whole people" shall make their own management decisions, be responsible for their own profits and losses, choose their own suppliers, and purchase their own goods and materials. The 1988 Law also has other provisions which support a finding that enterprises have management independence from the government. The 1992 Regulations provide that these same enterprises can, for example, set their own prices (Article IX); make their own production decisions (Article XI); use their own retained foreign exchange (Article XII); allocate profits (Article II); sell their own products without government interference (Article X); make their own investment decisions (Article XIII); dispose of their own assets (Article XV); and hire and fire their employees without government approval (Article XVII).

The Export Provisions list those products subject to direct government control. Coumarin is not included in the Export Provisions list and does not, therefore, appear to be subject to the export constraints of these provisions.

The existence of these enactments indicates that Jiangsu Native, Tianjin Chemicals, and Tianjin Native are not *de jure* subject to governmental control. However, there is some evidence that the provisions of the above-cited laws and regulations have not been implemented uniformly among different sectors and/or jurisdictions in the PRC (see "PRC Government Findings on Enterprise Autonomy," in Foreign Broadcast Information Service-China-93–133 (July 14, 1993)). Therefore, the Department has determined that an analysis of *de facto* control is critical to determining whether respondents are, in fact, subject to governmental control.

2. Absence of De Facto Control

The Department typically considers four factors in evaluating whether each respondent is subject to de facto governmental control of its export functions: (1) Whether the export prices are set by or subject to the approval of a governmental authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses (see Silicon Carbide and Sebacic Acid).

Jiangsu Native, Tianjin Chemicals, and Tianjin Native have each asserted that (1) it establishes its own export prices; (2) it negotiates contracts without guidance from any governmental entities or organizations; (3) its management operates with a high degree of autonomy and there is no information on the record that suggests central government control over selection of management; and (4) it retains the proceeds of its export sales, and has the authority to sell its assets and to obtain loans. In addition, questionnaire responses indicate that company-specific pricing during the POI does not suggest any coordination among exporters (*i.e.*, the prices for comparable products differ among companies). This information supports a preliminary finding that there is a *de facto* absence of governmental control of export functions.

Consequently, Jiangsu Native, Tianjin Chemicals, and Tianjin Native have preliminarily met the criteria for the application of separate rates. We will examine this issue in detail at verification and determine whether the questionnaire responses are supported by verifiable documentation.

There are two additional issues relating to governmental control that we will consider further for purposes of our final determination. First, Jiangsu Native, Tianjin Chemicals, and Tianjin Native have indicated that the appointments of their general managers are subject to approval by the local Foreign Trade and Economic Cooperation Bureaus (local Bureaus). Second, each of the responding exporters has reported that they are "administratively subject to" the local Bureaus. While the significance of the involvement of the local Bureaus is unclear, the respondents have reported that the local bureaus do not control the key functions of the enterprises. However, we will examine at verification the precise nature of the authority that the local Bureaus exercise over the enterprises.

Nonmarket Economy Country Status

The PRC has been treated as a nonmarket economy country (NME) in all past antidumping investigations (see, *e.g.*, Sebacic Acid and Silicon Carbide). No information has been provided in this proceeding that would lead us to overturn our former determinations. Therefore, in accordance with section 771(18)(c) of the Act, we have treated the PRC as an NME for purposes of this investigation.

Where the Department is investigating imports from an NME, section 773(c)(1) of the Act directs us to base FMV on the NME producers' factors of production, valued in a comparable market economy that is a significant producer of the merchandise. Section 773(c)(2) of the Act alternatively provides that where available information is inadequate for using the factors of production methodology, FMV may be based on the export prices for comparable merchandise from market economy countries at a comparable level of economic development.

For purposes of the preliminary determination, we have relied on the

methodology provided by section 773(c)(1) of the Act to determine FMV. The sources of individual factor prices are discussed under the FMV section, below.

Surrogate Country

Section 773(c)(4) of the Act requires the Department to value the NME producers' factors of production, to the extent possible, in one or more market economy countries that (1) are at a level of economic development comparable to that of the NME country, and (2) are significant producers of comparable merchandise. The Department has determined that India is the country most comparable to the PRC in terms of overall economic development (see Memorandum from David Mueller, Director Office of Policy, to Gary Taverman, Director of Division I of Office of Antidumping Investigations, dated March 10, 1994). In addition, there is evidence on the record that coumarin is produced in India.

Fair Value Comparisons

To determine whether sales of coumarin from the PRC to the United States by Jiangsu Native, Tianjin Chemicals, and Tianjin Native were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

We based USP on purchase price, in accordance with section 772(b) of the Act, because the subject merchandise was sold directly by the Chinese exporters to unrelated parties in the United States prior to importation into the United States.

For those exporters that responded to the Department's questionnaire and were found to be eligible for a separate rate, we calculated purchase price based on packed, FOB foreign-port prices to unrelated purchasers in the United States. As necessary, we made deductions for foreign inland freight, containerization, loading, port handling expenses, foreign inland and marine insurance, valued in a surrogate country. We were unable to obtain surrogate value information for ocean freight, so we valued ocean freight on international shipping rates between the PRC and U.S. ports, as quoted by a market-economy shipping company. (For a complete analysis of USP deductions, see the Calculation Memorandum for this investigation).

Foreign Market Value

In accordance with section 773(c) of the Act, we calculated FMV based on factors of production reported by the factories in the PRC which produced the subject merchandise for the three exporters. The factors used to produce coumarin include materials, labor, and energy. To calculate FMV, the reported quantities were multiplied by the appropriate surrogate values from India and Indonesia for the different inputs. We made adjustments to materials costs for the recovery of by-products, where applicable. In determining which surrogate value to use for valuing each factor of production, we selected, where possible, from publicly available, published information (public information). For a complete analysis of surrogate values, see the Calculation Memorandum for this investigation.

We used surrogate transportation rates to value inland freight between the source of the production factor and the coumarin factories, and between factories and exporters/ports. In those cases where a respondent failed to provide any information on transportation distances, we applied, as best information available, the farthest distance reported for the input in the public version of questionnaire responses.

To value certain raw materials, we used public information from Chemical Business of India for July–October 1993, and India Chemical Weekly for July–November 1993. For raw materials not listed in Chemical Business of India, or India Chemical Weekly, we used the Monthly Trade Statistics of Foreign Trade of India, Volume II—Imports (Indian Import Statistics) for April 1992–March 1993. We adjusted the factor values to the POI using wholesale price indices published in International Financial Statistics (*IFS*) by the International Monetary Fund. For materials sourced from market-economy countries and purchased in convertible currencies, we applied the actual purchase price paid during the POI, or the time period closest to the POI. No product-specific public information pertaining to India or any other potential surrogate country was available for certain raw materials. With respect to these raw materials, we have used, privately researched Indian price quotes, Indian import statistics for categories that include the specific raw materials (*i.e.*, "basket" categories), or Indonesian import statistics. (For a complete analysis of raw material valuations, see the Calculation Memorandum for this investigation).

To value electricity, we used public information from the Electric Utilities Data Book for the Asian and Pacific Region (January 1993) published by the Asian Development Bank. We selected this source because it provides an electricity rate for industrial use during the POI from India, our preferred surrogate country. To value water, we have used public information for India from the Water Utilities Data Book for the Asian and Pacific Region (November 1993) which is also published by the Asian Development Bank. To value coal, we used Indian Import Statistics. We adjusted the factor values to the POI using wholesale price indices published in the IFS.

To value hourly labor rates in India, we used the International Labor Office's 1993 Yearbook of Labor Statistics and Country Reports: Human Rights Practices for 1990.

To value factory overhead, we calculated percentages based on relevant data from The Reserve Bank of India Bulletin (RBI), December 1993. We based our overhead percentage calculations on the RBI summary income statement data applicable to the chemical manufacturing industry, and adjusted to reflect an energy-exclusive overhead percentage. For selling, general and administrative (SG&A) expenses, we calculated percentages based on the RBI summary income statement data. We used the calculated SG&A percentages because they were greater than the ten percent statutory minimum. For profit we used the statutory minimum of eight percent of materials, labor, factory overhead, and SG&A expenses, because the RBI percentage was less than eight percent. We added packing based on Indian values obtained from Indian Import Statistics.

Best Information Available (BIA)

Because information has not been presented to the Department to prove otherwise, any PRC company that did not respond fully to the Department's questionnaires or otherwise did not participate in this investigation, are assumed to be under government control, and, therefore, are not entitled to separate dumping margins. In the absence of responses from those companies that did not fully respond to the Department's questionnaire, and other PRC exporters during the POI, we are basing the All Other rate on BIA, pursuant to section 776(c) of the Act (see Silicon Carbide). In determining what to use as BIA, the Department follows a two-tiered methodology, whereby the Department normally assigns lower margins to those

respondents that cooperated in an investigation and more adverse margins for those respondents which did not cooperate in an investigation. When a company refuses to provide the information requested in the form required, or otherwise significantly impedes the Department's investigation, it is appropriate for the Department to assign to that company the higher of (a) the highest margin alleged in the petition, or (b) the highest calculated rate of any respondent in the investigation (see Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Belgium (58 FR 37083, July 9, 1993). In this investigation, since some PRC exporters failed to respond to our questionnaire, we are assigning to them the highest margin based on information submitted in the petition (see Initiation of Antidumping Duty Investigation: Coumarin from the People's Republic of China, 59 FR 3841, January 27, 1994). This rate applies to all exporters other than those responding exporters that are receiving separate rates.

Critical Circumstances

Petitioners allege that "critical circumstances" exist with respect to imports of coumarin from the PRC. Section 733(e)(1) of the Act provides that there is a reasonable basis to believe or suspect that critical circumstances exist if:

(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 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 criterion (A) above, we normally consider margins of 25 percent or more (in purchase price situations) as sufficient to impute knowledge of dumping (see Silicon Carbide). Since the preliminary estimated dumping margins for exporters of coumarin in the PRC are in excess of 25 percent, we can impute knowledge of dumping to the importers of the subject merchandise.

Regarding criterion (B) above, pursuant to 19 CFR 353.16(f), 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 the imports. If imports during the period immediately following the petition increase by 15 percent over imports during a comparable period immediately preceding the filing of a petition, we consider them massive pursuant to section 353.16(f)(2) of the Department's regulations. Three respondents have responded to the Department's request for the quantity and value of monthly exports to the U.S. To determine whether there have been massive imports of coumarin from the PRC, we compared each respondent's volume of shipments for the period following the petition (January through June 1994) to the period immediately preceding the petition (July through December 1993). Based on an analysis of these export data, we find that imports from Tianjin Chemical and Tianjin Native have been massive, while imports from Jiangsu Native have not been massive.

With respect to share of domestic consumption, the information available to us at this time does not allow us to evaluate whether the increase in absolute volume of coumarin shipments can be accounted for by a change in domestic consumption.

For Tianjin Chemical and Tianjin Native, because the preliminary dumping margins are sufficient to impute knowledge of dumping, and because we have found that imports of coumarin have been massive, we preliminarily determine that critical circumstances do exist for these two exporters.

With respect to Jiangsu Native, because we have found that imports of coumarin have not been massive, we preliminarily determine that critical circumstances do not exist for this exporter.

As regards the firms covered by the "All Others" rate, we have used BIA as the basis for determining whether critical circumstances exist for non-respondent exporters. The BIA margin exceeds the 25 percent threshold for imputing a knowledge of dumping to the importers of the merchandise. In addition, we have adversely assumed, as BIA, a massive increase in imports from these non-respondent exporters. We, therefore, determine that critical circumstances also exist for these exporters.

Verification

As provided in section 776(b) of the Act, we will verify all information determined to be acceptable for use in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the Customs Service to suspend liquidation of all entries of coumarin from the PRC, that are entered, or withdrawn from warehouse, for consumption on or after the date 90 days before the date of publication of this notice in the **Federal Register**, except for imports from Jiangsu Native, in which case the effective date of suspension of liquidation is the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or posting of a bond equal to the estimated amount by which the FMV exceeds the USP as shown below. These suspension of liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Manufacturer/Producer/Exporter	Weighted-average margin percentage	Critical circumstances
Tianjin Chemicals I/E Corp	143.40	Affirmative.
Jiangsu Native Produce I/E Corp	97.61	Negative.
Tianjin Native Produce I/E Corp	35.21	Affirmative.
All Others	444.37	Affirmative.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports

are materially injuring, or threaten material injury to, the U.S. industry.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments in at least six copies must be submitted to the Assistant Secretary for Import Administration no later than September 13, 1994, and rebuttal briefs, no later than September 20, 1994. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held at 1:00 p.m. on September 22, 1994, at the U.S. Department of Commerce, Room 3708, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B–099, within ten days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentations will be limited to issues raised in the briefs. If this investigation proceeds normally, we will make our final determination by the 135th day after the date of publication of the affirmative preliminary determination in the **Federal Register**.

This determination is published pursuant to section 733(f) of the Act and 19 CFR 353.15(a)(4).

Dated: July 28, 1994.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration

[FR Doc. 94–19066 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–P

[A–351–825]

Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Irene Darzenta or Kate Johnson, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–6320 or (202) 482–4929.

Preliminary Determination

The Department of Commerce (the Department) preliminarily determines that stainless steel bar (SSB) from Brazil is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. 1673b). The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Scope of Investigation

The merchandise covered by the scope of this investigation is SSB. For purposes of this investigation, the term "stainless steel bar" means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (*i.e.*, cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (i.e., cold-formed products in coils, of any uniform solid cross sections along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections.

The SSB subject to this investigation is currently classifiable under subheading 7222.10.0005, 7222.10.0050, 7222.20.0005, 7222.20.0045, 7222.20.0075 and 7222.30.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is July 1, 1993, through December 31, 1993.

Case History

Since the notice of initiation on January 19, 1994 (59 FR 3844, January 27, 1994), the following events have occurred.

On February 11, 1994, the U.S. Embassy in Brazil provided the Department with volume and value statistics for Brazilian SSB producing firms. On February 14, 1994, Instituto Brasileiro de Siderugica, the association for the iron and steel industry in Brazil, submitted volume and value data on behalf of its members.

Also on February 14, 1994, the International Trade Commission (ITC) issued an affirmative preliminary injury determination (USITC Publication 2734, February 1994).

On February 28, 1994, the Department sent its antidumping questionnaire to Acos Villares, S.A. (Villares). This company accounted for at least 60 percent of the exports of the subject merchandise to the United States during the POI, in accordance with 19 CFR 353.42(b). On March 1, 1994, the Department received a letter from Villares stating that it would not participate in this investigation. No questionnaire responses were submitted.

On March 25, 1994, we received comments on the issue of class or kind of merchandise from interested parties, per the Department's invitation for such comments in its notice of initiation. On April 13, 1994, we determined that SSB constitutes one class or kind of merchandise. (*See* May 11, 1994, Decision Memorandum to Barbara Stafford from The Team Re: Class or Kind of Merchandise.)

On April 26, 1994, the Department received a request from petitioners to postpone the preliminary determination until July 28, 1994. On May 16, 1994, we published in the **Federal Register** (59 FR 25447), a notice announcing the postponement of the preliminary determination until not later than July 28, 1994, pursuant to petitioners' request, in accordance with 19 CFR 353.15(c) and (d).

Best Information Available

Because Villares failed to respond to the Department's questionnaire, we based our determination on BIA pursuant to section 776(c) of the Act.

As BIA, we are assigning 19.43 percent, the highest margin among the margins alleged in the petition, in

accordance with the two-tiered BIA methodology under which the Department imposes the most adverse rate upon a respondent who refuses to cooperate or otherwise significantly impedes the proceeding, and as outlined in the Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review (56 FR 31692, 31704, July 11, 1991). The Department's methodology for assigning BIA has been upheld by the U.S. Court of Appeals of the Federal Circuit (*see Allied Signal Aerospace Co.* v. *United States*, Slip Op. 94–1112 (June 30, 1994); and *Allied Signal Aerospace Co.* v. *United States*, 996 F.2d 1185 (Fed. Cir. 1993); *see also Krupp Stahl, AG et al.* v. *United States*, 822 F. Supp. 789 (CIT 1993)).

Suspension of Liquidation

In accordance with section 733(d)(1) (19 U.S.C. 1673b(d)(1)) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of SSB from Brazil, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or posting of a bond equal to the estimated margin amount by which the foreign market value of the subject merchandise exceeds the United States price as shown below. The suspension of liquidation will remain in effect until further notice.

Manufacturer/Producer/Exporter	Weighted Average Margin Percent
Acos Villares, S.A.	19.43
All Others	19.43

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry, before the later of 120 days after the date of the preliminary determination or 45 days after our final determination.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments must be submitted, in at least ten copies, to the Assistant Secretary for Import Administration no later than November 8, 1994, and rebuttal briefs no later than November 15, 1994. In addition, a public version and five copies should be submitted by the appropriate date if the submission contains business proprietary information. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held, if requested, at 3:00 p.m. on November 17, 1994, at the U.S. Department of Commerce, Room 1414, 14th Street and Constitution Avenue, NW., Washington DC, 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B–099 within ten days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentation will be limited to arguments raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15(a)(4).

Dated: July 28, 1994.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 94–19067 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–P

[A–533–810]

Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From India

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Irene Darzenta, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4929 or 482–6320, respectively.

Preliminary Determination

The Department of Commerce (the Department) preliminarily determines that stainless steel bar (SSB) from India is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930 (the Act), as amended. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Scope of Investigation

The merchandise covered by this investigation is stainless steel bar (SSB). For purposes of this investigation, the term "stainless steel bar" means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (i.e., cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (i.e., cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections.

The SSB subject to this investigation is currently classifiable under subheading 7222.10.0005, 7222.10.0050, 7222.20.0005, 7222.20.0045, 7222.20.0075 and 7222.30.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is July 1, 1993, to December 31, 1993.

Case History

Since the notice of initiation on January 19, 1994 (59 FR 3844, January 27, 1994), the following events have occurred.

On February 14, 1994, the International Trade Commission (ITC) issued an affirmative preliminary injury

determination (USITC Publication 2734, February 1994).

On February 25, 1994 we named Grand Foundry, Limited (Grand Foundry) and Mukand, Limited (Mukand) as respondents in this investigation, and on February 28, 1994, we issued antidumping questionnaires to these companies. These companies accounted for at least 60 percent of the exports of the subject merchandise to the United States during the POI.

On February 26, 1994, Isibars, Limited (Isibars), an Indian producer/exporter of subject merchandise which was not selected as a mandatory respondent, requested that it be allowed to participate in the investigation as a voluntary respondent. On March 9, 1994, we sent Isibars a brief questionnaire requesting sales volume and value data and noted that based upon Isibars response we would determine if it was appropriate to issue a complete questionnaire to the company. On March 14, 1994, Isibars submitted its response to this questionnaire. Subsequently, on March 15, the Department issued Isibars a questionnaire, noting its policy with respect to voluntary respondents. On March 28, 1994, Isibars requested via facsimile a 30-day extension in order to respond to the Department's questionnaire. On March 28, 1994, we granted Isibars a partial extension contingent upon receipt of an officially filed extension request. However, because Isibars never submitted such an extension request or a response to any section of our questionnaire, we never deemed it to be a mandatory respondent.

On March 4, 1994, Akai Impex Ltd. (Akai), another Indian producer/exporter of subject merchandise, requested that it be allowed to participate in the investigation. Subsequently, on March 7, 1994, we sent Akai a brief questionnaire requesting sales volume and value data and noted that based upon Akai's response we would determine if it was appropriate to issue it a questionnaire. Akai's response to this questionnaire was received on March 14, 1994. Our examination of this response revealed that Akai had not made sales of the subject merchandise to the United States during the POI, and on this basis, we denied its request for voluntary respondent status on March 17, 1994.

On March 23, 1994, we received a response to Section A of the Department's questionnaire from Grand Foundry. In that response, respondent reported that it made no sales of export-quality merchandise in the home market during the POI. On April 4, 1994, we received petitioners' comments on Grand Foundry's Section A response. On April 5, 1994, the Department determined that Grand Foundry's third country sales to Germany were the appropriate basis for foreign market value (FMV), pursuant to 19 C.F.R. 353.49.

On March 25, 1994, we received comments on the issue of class or kind of merchandise from interested parties, per the Department's invitation for such comments in its notice of initiation. On April 13, 1994, we received rebuttal comments on this issue. On May 11, 1994, we determined that SSB constitutes one class or kind of merchandise. (See May 11, 1994, Decision Memorandum to Barbara Stafford from The Team Re: Class or Kind of Merchandise.)

On April 22, 1994, we received a response to Sections B and C of the Department's questionnaire from Grand Foundry. On May 4, 1994, we received petitioners' comments regarding Grand Foundry's responses to Sections B and C. On May 10, 1994, we issued a supplemental questionnaire to Grand Foundry. Grand Foundry submitted its supplemental response on June 20, 1994. Mukand never responded to any section of our antidumping questionnaire.

On April 26, 1994 the Department received a request from petitioners to postpone the preliminary determination until July 28, 1994. On May 16, 1994, we published in the **Federal Register** (59 FR 25447), a notice announcing the postponement of the preliminary determination until not later than July 28, 1994, pursuant to petitioners' request, in accordance with 19 C.F.R. 353.15(c) and (d).

On May 25, 1994, petitioners alleged that Grand Foundry sold the subject merchandise in Germany at prices below its cost of production (COP). Respondent rebutted the allegation on June 2, 1994. Petitioners supplemented their original allegation on June 7, 1994. On June 15, 1994, we determined that petitioners' allegation provided a reasonable basis to believe or suspect below cost sales, pursuant to section 353.51(a) of the Department's regulations. Accordingly, we initiated a sales below cost investigation for Grand Foundry on June 15, 1994, and subsequently issued Section D of the Department's questionnaire on June 16. On July 8, 1994, Grand Foundry requested an extension of time until August 1, 1994, to respond to Section D of the questionnaire. The Department granted such an extension on July 12, 1994.

Also on July 12, Grand Foundry requested that the Department postpone the final determination until 135 days after the date of publication of the Department's preliminary determination, if that determination is affirmative.

Best Information Available

In accordance with section 776(c) of the Act, we have determined that the use of best information available (BIA) is appropriate for Mukand. Mukand did not respond to the Department's questionnaire issued on February 28, 1994. Because Mukand failed to answer the Department's questionnaire, we find it has not cooperated in this investigation.

As BIA, we are assigning the highest margin among the margins alleged in the petition, in accordance with the two-tiered BIA methodology under which the Department imposes the most adverse rate upon a respondent who refuses to cooperate or otherwise significantly impedes the proceeding, and as outlined in the Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review (56 FR 31692, 31704, July 11, 1991). The Department's methodology for assigning BIA has been upheld by the U.S. Court of Appeals for the Federal Circuit (*see Allied-Signal Aerospace Co.* v. *United States*, Slip Op. 94–1112 (June 30, 1994); and *Allied Signal Aerospace Co.* v. *United States*, 996 F.2d 1185 (Fed. Cir. 1993); *see also Krupp Stahl, AG et al.* v. *United States*, 822 F. Supp. 789 (CIT 1993)).

Such or Similar Comparisons

We have determined that all the products covered by this investigation constitute a single category of such or similar merchandise. We made fair value comparisons on this basis. In accordance with the Department's standard methodology, we first compared identical merchandise. Where there were no sales of identical merchandise in the third country market to compare to U.S. sales, we made similar merchandise comparisons on the basis of the criteria defined in Appendix V to the antidumping questionnaire, on file in Room B–099 of the main building of the Department.

We altered the order of the SSB grades specified within the grade criterion of Appendix V to account for certain other SSB grades which respondent sold in the third country market during the POI, but which were not taken into account in Appendix V.

We also reversed the order of the size and shape criteria in Appendix V. In our original questionnaire issued on February 28, 1994, the fifth and sixth matching criteria were shape and size, respectively. However, based on the advice of our in-house technical expert, we reversed the order of these two criteria. Subsequently, Acciaierie Valbruna (Valbruna), a respondent in the concurrent antidumping investigation of SSB from Italy requested that the Department reconsider the reversal of these criteria in Appendix V. Specifically, Valbruna argued that the distinguishing factor of SSBs as compared to all other stainless steel products is that they can be supplied in a variety of shapes and that the COP and price of SSBs are influenced significantly more by shape than size. In light of the arguments raised by Valbruna, we reversed the hierarchy of these criteria to reflect the order in our original Appendix V. Although the issue was not raised by any interested party in the instant investigation, we reversed the order of these criteria to ensure consistent treatment of respondents in performing product comparisons across all concurrent SSB investigations.

Fair Value Comparisons

As discussed above, we are using BIA with regard to Mukand and thus did not make fair value comparisons with regard to this company. For the remaining company, Grand Foundry, we made fair value comparisons as discussed below.

To determine whether sales of SSB from Grand Foundry to the United States were made at less than fair value, we compared the United States price ("USP") to the FMV, as specified in the "United States Price" and "Foreign Market Value" sections of this notice. In accordance with 19 C.F.R. 353.58, we made comparisons at the same level of trade, where possible.

United States Price

We based USP on purchase price (PP), in accordance with section 772(b) of the Act, because the subject merchandise was sold to unrelated purchasers in the United States before importation and because exporter's sales price methodology was not otherwise indicated.

We calculated PP based on packed CNF prices to unrelated customers. In accordance with section 772(d)(2)(A) of the Act, we made deductions, where appropriate, for foreign brokerage (including containerization, foreign inland freight and port charges) and ocean freight.

Foreign Market Value

In order to determine whether there were sufficient sales of SSB in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of SSB to the volume of third country sales of SSB in accordance with section 773(a)(1)(B) of the Act. Based on this comparison, we determined that Grand Foundry had a viable home market with respect to sales of SSB during the POI. However, based on Grand Foundry's claim that its home market sales made during the POI consisted only of SSB scrap and rejects and that its U.S. sales during the same period consisted only of first (or export) quality SSB, we determined that third country sales would be a more appropriate basis for FMV. (See April 5, 1994 Decision Memorandum To Richard W. Moreland From The Team Re: Appropriate Basis for FMV.)

In order to select the appropriate third country in this case, we examined three factors in accordance with 19 C.F.R. 353.49(b): (1) The degree of similarity in terms of physical characteristics between the products sold in the United States and the individual third country markets; (2) the volume of sales in each third country market relative to that in the United States; and (3) the similarity of the market organization and development between the U.S. market and third country market. Based on these factors, we selected sales to Germany as the appropriate basis on which to calculate FMV.

In accordance with 19 CFR 353.46, we calculated FMV based on CIF or CNF prices charged to unrelated customers in Germany.

In light of the Court of Appeals for the Federal Circuit's (CAFC) decision in *Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement* v. *United States*, 13 F.3d 398 (Fed. Cir. 1994), the Department no longer can deduct home market movement charges from FMV pursuant to its inherent power to fill in gaps in the antidumping statute. Instead, we will adjust for those expenses under the circumstance-of-sale provision of 19 CFR 353.56(a) and the exporter's sales price offset provision of 19 CFR 353.56(b)(2), as appropriate. Accordingly, in the present case, we deducted post-sale home market movement charges from FMV under the circumstance-of-sale provision of 19 CFR 353.56(a). This adjustment included home market foreign brokerage (including containerization, foreign inland freight, loading and port fees), ocean freight, and marine insurance.

Pursuant to 19 CFR 353.56(a)(2), we made further circumstance-of-sale adjustments, where appropriate, for differences in credit expenses, and bank charges (including bank interest, courier charges and commissions) between the U.S. and third country markets. We recalculated credit expenses to reflect the revised short-term interest rate reported by respondent. We deducted third country commissions and added U.S. indirect selling expenses capped by the amount of third country commissions.

We also deducted third country packing and added U.S. packing costs, in accordance with section 773(a)(1) of the Act. We made adjustments, where appropriate, for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act.

Cost of Production

Based on petitioner's allegation, and in accordance with section 773(b) of the Act, the Department initiated an investigation to determine whether Grand Foundry made third country sales of subject merchandise at prices below its COP, and over an extended period of time. Although Grand Foundry's COP questionnaire response will be received too late for consideration for the preliminary determination, it will be verified and considered for the final determination.

Currency Conversion

We made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York. See 19 CFR 353.60(a).

Verification

As provided in section 776(b) of the Act, we will verify the information used in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the Customs Service to suspend liquidation of all entries of SSB from India, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated preliminary dumping margins, as shown below. The suspension of liquidation will remain in effect until further notice. The estimated preliminary dumping margins are as follows:

Manufacturer/Producer/Exporter	Margin Percent
Grand Foundry	2.67
Mukand	21.02
All Others	11.85

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry before the later of 120 days after the date of the preliminary determination or 45 days after our final determination.

Postponement of Final Determination

Pursuant to section 735(a)(2)(A) of the Act, on July 12, 1994, Grand Foundry, a significant producer of the subject merchandise, requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until 135 days after the date of publication of an affirmative preliminary determination. Pursuant to 19 CFR 353.20(b), because our preliminary determination is affirmative, and no compelling reasons for denial exist, we are postponing the final determination until the 135th day after the date of publication of this notice in the **Federal Register**.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than November 8, 1994, and rebuttal briefs no later than November 15, 1994. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to give interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on November 17, 1994 at 9:30 a.m. at the U.S. Department of Commerce, Room 3708, 14th Street and Constitution Avenue NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B–099, within ten days of the publication of this notice in the **Federal Register**. Request should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentation will be limited to issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15(a)(4).

Dated: July 28, 1994.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 94–19068 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–P

[A–475–813]

Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From Italy

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Irene Darzenta, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4929 or 482–6320, respectively.

Preliminary Determination

The Department of Commerce (the Department) preliminarily determines that stainless steel bar (SSB) from Italy is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Scope of Investigation

The merchandise covered by this investigation is SSB. For purposes of this investigation, the term "stainless steel bar" means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (i.e., cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (i.e., cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections.

The SSB subject to this investigation is currently classifiable under subheadings 7222.10.0005, 7222.10.0050, 7222.20.0005, 7222.20.0045, 7222.20.0075 and 7222.30.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is July 1, 1993, to December 31, 1993.

Case History

Since the notice of initiation on January 19, 1994 (59 FR 3844, January 26, 1994), the following events have occurred.

On February 14, 1994, the International Trade Commission (ITC) issued an affirmative preliminary injury determination (USITC Publication 2734, February 1994).

On February 28, 1994, we named Acciaierie Valbruna S.r.l. (Valbruna) and Foroni S.p.A. (Foroni) as respondents in this investigation and issued antidumping questionnaires to both companies. These companies accounted for at least 60 percent of the exports of the subject merchandise to the United States during the POI, in accordance with 19 CFR 353.42(b). We presented the questionnaire to Valbruna at its facility in Vicenza, Italy, on March 3, 1994, and to Foroni at its facility in Gorle Minore, Italy, on March 7, 1994.

We received responses to Section A of the Department's questionnaire on March 21, 1994, from Foroni and on March 22, 1994 from Valbruna.

On March 25, 1994, we received comments on the issue of class or kind of merchandise from interested parties, per the Department's invitation for such comments in its notice of initiation. On April 13, 1994, we received rebuttal comments on this issue. On May 11, 1994, we determined that SSB

constitutes one class or kind of merchandise. (See May 11, 1994, Decision Memorandum to Barbara Stafford from The Team Re: Class or Kind of Merchandise.)

On March 31, 1994, we sent Sections A through D of the Department's questionnaire to Cogne S.p.A. (Cogne) because it requested that it be included in the investigation as a voluntary respondent. On April 14, 1994, Cogne notified the Department that it had decided not to participate as a voluntary respondent in the investigation.

On April 26, 1994, the Department received a request from petitioners to postpone the preliminary determination until July 28, 1994. On May 16, 1994, we published in the **Federal Register** (59 FR 25447), a notice announcing the postponement of the preliminary determination until not later than July 28, 1994, pursuant to petitioners' request, in accordance with 19 CFR 353.15(c) and (d).

On April 29 and May 2, 1994, we received responses to Sections B and C of the Department's questionnaire from Foroni and Valbruna, respectively.

On May 18, 1994, petitioners alleged that Valbruna sold the subject merchandise in Italy at prices below its cost of production (COP). Petitioners supplemented their original allegation on June 3, 13, and 22, 1994. Respondent rebutted the allegation on May 24, June 9, 15, 27, and 28, 1994. On June 24, 1994, we determined that petitioners' allegation provided a reasonable basis to believe or suspect below cost sales, pursuant to section 353.51(a) of the Department's regulations. Accordingly, we initiated a sales below cost investigation for Valbruna on June 24, and issued Section D of the Department's questionnaire on the same date.

On May 20, 1994, we issued a supplemental questionnaire to both respondents. Valbruna submitted its supplemental response on June 6, 1994, and Foroni on June 8, 1994.

On July 19, 1994, Valbruna requested an extension of time until August 5, 1994, to respond to the Section D questionnaire. The Department granted such an extension on July 20, 1994.

Also, on July 20, 1994, respondent Valbruna requested that, in the event of an affirmative determination in this investigation, the Department postpone the final determination until 135 days after the date of publication of the preliminary determination in the **Federal Register**.

Such or Similar Comparisons

We have determined that all the products covered by this investigation constitute a single category of such or similar merchandise. We made fair value comparisons on this basis. In accordance with the Department's standard methodology, we first compared identical merchandise. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we made similar merchandise comparisons on the basis of the criteria defined in Appendix V to the antidumping questionnaire, on file in Room B–099 of the main building of the Department of Commerce.

We altered the order of the SSB grades specified within the grade criterion of Appendix V to account for certain other SSB grades which Foroni sold during the POI, but which were not taken into account in Appendix V.

We also reversed the order of the size and shape criteria in Appendix V. In our original questionnaire issued on February 28, 1994, the fifth and sixth matching criteria were shape and size, respectively. However, based on the advice of our in-house technical expert, we reversed the order of these two criteria. Subsequently, Valbruna requested that the Department reconsider the reversal of these criteria in Appendix V. Specifically, it argued that the distinguishing factor of SSBs as compared to all other stainless steel products is that they can be supplied in a variety of shapes and that the COP and price of SSBs are influenced significantly more by shape than size. In light of the arguments raised by Valbruna, we reversed the hierarchy of these criteria to reflect the order in our original Appendix V.

Fair Value Comparisons

To determine whether sales of SSB from Italy 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 in the "United States Price" and "Foreign Market Value" sections of this notice. In accordance with 19 CFR 353.58, we made comparisons at the same level of trade, where possible.

United States Price

Foroni

All of Foroni's U.S. sales to the first unrelated purchaser took place after importation into the United States. Therefore, we based USP on exporter's sales prices (ESP), in accordance with section 772(c) of the Act. In accordance with section 772(d) of the Act, we calculated ESP based on FOB warehouse and FOB port prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign brokerage, ocean freight (including foreign inland freight and loading/unloading charges), U.S. brokerage and handling, U.S. inland freight, U.S. import duties, and export taxes. For those sales of subject merchandise with FOB U.S. port sales terms, we made no deduction for the U.S. inland freight charges reported in respondent's U.S. sales listing.

We also deducted credit expenses, warranty expenses, product liability premiums, quality control expenses, and commissions paid to an employee, in accordance with section 772(e)(2) of the Act. We also deducted U.S. indirect selling expenses, including pre-sale warehousing costs incurred in the United States, advertising, and inventory carrying costs.

We did not make an adjustment for payroll taxes reported by Foroni for the preliminary determination because Foroni did not provide sufficient explanation as to how these expenses should be treated. We will review these expenses at verification and reconsider the issue for the final determination. In addition, we made no adjustment for U.S. packing expenses because Foroni claims that it does not pack the subject merchandise and, therefore, did not report this expense.

Valbruna

For Valbruna, we based USP on both ESP and purchase price (PP), in accordance with section 772 of the Act, because Valbruna made sales both before and after importation into the United States. We calculated both PP and ESP based on packed prices to unrelated customers. In accordance with section 772(d)(2)(A) of the Act, for both PP and ESP sales we made deductions, where appropriate, for ocean freight (including foreign inland freight, foreign inland insurance, marine insurance and foreign brokerage and handling), U.S. import duties, U.S. merchandise processing and harbor maintenance fees, U.S. inland freight, U.S. brokerage and handling, and containerization expenses (including drayage, stripping, and storage expenses). We added freight income (*i.e.*, freight charges paid by the customer but not included in the gross price) to both ESP and PP sales.

For ESP sales only, we further deducted credit expenses and warranty expenses, in accordance with section 772(e)(2) of the Act. We also deducted indirect selling expenses incurred in Italy on sales to the United States, as well as indirect selling expenses incurred in the United States, and inventory carrying costs. We recalculated indirect selling expenses

incurred in the United States to reflect respondent's reported methodology.

We also made an adjustment to USP for the value-added tax (VAT) paid on the comparison sales in Italy in accordance with our practice, pursuant to the Court of International Trade (CIT) decision in *Federal-Mogul Corp. and The Torrington Co. v. United States*, Slip Op. 93–194 (CIT October 7, 1993). (See Final Determination of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux from France, 59 FR 14136, March 25, 1994).

Foreign Market Value

In order to determine whether there were sufficient sales of SSB in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of SSB to the volume of third country sales of SSB in accordance with section 773(a)(1)(B) of the Act. Based on this comparison, we determined that both respondents had viable home markets with respect to sales of SSB during the POI.

Foroni

We calculated FMV based on ex-factory prices charged to unrelated customers in the home market.

Pursuant to 19 CFR 353.56(a)(2), we deducted credit expenses and quality control expenses. We also deducted home market indirect selling expenses capped by the sum of U.S. commissions and indirect selling expenses (including inventory carrying costs), in accordance with 19 CFR 353.56(b).

We made adjustments, where appropriate, for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act.

We did not make an adjustment for VAT for Foroni based on its claim that it and its home market customers qualify for exemptions under the Italian VAT program.

We also made no adjustment for home market packing expenses because Foroni claims that it does not pack the subject merchandise and, therefore, did not report this expense.

Valbruna

We calculated FMV based on packed prices charged to related and unrelated customers in the home market. For purposes of the preliminary determination, we included arm's-length sales to related customers, pursuant to 19 CFR 353.45.

We deducted cash discounts. We added freight income (i.e., freight charges paid by the customer but not included in the gross price) to both ESP and PP sales.

In light of the Court of Appeals for the Federal Circuit's (CAFC) decision in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement V. United States*, 13 F.3d 398 (Fed. Cir. 1994), the Department no longer can deduct home market movement charges from FMV pursuant to its inherent power to fill in gaps in the antidumping statute. Instead, we will adjust for those expenses under the circumstance-of-sale provision of 19 CFR 353.56(a) and the exporter's sales price offset provision of 19 CFR 353.56(b)(2), as appropriate. Accordingly, in the present case, we deducted post-sale home market movement charges from FMV under the circumstance-of-sale provision of 19 CFR 353.56(a). This adjustment included home market inland freight (including inland insurance). We adjusted for pre-sale warehousing charges associated with pre-sale movement charges in the ESP offset.

For comparison to ESP sales, we also deducted credit expenses and home market commissions from FMV. We then deducted home market indirect selling expenses capped by the sum of U.S. indirect selling expenses and inventory carrying costs.

For comparison to PP sales, we made a circumstance-of-sale adjustment for differences in credit expenses and warranty expenses, pursuant to 19 CFR 353.56(a)(2). We also deducted home market commissions from FMV and added to FMV the U.S. indirect selling expenses capped by the amount of home market commissions.

For purposes of the preliminary determination, we considered pre-sale warehousing expenses to be indirect selling expenses because respondent has not adequately demonstrated that such expenses are directly attributable to particular sales of the subject merchandise.

We also did not allow Valbruna's claim of imputed VAT expenses. While there may be an opportunity cost or income associated with the payment of VAT, that fact alone is not a sufficient basis for the Department to make an adjustment. (See Final Determination of Sales at Less Than Fair Value: Sulfur Dyes, Including Sulfur Vat Dyes, from the United Kingdom, 58 FR 3253, January 8, 1993.)

For both ESP and PP sales, we deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(1) of the Act.

We made adjustments, where appropriate, for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act.

We adjusted for VAT in accordance with our practice. (See the "United States Price" section of this notice, above.)

Cost of Production

Petitioners alleged that Valbruna made home market sales of subject merchandise at prices below its COP. Based on petitioners' allegation, and in accordance with section 773(b) of the Act, we initiated a COP investigation to determine whether Valbruna made home market sales at prices below its COP over an extended period of time. Although Valbruna's COP questionnaire response will be received too late to be considered for the preliminary determination, it will be verified and considered for the final determination.

Currency Conversion

We made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York. See 19 CFR 353.60(a).

Verification

As provided in section 776(b) of the Act, we will verify the information used in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the Customs Service to suspend liquidation of all entries of SSB from Italy, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated preliminary dumping margins, as shown below. The suspension of liquidation will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/producer/exporter	Margin percent
Acciaierie Valbruna S.r.l.	0.57
Foroni S.p.A.	6.13
All Others	4.11

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry, before the later of 120

days after the date of the preliminary determination or 45 days after our final determination.

Postponement of Final Determination

Pursuant to section 735(a)(2)(A) of the Act, on July 20, 1994, respondent Valbruna, a significant producer of the subject merchandise, requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until 135 days after the date of publication of an affirmative preliminary determination. Pursuant to 19 CFR 353.20(b), because our preliminary determination is affirmative, and no compelling reasons for denial exist, we are postponing the final determination until the 135th day after the date of publication of this notice in the **Federal Register**.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than November 9, 1994, and rebuttal briefs no later than November 16, 1994. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to give interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on November 18, 1994 at 9:30 a.m. at the U.S. Department of Commerce, room 1414, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, room B–099, within ten days of the publication of this notice in the **Federal Register**. Request should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentation will be limited to issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15(a)(4).

Dated: July 28, 1994.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 94–19069 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–P

[A–588–833]

Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Japan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Irene Darzenta or Kate Johnson, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–6320 or (202) 482–4929.

Preliminary Determination

The Department of Commerce (the Department) preliminarily determines that stainless steel bar (SSB) from Japan is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. 1673b). The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Scope of Investigation

The merchandise covered by this investigation is SSB. For purposes of this investigation, the term "stainless steel bar" means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (*i.e.*, cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (*i.e.*, cold-formed products in coils, of any uniform solid cross sections along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections.

The SSB subject to this investigation is currently classifiable under subheading 7222.10.0005, 7222.10.0050, 7222.20.0005, 7222.20.0045, 7222.20.0075, and 7222.30.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is July 1, 1993, through December 31, 1993.

Case History

Since the notice of initiation on January 19, 1994 (59 FR 3844, January 27, 1994), the following events have occurred.

On February 4, 1994, the U.S. Embassy in Tokyo provided the Department with the names of the firms producing SSB in Japan. To supplement this data, on February 7, 1994, counsel for respondents submitted volume and value statistics for eight Japanese companies.

On February 14, 1994, the International Trade Commission (ITC) issued an affirmative preliminary injury determination (USITC Publication 2734, February 1994).

On February 28, 1994, the Department sent its antidumping questionnaire to Aichi Steel Works, Ltd. (Aichi), Daido Steel Co., Ltd. (Daido), and Sanyo Special Steel Co., Ltd. (Sanyo). These firms accounted for at least 60 percent of the exports of the subject merchandise to the United States during the POI, in accordance with 19 CFR 353.42(b). On March 7, 1994, the Department met with company officials from Aichi, Daido and Sanyo at the Japanese Ministry of International Trade and Industry in Tokyo. At this meeting each of the three named respondent companies stated that they did not intend to participate in our investigation. No questionnaire responses were submitted.

On March 11, 1994, the Department received a request from an additional Japanese producer of SSB, Abe Bright Shaft Manufacturing Co., Ltd. (Abe Bright), to be a voluntary respondent in this investigation. On March 11, 1994, we sent a questionnaire to Abe Bright. On April 4, 1994, Abe Bright submitted a letter withdrawing its request to participate as a voluntary respondent in this investigation.

On March 25, 1994, we received comments on the issue of class or kind of merchandise from interested parties, per the Department's invitation for such

comments in its notice of initiation. On April 13, 1994, we determined that SSB constitutes one class or kind of merchandise. (*See* May 11, 1994, Decision Memorandum to Barbara Stafford from The Team Re: Class or Kind of Merchandise.)

On April 26, 1994, the Department received a request from petitioners to postpone the preliminary determination until July 28, 1994. On May 16, 1994, we published in the **Federal Register** (59 FR 25447), a notice announcing the postponement of the preliminary determination until not later than July 28, 1994, pursuant to petitioners' request, in accordance with 19 CFR 353.15 (c) and (d).

Best Information Available

Because the three named respondents failed to respond to the Department's questionnaire, we based our determination on BIA pursuant to section 776(c) of the Act.

As BIA, we are assigning 61.47 percent, the highest margin among the margins alleged in the petition, in accordance with the two-tiered BIA methodology under which the Department imposes the most adverse rate upon a respondent who refuses to cooperate or otherwise significantly impedes the proceeding, and as outlined in the Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review (56 Fr 31692, 31704, July 11, 1991). The Department's methodology for assigning BIA has been upheld by the U.S. Court of Appeals for the Federal Circuit (see *Allied-Signal Aerospace Co.* v. *United States*, Slip Op. 94–1112 (June 30, 1994); and *Allied Signal Aerospace Co.* v. *United States*, 996 F.2d 1185 (Fed. Cir. 1993); see also *Krupp Stahl AG, et al.* v. *United States*, 822 F. Supp. 789 (CIT 1993)).

Suspension of Liquidation

In accordance with section 733(d)(1) (19 U.S.C. 1673b(d)(1)) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of SSB from Japan, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or posting of a bond equal to the estimated margin amount by which the foreign market value of the subject merchandise exceeds the United States price as shown below. The suspension of liquidation will remain in effect until further notice.

Manufacturer/producer/exporter	Weighted average margin percent
Aichi Steel Works, Ltd.	61.47
Daido Steel Co., Ltd.	61.47
Sanyo Special Steel Co., Ltd.	61.47
All Others	61.47

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry, before the later of 120 days after the date of the preliminary determination or 45 days after our final determination.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments must be submitted, in at least ten copies, to the Assistant Secretary for Import Administration no later than November 8, 1994, and rebuttal briefs no later than November 15, 1994. In addition, a public version and five copies should be submitted by the appropriate date if the submission contains business proprietary information. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held, if requested, at 2:00 p.m. on November 17, 1994, at the U.S. Department of Commerce, Room 1414, 14th Street and Constitution Avenue NW., Washington DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B–099 within ten days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentation will be limited to arguments raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15(a)(4).

Dated: July 28, 1994.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 94–19070 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–P

[A–469–805]

Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar from Spain

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Mary Jenkins or Kate Johnson, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–1756 or 482–4929, respectively.

Preliminary Determination

The Department of Commerce (the Department) preliminarily determines that stainless steel bar (SSB) from Spain is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930 (the Act), as amended. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Scope of Investigation

The merchandise covered by this investigation is SSB. For purposes of this investigation, the term "stainless steel bar" means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (i.e., cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds

150 mm and measures at least twice the thickness), wire (i.e., cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections.

The SSB subject to this investigation is currently classifiable under subheadings 7222.10.0005, 7222.10.0050, 7222.20.0005, 7222.20.0045, 7222.20.0075 and 7222.30.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The (POI) is July 1, 1993, to December 31, 1993.

Case History

Since the notice of initiation on January 19, 1994 (59 FR 3844, January 26, 1994), the following events have occurred.

On February 14, 1994, the International Trade Commission (ITC) issued an affirmative preliminary injury determination (USITC Publication 2734, February 1994).

On February 25, 1994, we named Roldan, S.A. (Roldan) and Acenor, S.A. (Acenor) as respondents in this investigation and on February 28, 1994, issued antidumping questionnaires to both companies. These companies represent 100 percent of U.S. imports of subject merchandise from Spain during the POI. We presented the questionnaire to Roldan at its facility in Madrid, Spain on March 7, 1994, and to Acenor at its facility in Bilbao, Spain on March 10, 1994.

We received Roldan's response to Section A of the Department's questionnaire on March 28, 1994. We received Roldan's responses to Sections B and C of the Department's questionnaire on April 21, 1994. We received Acenor's responses to Sections A, B, and C of the Department's questionnaire on May 18, 1994.

On March 25, 1994, we received comments on the issue of class or kind of merchandise from interested parties, per the Department's invitation of such comments in its notice of initiation. On April 13, 1994, we received rebuttal comments on this issue. On May 11, 1994, we determined that SSB constitutes one class or kind of merchandise. (See May 11, 1994, Decision Memorandum to Barbara Stafford from The Team Re: Class or Kind of Merchandise.)

On May 27, 1994, the Department rescinded the COP investigations against Roldan and Acenor that were initiated on January 19, 1994, because the Department had reason to believe that petitioners did not base their cost allegations on information reasonably available to them. (See May 27, 1994, Decision Memorandum to Barbara Stafford from David L. Binder Re: Rescinding the COP investigations for Acenor and Roldan.) On June 13, 1994, the Department re-initiated COP investigations against Roldan and Acenor based on the allegations submitted by petitioners on May 9, 1994, and May 24, 1994, pursuant to section 19 CFR 353.51(a) (1994). (See June 13, 1994, Decision Memorandum to Barbara R. Stafford from Richard Moreland Re: Petitioners' Allegations of Sales Below the Cost of Production for Roldan and Acenor.) We received Roldan's and Acenor's responses, to Section D of the Department's questionnaire on June 23, and June 27, 1994, respectively.

On April 26, 1994, the Department received a request from petitioners to postpone the preliminary determination until July 28, 1994. On May 16, 1994, we published in the **Federal Register** (59 FR 25447), a notice announcing the postponement of the preliminary determination until not later than July 28, 1994, in accordance with sections 19 CFR 353.15 (c) and (d).

On July 13, 1994, the Department issued to each respondent a supplementary questionnaire regarding Section D of the Department's original questionnaire. The due dates for Acenor's and Roldan's supplementary responses have been extended until August 3 and August 4, 1994, respectively. Consequently, this information will be received too late for purposes of the preliminary determination, but will be analyzed, verified, and considered for the final determination.

On July 26, 1994, pursuant to 19 CFR 353.20(b), respondents requested that the Department postpone the final determination until 135 days after the date of publication of the Department's preliminary determination, if that determination is affirmative.

Such or Similar Comparisons

We have determined that all the products covered by this investigation constitute a single category of such or similar merchandise. We made fair value comparisons on this basis. In accordance with the Department's standard methodology, we first compared identical merchandise. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we made similar merchandise comparisons on the basis of the criteria defined in Appendix V to the antidumping questionnaire, on file in Room B–099 of the main building of the Department of Commerce.

We altered the order of the SSB grades specified within the grade criterion of Appendix V to account for certain other SSB grades which Roldan sold during the POI, but which were not taken into account in Appendix V.

We also reversed the order of the size and shape criteria in Appendix V. In our original questionnaire issued on February 28, 1994, the fifth and sixth matching criteria were shape and size, respectively. However, based on the advice of our in-house technical expert, we reversed the order of these two criteria. Subsequently, Acciaierie Valbruna (Valbruna), a respondent in the concurrent antidumping investigation of SSB from Italy, requested that the Department reconsider the reversal of these criteria in Appendix V. Specifically, it argued that the distinguishing factor of SSBs as compared to all other stainless steel products is that they can be supplied in a variety of shapes and that the COP and price of SSBs are influenced significantly more by shape than size. In light of the arguments raised by Valbruna, we reversed the hierarchy of these criteria to reflect the order in our original Appendix V. Although the issue was not raised by any interested party in the instant investigation, we reversed the order of these criteria to ensure consistent treatment of respondents in performing product comparisons across all concurrent SSB investigations.

Related Party Sales

On April 21, 1994, Roldan reported sales made to both related and unrelated distributors, and unrelated end users in the home market. We compared related party prices to unrelated party prices using the test set forth in Appendix II to Final Determination of Sales at Less than Fair Value; Certain Cold-rolled Carbon Steel Flat Products from Argentina, 58 FR 37062 (July 9, 1994), and determined that the sales made to related parties were not at arm's length. We subsequently requested that Roldan and Acenor report all sales made by their related parties to the first unrelated customer in the home market. These sales, reported on June 29, and July 1, for Acenor and Roldan, respectively, were submitted too late to be properly analyzed for use in the preliminary determination.

On June 13, 1994, Roldan submitted a revised home market sales listing

including Roldan's sales to both related and unrelated parties. However, for the preliminary determination we did not use portions of the revised sales listing containing related party sales because we found certain discrepancies between the related party sales data contained in respondent's original and revised responses. However, we intend to clarify these discrepancies prior to verification and consider respondent's revised related party sales listing for the final determination based on verification findings. Therefore, for purposes of the preliminary determination, we only used the portion of Roldan's sales listing pertaining to sales made directly to unrelated parties in our analysis.

For Acenor, we compared prices to a related party with prices to unrelated parties using the test referenced above and determined that the sales made to the related party were not at arm's length. Accordingly, we used only sales made directly to unrelated parties reported in Acenor's June 29, 1994, sales listing.

Fair Value Comparisons

To determine whether sales of SSB from Spain 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 in the "United States Price" and "Foreign Market Value" sections of this notice. In accordance with 19 CFR 353.58, we made comparisons at the same level of trade, where possible.

United States Price

For both Roldan and Acenor, we based USP on purchase price (PP), in accordance with section 772(b) of the Act, because the subject merchandise was sold to unrelated purchasers in the United States before importation and exporter's sales price methodology was not otherwise indicated.

We made an adjustment to USP for the value-added tax (VAT) paid on the comparison sales in Spain, in accordance with our practice, pursuant to the Court of International Trade (CIT) decision in *Federal-Mogul Corp. and The Torrington Co.* v. *United States*, Slip Op. 93–194 (CIT, October 7, 1993). (See Final Determination of Sales at Less than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux from France, 59 FR 14136, March 25, 1994).

We re-calculated the VAT for both Roldan and Acenor because the methodology they employed in reporting the VAT was not clearly defined. The VAT will be examined at verification and re-analyzed for the final determination.

Roldan

We calculated PP based on CIF delivered prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign brokerage and handling, foreign inland freight, ocean freight, marine insurance, U.S. brokerage and handling (including insurance), U.S. inland freight and U.S. import duties.

We made no adjustment for freight charge differentials claimed by Roldan because of the lack of data on the record concerning the nature of the adjustment claimed. We intend to obtain further information and to verify the reported data. We will revisit this issue in our final determination based on verification findings.

Acenor

We calculated PP based on ex-factory packed prices to unrelated customers. Accordingly, we made no adjustments to these reported prices.

Foreign Market Value

In order to determine whether there were sufficient sales of SSB in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of SSB to the volume of third country sales of SSB in accordance with section 773(a)(1)(B) of the Act. Based on this comparison, we determined that both respondents had viable home markets with respect to sales of SSB during the POI.

Cost of Production

Petitioners alleged that Roldan and Acenor were selling in the home market at prices below COP in the petition filed in this investigation. The Department initiated COP investigations for both respondents on January, 19, 1994. However, as stated above, the Department rescinded the original COP investigations. After reviewing petitioners' revised allegations, we re-initiated COP investigations. We requested that respondents reply to Section D of our antidumping questionnaires issued on February 28, 1994. Roldan and Acenor submitted their responses to Section D of our questionnaire on June 23, and June 27, 1994, respectively. On July 13, 1994, the Department sent Roldan and Acenor a Section D deficiency questionnaire.

In order to determine whether home market prices were below COP within the meaning of section 773(b) of the Act, we calculated COP based on the sum of the respondents' cost of materials, fabrication, general expenses and home market packing costs. We compared individual home market prices with the COPs. We tested the home market prices on a product-specific basis using Roldan's sales to unrelated customers from the database received on June 13, 1994, and Acenor's sales to unrelated customers from the database received on June 29, 1994. We compared model-specific COP to reported prices that were net of movement charges.

Following our standard practice, where we found over 90 percent of a respondent's sales of a given product were at prices above the COP, we did not disregard any below-cost sales because we determined that the respondent's below-cost sales were not made in substantial quantities. If between ten and 90 percent of a respondent's sales of a given product were at prices above the COP, we discarded only the below-cost sales if made over an extended period of time. Where we found that more than 90 percent of a respondent's sales of a given product were at prices below the COP and were sold over an extended period of time, we disregarded all sales for that model and calculated FMV based on constructed value (CV), in accordance with section 773(b) of the Act.

If sales below cost occurred in three or more months of the POI, they are considered to be made over an extended period of time. For sales made in less than three months of the POI, the extended period of time is the number of months in which the sales occur. (See, 19 U.S.C. 1677b(b)(1)).

Roldan and Acenor provided no indication that the disregarded sales were at prices that would permit recovery of all costs within a reasonable period of time and in the normal course of trade. (See, 19 U.S.C. 1677b(b)(2)).

Constructed Value (CV)

We calculated CV based on the sum of the cost of materials, fabrication, general expenses, U.S. packing costs and profit. In accordance with section 773(e)(1)(B)(i) and (ii) of the Act we: (1) Included the greater of respondents' reported general expenses or the statutory minimum of ten percent of the COM, as appropriate and; (2) for profit, we used the statutory minimum of eight percent of the sum of COM and general expenses.

Roldan

For purposes of calculating FMV, we used the sales from Roldan to its unrelated customers and CV, as described above.

For price-to-price comparisons, we calculated FMV based on delivered

prices, inclusive of packing to unrelated customers in the home market.

In light of the Court of Appeals for the Federal Circuit's decision in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* V. *United States*, 13 F.3d 398 (Fed. Cir., 1994), the Department no longer can deduct home market movement charges from FMV pursuant to its inherent power to fill in gaps in the antidumping statute. Instead, we adjust for those expenses under the circumstance-of-sale provision of 19 CFR 353.56(a) and the exporter's sales price offset provision of 19 CFR 353.56(b)(2), as appropriate. Accordingly, in the present case, we deducted post-sale home market movement charges from the FMV under the circumstance-of-sale provision of 19 CFR 353.56(a). This adjustment included home market inland freight (including inland insurance).

For both price-to-price comparisons and comparisons to CV, we made circumstance-of-sale adjustments, where appropriate, for differences in credit expenses, pursuant to 19 CFR 353.56(a)(2). We re-calculated home market and U.S. credit expenses because Roldan reported an average interest rate for a seven-month period, rather than the six-month POI. In addition, for those sales with missing shipment dates and payment dates, we calculated credit expenses based on the average payment period for the respondent's sales reported with shipment and payment dates.

We did not make a circumstance-of-sale adjustment for commissions claimed by Roldan that were paid to its parent company for export sales services performed by the parent company's commercial department. We also did not adjust for commissions paid by Roldan to the U.S. subsidiary of its parent company for marketing Roldan's products in the United States. We consider these payments to be intra-company transfers not tied directly to sales of the subject merchandise. Furthermore, we have no appropriate benchmark against which to test whether the commission arrangements between Roldan and its related party commissionaires are at arm's length. (See Final Determination of Sales at Less than Fair Value; Coated Groundwood Paper from Belgium, Finland, France, Germany and the United Kingdom, 56 FR 56359, November 4, 1992.)

We also deducted home market packing and added U.S. packing costs, in accordance with section 773(a)(1) of the Act.

For price-to-price comparisons only, we also made adjustments, where appropriate, for differences in the physical characteristics of the merchandise in accordance with section 773(a)(4)(C) of the Act. We adjusted for VAT in accordance with our practice. (*See* the "United States Price" section of this notice, above.)

We made no adjustment for freight charge differentials claimed by Roldan because of the lack of data on the record concerning the nature of the adjustment claimed. We intend to obtain further information and to verify the reported data. We will revisit this issue in our final determination based on verification findings.

Acenor

For purposes of calculating FMV, we used the sales from Acenor to its unrelated customers and CV, as described above.

For price-to-price comparisons, we calculated FMV based on packed, ex-factory and delivered prices, where applicable. We made an adjustment for home market inland freight (including inland insurance), where applicable, under the circumstance-of-sale provision of 19 CFR 353.56(a), as described above.

For price-to-price comparisons and comparisons to CV, we made circumstance-of-sale adjustments, where appropriate, for differences in credit expenses, pursuant to 19 CFR 353.56(a)(2). We re-calculated home market and U.S. credit expenses because Acenor reported its U.S. imputed credit expense in pesetas and its calculation overstated this expense because of an error in decimal placement. In addition, for those sales with missing shipment dates and payment dates, we calculated credit expenses based on the average payment period for the respondent's sales reported with shipment and payment dates.

We also deducted home market packing and added U.S. packing costs, in accordance with section 773(a)(1) of the Act.

For price-to-price comparisons only, we also made adjustments, where appropriate, for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act. We adjusted for VAT in accordance with our practice. (See the "United States Price" section of this notice, above.)

Currency Conversion

We made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York. See 19 CFR 353.60(a).

Verification

As provided in section 776(b) of the Act, we will verify the information used in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the Customs Service to suspend liquidation of all entries of SSB from Spain, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated preliminary dumping margins, as shown below. The suspension of liquidation will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/producer/exporter	Margin percent
Roldan, S.A.	25.21
Acenor, S.A.	8.96
All Others	17.89

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry, before the later of 120 days after the date of the preliminary determination or 45 days after our final determination.

Postponement of Final Determination

Pursuant to section 735(a)(2)(A) of the Act, on July 26, 1994, respondents accounting for all exports to the United States during the POI requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until 135 days after the date of publication of an affirmative preliminary determination. Pursuant to 19 CFR 353.20(b), because our preliminary determination is affirmative, and no compelling reasons for denial exist, we are postponing the date of the final determination until the 135th day after the date of publication of this notice in the **Federal Register**.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than November

9, 1994, and rebuttal briefs no later than November 16, 1994. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to give interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on November 18, 1994, at 2:00 p.m. at the U.S. Department of Commerce, Room 1414, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B–099, within ten days of the publication of this notice in the **Federal Register**. Request should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentation will be limited to issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15(a)(4).

Dated: July 28, 1994.

Barbara R. Stafford,

Acting Assistant Secretary for Investigations.

[FR Doc. 94–19071 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–P

[C–351–609]

Certain Forged Steel Crankshafts From Brazil Intent To Terminate Suspended Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of intent to terminate suspended investigation.

SUMMARY: The Department of Commerce (the Department) is notifying the public of its intent to terminate the suspended countervailing duty investigation on Certain Forged Steel Crankshafts from Brazil. Domestic interested parties who object to this termination must submit their comments in writing not later than 30 days from the publication date of this notice.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Jonathan Freilich or Jean Kemp, Office of Agreements Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Ave., NW., Washington, DC 20230; telephone (202) 482–3793.

SUPPLEMENTARY INFORMATION:

Background

The Department may terminate a suspended investigation if the Secretary of Commerce concludes that it is no longer of interest to interested parties. Accordingly, as required by 19 CFR § 355.25(d)(4) (1994), we are notifying the public of our intent to terminate the suspended investigation on Certain Forged Steel Crankshafts from Brazil for which the Department has not received a request to conduct an administrative review for over four consecutive annual anniversary months.

In accordance with 19 CFR § 355.25(d)(4)(iii), if domestic interested parties do not object to the Department's intent to terminate the suspended investigation pursuant to this notice, or interested parties (as defined in 19 CFR 355.2(i)) do not request an administrative review in accordance with the Department's notice of opportunity to request administrative review, we shall conclude that the suspended investigation is no longer of interest to interested parties and shall proceed with the termination.

Opportunity to Object

Not later than 30 days after the publication date of this notice, domestic interested parties may object to the Department's intent to terminate this suspended investigation. Any submission objecting to a termination must include the name and case number of the suspension agreement and a statement that explains how the objecting party qualifies as a domestic interested party under 19 CFR 355.2(i)(3), (i)(4), (i)(5), or (i)(6).

Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room B–099, U.S. Department of Commerce, Washington, DC 20230. Attention: Roland L. MacDonald, Director, Office of Agreements Compliance.

This notice is in accordance with 19 CFR 355.25(d)(4)(i).

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93–19073 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–M

University of Minnesota, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 94–027. *Applicant:* University of Minnesota, Minneapolis, MN 55455. *Instrument:* Muscle Research System, Model OPT1S. *Manufacturer:* Scientific Instruments, Germany. *Intended Use:* See notice at 59 FR 16188, April 6, 1994. *Reasons:* The foreign instrument provides: (1) a complete system to measure contractile force to less than 0.2 ng, (2) length detection with time resolution of 1.0 ms, and (3) special tweezers for muscle fiber attachment. *Advice Received From:* National Institutes of Health, June 23, 1994.

Docket Number: 94–031. *Applicant:* University of California, Los Angeles, Los Angeles, CA 90024-6951. *Instrument:* pO_2 Histograph. *Manufacturer:* Eppendorf, Germany. *Intended Use:* See notice at 59 FR 16188, April 6, 1994. *Reasons:* The foreign instrument provides: (1) a rugged steel probe inserted stepwise under computer control and (2) partial 0_2 pressure data statistically evaluated and displayed as the average tissue oxygen supply. *Advice Received From:* National Institutes of Health, June 23, 1994.

Docket Number: 94–035. *Applicant:* University of California, Santa Cruz, Santa Cruz, CA 95064. *Instrument:* Mass Spectrometer, Model PRISM Series II. *Manufacturer:* Fisons Instruments, United Kingdom. *Intended Use:* See notice at 59 FR 16188, April 6, 1994. *Reasons:* The foreign instrument provides an internal precision of 0.006 per mil for 75 bar µl samples of $C0_2$ and a dual micro-inlet. *Advice Received From:* National Institutes of Health, June 23, 1994.

Docket Number: 94–040. *Applicant:* University of Wisconsin-Madison, Madison, WI 53706. *Instrument:* Laser System. *Manufacturer:* Microlase

Optical Systems Ltd., United Kingdom. *Intended Use:* See notice at 59 FR 18371, April 18, 1994. *Reasons:* The foreign instrument provides: (1) compact and efficient "diode-pump" technology, (2) 1 picosecond pulses and (3) optical power to 2.5 kw. *Advice Received From:* National Institutes of Health, June 23, 1994.

The National Institutes of Health advises that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) they know of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Pamela Woods,

Acting Director, Statutory Import Programs Staff.

[FR Doc. 94–19074 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–DS–F

National Institute of Standards and Technology

[Docket No. 940709–4209]

Availability of Report of the Federal Internetworking Requirements Panel

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice of availability of report; request for comments.

SUMMARY: In May 1994, the Federal Internetworking Requirements Panel (FIRP), which was established by NIST to study issues and recommend actions which the Federal Government can take to address the short- and long-term issues of interworking and convergence of networking protocols, issued its final report. An interagency study group composed of nine Federal government agency staff members, the Panel was appointed at the request of the Office of Management and Budget in collaboration with the Federal Networking Council and the Federal Information Resources Policy Council.

The Panel concluded that no single networking protocol suite meets the full range of government requirements for data internetworking. The Panel recommended that Federal government agencies select standards based on their interoperability needs, existing infrastructure, costs, marketplace products, and status as standards. In addition, the Panel made other recommendations concerning Federal internetworking as a component of the National Information Infrastructure (NII).

NIST has proposed changes to Federal Information Processing Standards (FIPS) 146–1, Government Open Systems Interconnection Profile (GOSIP), and FIPS 179, Government Network Management Profile (GNMP), based on the recommendations of the Panel concerning government use of open voluntary standards for network protocols.

NIST solicits the views of industry, the public, and State and local governments concerning the Panel's recommendations on long-term issues related to internetworking. The Report of the Federal Internetworking Requirements Panel can be obtained in any of the following ways:

Anonymous file transfer can be achieved through FTP, FTAM and Gopher. Electronic files are named firp-report.* and f-report.*.

For anonymous FTP:

1. ftp to osi.ncsl.nist.gov (129.6.48.100)
2. respond to the "login:" prompt with user name "anonymous" (do not type the quotes)
3. respond to the "password:" prompt with your E-mail address.
4. you are now logged in. Use "cd" to change directory to ./pub/firp. Use "ls" or "dir" to get directory listings. Use "get" to transfer a file.

For anonymous FTAM:

Paddr = {1,1,1,47:0005:80:
005A00:0000:0001:E137:
080020079EFC:00}
userid =anon, no password, realstore = unix
The corresponding "ISODE isodentities" entry is:
osi.ncsl.nist.gov filestone null/ #1/ #1/#1/NS+47000580005a 0000000001e137080020079efc00

Questions regarding these services should be sent via SMTP mail to staff@osi.ncsl.nist.gov. An electronic mail request for the report may be sent to: firp@osi.ncsl.nist.gov.

Paper copies of the report are available from Joan Wyrwa, Technology Building, Room B217, NIST, Gaithersburg, MD 20899; telephone: (301) 975–3643; facsimile: (301) 590–0932.

DATES: Comments on the Report of Federal Internetworking Requirements Panel should be submitted on or before November 2, 1994.

ADDRESSES: Written comments concerning the Panel's report should be sent to: Director, Computer Systems Laboratory, ATTN: FIRP Report, Technology Building, Room B154, National Institute of Standards and Technology, Gaithersburg, MD 20899.

FOR FURTHER INFORMATION CONTACT: Anastase Nakassis, National Institute of Standards and Technology, Gaithersburg, MD 20899, (301) 975–3632. E-mail: firp.staff@osi.ncsl.nist.gov.

Dated: July 28, 1994.

Raymond G. Kammer,

Deputy Director.

[FR Doc. 94–19065 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–CN–M

National Oceanic and Atmospheric Administration

[I.D. 071494C]

Marine Mammals

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

ACTION: Issuance of scientific research permit No. 932 (P317B).

SUMMARY: Notice is hereby given that Mr. Jeff Goodyear, Department of Zoology, University of British Columbia, Vancouver, B.C., Canada, V8R 1S4, has been issued a permit to take humpback whales (*Megaptera novaeangliae*), fin whales (*Balaenoptera physalus*), and northern right whales (*Eubalaena glacialis*) for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713–2289); and

Director, Northeast Region, NMFS, NOAA, One Blackburn Drive, Gloucester, MA 01930 (508/281–9200).

SUPPLEMENTARY INFORMATION: On May 11, 1994, notice was published in the **Federal Register** (59 FR 24406) that a request for a scientific research permit to tag humpback whales (*Megaptera novaeangliae*), fin whales (*Balaenoptera physalus*), and northern right whales (*Eubalaena glacialis*) had been submitted by the above-named individual. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered fish and wildlife (50 CFR part 222).

Dated: July 27, 1994.

William W. Fox, Jr., Ph.D.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94–18973 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–22–F

[I.D. 072694C]

Endangered Species; Permits

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

ACTION: Issuance of Modification 4 to Scientific Research and Enhancement Permit 795 (P503A).

On June 27, 1994, an application was filed by the Idaho Department of Fish and Game for Modification 4 to Permit 795 (P503A) for a take of listed species as authorized by the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531-1543) and the NMFS regulations governing listed fish and wildlife permits (50 CFR parts 217-222).

Permit 795 was issued on July 29, 1992, and subsequently modified three times, as authorized by the ESA. The permit authorizes scientific research and enhancement activities involving listed Snake River sockeye salmon (Oncorhynchus nerka) through December 31, 1997.

For Modification 4 of this permit, IDFG will release approximately 500 more of the progeny of the listed Redfish Lake 1991 sockeye outmigrants (artificially spawned in 1993) into two net pens in Redfish Lake in 1994 only. Modification 3 of this permit authorizes the release of up to 9,000 of these fish in 1994. Also in 1994, IDFG will release approximately 450 more listed sockeye fingerlings (1993 brood progeny of Redfish Lake anadromous sockeye that returned in 1993) into net pens in Redfish Lake. Modification 3 authorizes the release of up to 1,200 of these fish in 1994. All of the juveniles will be released from the net pens into Redfish Lake in September-October, 1994.

Also for Modification 4, IDFG will release additional progeny of the adult, listed, Snake River sockeye salmon that returned to Redfish Lake in 1991. In 1994 only, approximately 4,000 listed, artificially propagated, juveniles will be released directly into Redfish Lake as presmolts in November-December, 1994 and allowed to overwinter under natural conditions in the lake. These releases were not considered for Modification 3 because the fish developed quicker than IDFG anticipated and because the 1991 adults matured and spawned at unusual times. IDFG plans to culture these fish to reach a target size consistent with the size of the juveniles authorized to be released from the net pens in Redfish Lake.

Notice is hereby given that on July 27, 1994, as authorized by the provisions of the ESA, NMFS issued Modification 4 to Permit Number 795 for the above taking, subject to certain conditions set forth therein.

Issuance of this modification, as required by the ESA, was based on a finding that such modification: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the listed species which is/are the subject of this permit; (3) is consistent with the purposes and policies set forth in section 2 of the ESA. This permit was also issued in accordance with and is subject to parts 217-222 of Title 50 CFR, the NMFS regulations governing listed species permits.

The application, permit, and supporting documentation are available for review by interested persons in the following offices, by appointment:

Office of Protected Resources, NMFS, 1335 East-West Highway, Silver Spring, MD 20910–3226 (301–713–2322); and

Environmental and Technical Services Division, NMFS, NOAA, 911 North East 11th Ave., Room 620, Portland, OR 97232 (503-230-5400).

Dated: July 27, 1994.

William W. Fox, Jr.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94–18974 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–22–F

National Telecommunications and Information Agency

National Performance Benchmarking Program Work Session

AGENCY: Institute for Telecommunications Sciences, National Telecommunications and Information Administration (NTIA), Department of Commerce.

ACTION: Notice of work session.

SUMMARY: The Institute for Telecommunications Sciences (ITS) at NTIA and the Computer Science Laboratory (CSL) at the National Institute of Standards and Technology (NIST) announce a work session targeted at defining a National Wireless Performance Benchmarking Program to identify common approaches for measuring the performance of wireless communications systems or components. This work session is directed at technical decisionmakers involved in wireless systems. Its purpose is to gather information on industry needs that will enable NTIA, NIST, independent laboratories, and the wireless industry to develop and provide performance measures to promote the development and consumption of wireless products and services. This information will be used to plan the joint National Wireless Performance Benchmarking Program.

DATES: The work session is scheduled as follows:

1. August 16, 1994, 1:00 p.m. to 5:00 p.m.

2. August 17, 1994, 8:00 a.m. to 5:00 p.m.

ADDRESSES:

1. Gaithersburg Hilton Hotel, Gaithersburg, Maryland.

2. Gaithersburg Hilton Hotel, Gaithersburg, Maryland.

FOR FURTHER INFORMATION CONTACT: Kenneth C. Allen at (303) 497–5474 (telephone) or (303) 497–3680 (fax) or Robert E. Toense at (301) 975–2930 (telephone) or (301) 840–1357 (fax).

SUPPLEMENTARY INFORMATION: Space is limited and early registration is encouraged. Participants are expected to provide, one day in advance, a one-page technical position statement on requirements for a national wireless performance benchmarking program. Statements will be used by NTIA and NIST to identify common areas for discussion at the work session.

Larry Irving,

Assistant Secretary for Communications and Information.

[FR Doc. 94–18999 Filed 8–3–94; 8:45 am]

BILLING CODE 3510–60–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in the United Arab Emirates

July 29, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing a limit.

EFFECTIVE DATE: July 29, 1994.

FOR FURTHER INFORMATION CONTACT: Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of this limit, 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 limit for Category 369–O is being increased for carryforward.

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 58 FR 62645, published on November 29, 1993). Also see 59 FR 2827, published on January 19, 1994.

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

July 29, 1994.

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 January 14, 1994, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, man-made fiber, silk blend and other vegetable fiber textile products, produced or manufactured in the United Arab Emirates and exported during the twelve-month period which began on January 1, 1994 and extends through December 31, 1994.

Effective on July 29, 1994, you are directed to amend the directive dated January 14, 1994 to increase to the limit for Category 369–O [1] to 530,606 kilograms [2], as provided under the terms of the current bilateral agreement between the Governments of the United States and the United Arab Emirates.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

[1] The limit has not been adjusted to account for any imports exported after December 31, 1993.

[2] Category 369–O: all HTS numbers except 6307.10.2005 (Category 369–S).

Sincerely,
Rita D. Hayes,
Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–18986 Filed 8–3–94; 8:45 am]
BILLING CODE 3510–DR–F

CONSUMER PRODUCT SAFETY COMMISSION

Petition Requesting Exemption From Child-Resistant Packaging Requirements for Iron-Containing Dietary Supplements

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: Douglas Ingoldsby of Nutritech, Inc., has petitioned the Commission for an exemption from the child-resistant packaging requirements for dietary supplements containing iron, 16 CFR 1700.14(a)(13). The exemption would be for unflavored, unsweetened powders. The petition contends that child-resistant packaging is not needed for this product because a child would gag before ingesting a toxic amount. The Commission solicits written comments concerning the petition from all interested parties.

DATES: Comments on the petition should be received in the Office of the Secretary by October 3, 1994.

ADDRESSES: Comments on the petition should be mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 504–0800, or delivered to the Office of the Secretary, Consumer Product Safety Commission, room 501, 4330 East-West Highway, Bethesda, Maryland 20814. Comments should be captioned "Petition PP 94–1 for Exemption of Iron-Containing Supplement." Copies of the petition are available by writing or calling the Office of the Secretary.

FOR FURTHER INFORMATION CONTACT: Sadye E. Dunn, Secretary, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 504–0800 ext. 1502.

SUPPLEMENTARY INFORMATION: The Commission has docketed correspondence from Douglas Ingoldsby of Nutritech, Inc., as a petition for an exemption from the child-resistant packaging requirement for certain dietary supplements containing iron that is codified at 16 CFR 1700(a)(13). That requirement applies to supplements containing "an equivalent of 250 mg or more of elemental iron, from any source, in a single package in concentrations of 0.025 percent or more on a weight to volume basis for liquids and 0.05 percent or more on a weight-to-weight basis for nonliquids * * *." Mr. Ingoldsby requests that the Commission exempt "an unsweetened, unflavored, bland multi-vitamin, mineral, amino acid powder that contains no colorings, flavoring agents, [or] sweeteners of any kind and is virtually unpalatable until mixed with juice." Petitioner contends that child-resistant requirements for this product are unnecessary because, until it is mixed with juice, it is so unpalatable that a child will gag before ingesting a toxic amount.

The Commission solicits comment on the issues presented by the petition. Comments on the petition should be received in the Office of the Secretary by October 3, 1994.

Interested parties may obtain a copy of the petition by writing or calling the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–0800. A copy of the petition is available for inspection from 8:30 a.m. to 5 p.m., Monday through Friday, in the Commission's Public Reading Room, room 501, 4330 East-West Highway, Bethesda, Maryland 20814.

Dated: July 29, 1994.

Sadye E. Dunn,

Secretary of the Commission.

[FR Doc. 94–18937 Filed 8–3–94; 8:45 am]
BILLING CODE 6355–01–P

[CPSC Docket No. 94–C0012]

S&D Importing Co., a Limited Partnership; Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Provisional Acceptance of a Settlement Agreement under the Consumer Product Safety Act.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e)–(h). Published below is a provisionally-accepted Settlement Agreement with S&D Importing Co., a limited partnership.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with

the Office of the Secretary by August 19, 1994.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 94–C0012, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Leonard H. Goldstein, Trial Attorney, Office of Compliance and Enforcement, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504–0626.

SUPPLEMENTARY INFORMATION: (attached)

Dated: July 28, 1994.

Sadye E. Dunn,

Secretary.

Settlement Agreement and Order

1. S&D Importing Co. (hereinafter, "S&D"), a limited partnership, enters into this Settlement Agreement with the Consumer Product Safety Commission, and agrees to the entry of the Order described herein. The purpose of the Settlement Agreement and Order is to settle the allegations of the Commission staff that S&D knowingly caused the introduction or delivery for introduction into interstate commerce of certain banned hazardous toys, in violation of Section 4(a) of the Federal Hazardous Substances Act, 15 U.S.C. 1263(a).

I. Jurisdiction

2. The Commission has jurisdiction over S&D and the subject matter of this Settlement Agreement pursuant to Section 30(a) of the Consumer Product Safety Act (hereinafter, "CPSA"), 15 U.S.C. 2079(a), and Sections 2(f)(1)(D), 4(a), and 5(c) of the Federal Hazardous Substances Act (hereinafter, "FHSA"), 15 U.S.C. 1261(f)(1)(D), 1263(a), and 1264(c).

II. The Parties

3. The "staff" is the staff of the Consumer Product Safety Commission, an independent regulatory agency of the United States established pursuant to section 4 of the CPSA, 15 U.S.C. 2053.

4. S&D is a limited partnership created on December 24, 1987, under the laws of the State of New York, with its principal offices located at 1200 Shames Drive, Westbury, New York. The sole general partner of S&D is Gem Fulfillment Corp., 1530 McDonald Ave., Brooklyn, New York. The president of Gem Fulfillment Corp. is David Weldler. The limited partners of S&D are Jerry Williams and Steven Brown. S&D is engaged in the business of importing general merchandise for resale to other companies.

III. Allegations of the Staff

5. In 1988, S&D imported approximately 698,000 "Santa Bear" stuffed toy animals from China. The toys are subject to, but some failed to comply with, the Commission's Small Parts Regulation, 16 CFR part 1501, in that when tested by the staff in 1990 under 16 CFR 1500.52, (a) one or more parts of some of the tested toys separated and (b) one or more of the parts that separated from the tested toys fit completely within the test cylinder, as set forth in 16 CFR 1501.4. Accordingly, some of the Santa Bears present a "mechanical hazard" within the meaning of section 2(s) of the FHSA, 15 U.S.C. 1261(s).

6. Most of the Santa Bears identified in paragraph 5 above were sold to the public by Raffoler, Ltd., a mail order business that is owned by Jerry Williams and Stephen Brown and is located at the same address as S&D.

7. Some of the Santa Bears identified in paragraph 5 above are a "hazardous substance" pursuant to section 2(f)(1)(D) of the FHSA, 15 U.S.C. 1261(f)(1)(D). Some of the Santa Bears identified in paragraph 5 above are also a "banned hazardous substance" pursuant to section 2(q)(1)(A) of the FHSA, 15 U.S.C. § 1261(q)(1)(A); and 16 CFR 1500.18(a)(9).

8. On November 7, 1990, the staff sent a certified letter to S&D advising the firm that the Santa Bear contains small parts and is considered to be a banned hazardous substance. Notice was provided that continued sale of the product is prohibited by section 4 of the FHSA, 15 U.S.C. 1263, and is punishable by penalties described in section 5 of the Act, 15 U.S.C. § 1264. At this time, S&D had an unsold inventory of approximately 110,000 Santa Bears.

9. On November 15, 1990, S&D attempted to return its inventory of Santa Bears to the import agent from whom S&D had purchasedthe goods. On November 20, 1990, the import agent advised S&D that it would not accept return of the Santa Bears.

10. In or around early December 1990, an employee of S&D asked a third party to attempt to find prospective purchasers of the Santa Bears. The third party found a prospective purchaser and so advised the employee of S&D. The sale of the Santa Bears was consummated and S&D received proceeds from the sale in the form of credit from the import agent for goods previously purchased and for goods to be purchased in the future.

11. After receipt of the certified letter of November 7, 1990, from the staff, as described in paragraph 8 above, S&D knowingly caused the introduction or delivery for introduction into interstate commerce of its remaining inventory of approximately 110,000 Santa Bears, in violation of section 4(a) of the FHSA, 15 U.S.C. 1263(a), and for which a civil penalty may be improved pursuant to section 5(c) of the FHSA, 15 U.S.C. 1264(c).

IV. Response of S&D Importing Co.

12. S&D denies the allegations of the staff set forth in paragraphs 5 through 11 above, including the allegations that it has knowingly caused the introduction into commerce of the aforesaid banned hazardous toys and that it has violated the FHSA.

V. Agreement of the Parties

13. The Consumer Product Safety Commission has jurisdiction over S&D and the subject matter of this Settlement Agreement and Order under the following Acts: Consumer Product Safety Act, 15 U.S.C. 2051, *et seq.*, and the Federal Hazardous Substances Act, 15 U.S.C. 1261, *et seq.*

14. S&D agrees to pay to the Commission a civil penalty in the amount of ONE HUNDRED AND SEVENTY FIVE THOUSAND DOLLARS ($175,000). Payment of the civil penalty shall settle fully all claims by the United States Gvernment arising out of the staff's allegations set forth in paragraphs 5 through 11.

15. The Commission does not make any determination that S&D violated the FHSA. The Commission and S&D agree that this Settlement Agreement is entered into for the purposes of settlement only.

16. Upon final acceptance of this Settlement Agreement by the Commission and issuance of the Final Order, S&D knowingly, voluntarily and completely, waives any rights it may have in this matter (1) to an administrative or judicial hearing, (2) to judicial review or other challenge or contest of the validity of the Commission's actions, (3) to a determination by the Commission as to whether S&D failed to comply with the FHSA as alleged, and (4) to a statement of findings of fact and conclusions of law.

17. For purposes of section 6(b) of the CPSA, 15 U.S.C. 2055(b), this matter shall be treated as if a compliant had issued; and, the Commission may publicize the terms of the Settlement Agreement and Order.

18. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, this Settlement Agreement and Order shall be placed on

the public record and shall be published in the **Federal Register** in accordance with the procedures set forth in 16 CFR 118.20(e)–(h). If the Commission does not receive any written request not to accept the Settlement Agreement and Order within 15 days, the Settlement Agreement and Order will be deemed finally accepted on the 16th day after the date it is published in the **Federal Register**.

19. The parties further agree that the Commission shall issue the attached Order incorporated herein by reference; and that a violation of the Order shall subject S&D to appropriate legal action.

20. No agreement, understanding, representation, or interpretation not contained in this Settlement Agreement and Order may be used to vary or to contradict its terms.

21. The provisions of the Settlement Agreement and Order shall apply to S&D and each of its successors and assigns.

22. By their signatures set forth below, Raffoler, Ltd., a corporation, and Jerry Williams and Stephen Brown, individually, agree to serve as guarantors of payment to the Commission of the civil penalty specified in paragraph 14 of this Settlement Agreement.

Respondent S&D Importing Co.

By: GEM Fulfillment Corp. General Partner

Dated: June 14, 1994.

David Weldler,

President.

Guarantors of Payment of Civil Penalty

Dated: June 9, 1994.

Jerry Williams,

Individually, and as an officer of Raffoler, Ltd.

Dated: June 9, 1994.

Stephen Brown,

Individually, and as an officer of Raffoler, Ltd.

Commission Staff

David Schmeltzer,

Assistant Executive Director Office of Compliance and Enforcement.

Eric L. Stone,

Acting Director, Division of Administrative Litigation Office of Compliance and Enforcement.

Leonard H. Goldstein,

Trial Attorney, Division of Administrative Litigation, Office of Compliance and Enforcement.

Order

Upon consideration of the Settlement Agreement entered into between S&D Importing Co., a limited partnership, and the Consumer Product Safety Commission; and the Commission having jurisdiction over the subject matter and S&D Importing Co.; and it appearing that the Settlement Agreement is the public interest, it is

Ordered, That the Settlement Agreement be and hereby is accepted, as indicated below; and it is

Further ordered, That, within twenty (20) days after service of the Final Order of the Commission accepting the Settlement Agreement, S&D Importing Co. shall pay to the Commission a civil penalty in the amount of one hundred and seventy-five thousand dollars ($175,000). Payment of the civil penalty shall settle fully all claims of the United States government arising out of the allegations of the Commission's staff set forth in paragraphs five through eleven of the Settlement Agreement.

Provisionally accepted and Provisional Order issued on the 28th day of July, 1994.

By order of the Commission.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

DEPARTMENT OF DEFENSE

Office of the Secretary

Advisors to the National Security Education Board

AGENCY: Office of the Assistant Secretary of Defense, Strategy and Requirements.

ACTION: Notice of meeting.

SUMMARY: Purusant to Public Law 92–463, notice is hereby given of a forthcoming meeting of advisors to the National Security Education Board. The purpose of the meeting is to review and make recommendations to the National Security Education Board concerning the requirements established by the David L. Boren National Security Education Act, Title VIII of Public Law 102–183, as amended.

DATES: September 19–20, 1994.

ADDRESSES: University of Arizona Tucson, Arizona.

FOR FURTHER INFORMATION CONTACT: Mr. Edmond J. Collier, Assistant Director for External Affairs, National Security Education Program, 1101 Wilson Blvd.—suite 1210, Rosslyn, VA 22209; (703) 696–1991.

SUPPLEMENTARY INFORMATION: The advisors meeting is open to the public.

Dated: August 1, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–19022 Filed 8–3–94; 8:45 am]

BILLING CODE 5000–04–M

National Security Education Board Meeting

AGENCY: Office of the Assistant Secretary of Defense, Strategy and Requirements.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Public Law 92–463, notice is hereby given of a forthcoming meeting of the National Security Education Board. The purpose of the meeting is to review and make recommendations to the Secretary of Defense concerning requirements established by the David L. Boren National Security Education Act, Title VIII of Public Law 102–183, as amended.

DATES: October 24, 1994.

ADDRESSES: Wyndham Bristol Hotel, 2430 Pennsylvania Avenue, NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Mr. Edmond J. Collier, Assistant Director for External Affairs, National Security Education Program, 1101 Wilson Blvd.—suite 1210, Rosslyn, VA 22209; (703) 696–1991.

SUPPLEMENTARY INFORMATION: The Board meeting is open to the public.

Dated: August 6, 1994

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–19023 Filed 8–3–94; 8:45 am]

BILLING CODE 5000–04–M

Department of the Army

Request for Nominations to the Inland Waterways Users Board

AGENCY: Assistant Secretary of the Army (Civil Works), DOD.

ACTION: Notice.

SUMMARY: Section 302 of Public Law 99–862 established the inland Waterways Users Board. The Board is an independent Federal advisory committee. Its eleven members are appointed by the Secretary of the Army. This noticeis to solicit nominations for five appointments or reappointments to two-year terms that will begin January 1, 1995.

EFFECTIVE DATE: August 4, 1994.

ADDRESSES: Office of the Assistant Secretary of the Army (Civil Works), Department of the Army, ATTN: Inland Waterways Users Board Nominations Committee, Washington, DC 20310–0103.

FOR FURTHER INFORMATION CONTACT: Mr. John Zirschky, Acting Assistant Secretary of the Army (Civil Works), (703) 697–4671.

SUPPLEMENTARY INFORMATION: The selection, service and appointment of board members are covered by provisions of Section 302 of Public Law 99–662. The substance of those provisions is as follows: *Selection.* Members are to be selected from the spectrum of commercial carriers and shippers using the inland and intracoastal waterways, to represent geographical regions and to be representative of waterway commerce as determined by commodity ton-mile statistics. *Service.* The Board is required to meet at least semi-annually to develop and make recommendations to the Secretary of the Army on waterways construction and rehabilitation priorities and spending levels for commercial navigation improvements, and report its recommendations annually to the Secretary and the Congress. *Appointment.* The operation of the Board and appointment of its members are subject to the Federal Advisory Committee Act (Public Law 92–463 as amended) and Departmental implementing regulations. Members serve without compensation, but their expenses due to Board activities are reimbursable.

The considerations specified in Section 302 for the selection of the Board members, and certain terms used therein, have been interpreted, supplemented, or otherwise clarified as follows: *Carriers and Shippers.* The law uses the terms "primary users and shippers." Primary users has been interpreted to mean the providers of transportation services on inland waterways such as barge or towboat operators. Shippers has been interpreted to mean the purchasers of such services for the movement of commodities they own or control. Individuals are appointed to the Board, but the must be either a carrier or a shipper, or represent a firm that is a carrier or shipper. For that purposes a trade or regional association is neither a shipper or primary user. *Geographical Representation.* The law specifies "various" regions. For the purpose of selecting Board members, the waterways subjected to fuel taxes and described in Public Law 95–502, as amended, have been aggregated into six regions. These are: (1) the Upper Mississippi River and its tributaries above the mouth of the Ohio; (2) the Lower Mississippi River and its tributaries below the mouth of the Ohio and above Baton Rouge; (3) the Ohio River and its tributaries; (4) the Gulf Intracoastal Waterway in Louisiana and Texas; (5) the Gulf Intracoastal Waterway east of New Orleans and associated fuel-taxed waterways east of New Orleans and associated fuel-taxed waterways including the Tennessee-Tombigbee, plus the Atlantic Intracoastal Waterway below Norfolk; and (6) the Columbia-Snake River System and Upper Willamette. The intent is that each region shall be represented by at least one board member, with that representation determined by the regional concentration of the individual's traffic on the waterways. *Commodity Representation.* Waterway commerce has been aggregated into six commodity categories based on "inland" ton-miles shown in *Waterborne Commerce of the United States.* In rank order they are: (1) Farm and Food Products; (2) Coal and Coke; (3) Petroleum, Crude and Products; (4) Minerals, Ores, and Products; [5) Chemicals and Allied Products; and (6) All other. A considerable in the selection of Board members will be, that the commodities carried or shipped by those individuals or their firms will be reasonably representative of the above commodity categories.

Reflecting preceding selection criteria, the present representation by Board members is as follows:

The five members whose terms expire December 31, 1994, include one shipper representative representing the Upper Mississippi River region (Region 1) and farm and food products, ethanol and coal; one shipper representative representing the Lower Mississippi River region (Region 2), and farm and food products; one carrier representative representing the Gulf Intracoastal Waterway in Louisiana and Texas (Region 4), and petroleum and petroleum products; one carrier representative representing the Ohio River region (Region 3), and coal and coke, minerals, and metals, petroleum products, farm and food products and chemicals; and, one carrier representative representing the Columbia-Snake River system and Upper Willamette (Region 6), and farm and food products, petroleum products, chemicals, containers, and forest products. The members representing Regions 2, 3 and 6 are eligible for reappointment.

The six members whose terms expire December 31, 1995, include three shipper representatives representing (1) the Lower Mississippi River (Region 2), and farm and food products, (2) the Ohio River (Region3), and coal, and (3) the East Gulf region (Region 5), and coal; two carrier representatives representing the Ohio River region (Region 3), and farm and food products, coal, petroleum, chemicals, minerals and metals; and one shipper/carrier representative representing the Ohio River region (Region 3), and coal.

Nominations to replace members whose terms expire December 31, 1994, may be made by individuals, firms, or associations. Nominations should state the region to be represented and whether the nominee is to represent carriers or shippers. Information should be provided on the nominee's personal qualifications and the commercial operations of the carrier and/or shipper with whom the nominee is associated. The latter information should show the actual or estimated ton-miles of commodities carried or shipped on inland waterways in a recent year (or years) using the waterway regions and commodity categories previously listed.

Nomations received in response to last year's **Federal Register** notice published August 9, 1993, have been retained for consideration for appointment along with nominations received in response to this **Federal Register** notice. Renomination is not required but may be desirable.

DEADLINE FOR NOMINATIONS: All nominations must be received at the address shown above no later than August 29, 1994.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 94–19038 Filed 8–3–94; 8:45 am]

BILLING CODE 3710–02–M

Membership Senior Executive Service Performance Review Boards

AGENCY: Assistant Secretary of the Army, Manpower & Reserve Affairs, DOD.

ACTION: Notice.

SUMMARY: Section 4314(c) (1) through (5) of Title 5, U.S. Code, requires each agency to establish in accordance with regulations, one or more Senior Executive Service Performance Review Boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

EFFECTIVE DATE: The effective date of this notice is August 1, 1994.

ADDRESSES: Senior Executive Service Office, Assistant Secretary of the Army, Manpower & Reserve Affairs, 111 Army, the Pentagon, room 2C670, Washington, DC 20310–0111.

FOR FURTHER INFORMATION CONTACT:

Jeanne Raymos, (703) 695–2975.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

The members of the Performance Review Board for the United States Army Office, Secretary of the Army are:

1. Mr. Anthony H. Gamboa, Deputy General Counsel (Acquisition), Office of the General Counsel
2. Mr. Thomas W. Taylor, Deputy General Counsel (Operations and Personnel), Office of the General Counsel
3. Mr. David Borland, Director, U.S. Army Information System Selection and Acquisition Agency, Director of Information Systems, Command, Control and Computers
4. Mr. David E. White, Director of Plans and Programs, Director of Information Systems, Command, Control and Computers
5. Mr. Thomas Druzgal, Deputy Auditor General, U.S. Army Audit Agency
6. Mr. Thomas W. Brown, Director, Acquisition and Force Management Audits, U.S. Army Audit Agency
7. Dr. Morgan R. Rees, Deputy Assistant Secretary of the Army (Planning Policy and Legislation), Assistant Secretary of the Army (Civil Works)
8. Mr. Steven Dola, Deputy Assistant Secretary of the Army (Management & Budget), Assistant Secretary of the Army (Civil Works)
9. Mr. Eric A. Orsini, Deputy Assistant Secretary of the Army (Logistics), Assistant Secretary of the Army (Installation, Logistics and Environment)
10. Mr. Lewis D. Walker, Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health), Assistant Secretary of the Army (Installation, Logistics and Environment)
11. Ms. Carol A. Smith, Deputy Assistant Secretary of the Army for Civilian Personnel and Equal Employment Opportunity Policy, Assistant Secretary of the Army, Manpower and Reserve Affairs/ Director of Civilian Personnel, Directorate of the Chief of the Staff of Personnel, Department of the Army
12. Mr. Todd A. Weiler, Deputy Assistant for Training, Education and Community Support, Assistant Secretary of the Army (M&RA)
13. Mr. William K. Takahoshi, Special Assistant, Office of the Under Secretary
14. Mr. John F. Gehrig, Director, Test and Evaluation Management Agency, Deputy Under Secretary of the Army (Operations Research)
15. Mr. J. Douglas Sizelove, Special Assistant for Electronic Systems, Deputy Under Secretary of the Army (Operations Research)
16. Dr. Richard Chait, Director, Research, Assistant Secretary of the Army (Research, Development and Acquisition)
17. Mr. Maurice R. Donnelly, Director, Plans, Programs & Resources, Assistant Secretary of the Army (Research, Development and Acquisition)
18. Ms. Helen T. McCoy, Assistant Secretary of the Army (Financial Management)
19. Dr. Robert W. Raynsford, Special Advisor for Economic Policy & Productivity Programs, Assistant Secretary of the Army (Financial Management)
20. Ms. Barbara A. Leiby, Deputy for Operations, Support, and Business Activities, Assistant Secretary of the Army (Financial Management)

[FR Doc. 94–19039 Filed 8–3–94; 8:45 am]

BILLING CODE 3710–08–M

DELAWARE RIVER BASIN COMMISSION

Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold a public hearing on Wednesday, August 10, 1994. The hearing will be part of the Commission's regular business meeting which is open to the public and scheduled to begin at 10:00 a.m. in Room 620 of the New York State Department of Environmental Conservation offices at 50 Wolf Road, Albany, New York.

An informal conference among the Commissioners and staff will be open for public observation at 9:30 a.m. at the same location and will include status reports on the Upper Delaware ice diversion project and a proposal to revise Commission water supply charges regulations with respect to transfers of certificates of entitlement.

The subjects of the hearing will be as follows:

Applications for Approval of the Following Projects Pursuant to Article 10.3, Article 11 and/or Section 3.8 of the Compact

1. *New Jersey-American Water Company, Inc., Western Division-Haddon System D–90–108 CP.* An application for approval of a ground water withdrawal project to supply up to 30 million gallons (mg)/30 days of water to the applicant's distribution system from new Well No. 65, and to increase the existing withdrawal limit from all wells in the Camden and Haddon Systems of 1,186 mg/30 days to 1,238 mg/30 days. The project is located in Cherry Hill Township, Camden County, New Jersey.

2. *Waynesborough Country Club D–92–9.* An application for approval of a ground water and surface water withdrawal project which supplies irrigation water for the applicant's golf course. The applicant requires an average of up to 200,000 gallons per day to irrigate the golf course. The water is pumped from an on-site pond which is supplemented by inflow from two existing on-site wells. The project is located just off Route 252 (Darby-Paoli Road) and south of Lancaster Pike in Easttown Township, Chester County, Pennsylvania.

3. *PECO Energy Company D–92–67.* A project to modify the location of the applicant's 3.7 million gallons per day (mgd) discharge (outfall 011), from its Eddystone Generation Station industrial wastewater treatment plant (IWTP), by rerouting the effluent to join either or both of the main cooling water discharge tunnels (outfalls 007 and 008). All proposed discharges are to the Delaware River, and the existing IWTP's direct discharge will be discontinued. The project is proposed in order to meet a total dissolved solids concentration limit of 1000 mg/l in the Eddystone Station discharge. The project is located south of the confluence of Crum Creek and the Delaware River in the Borough of Eddystone, Delaware County, Pennsylvania.

4. *Garden State Water Company - Blackwood District D–93–13 CP.* An application for approval of a ground water withdrawal project to: (1) Supply up to 33.5 mg/30 days of water to the applicant's distribution system from new Well Nos. 16 and 17, screened in the Mount Laurel-Wenonah Formation; (2) increase the withdrawal limit from Well Nos. 3, 6 and 7, screened in the Potomac-Raritan-Magothy Formation to 132.8 mg/30 days and; (3) reduce the withdrawal limit from Well Nos. 13, 14 and 15, screened in the Cohansey-Kirkwood Formation to 58.3 mg/30 days. The project is located in Gloucester Township, Camden County, New Jersey.

5. *Perdue Farms Inc. D–93–67.* A project to expand the existing tertiary level Perdue Farm industrial wastewater treatment plant (IWTP) at its Georgetown, Delaware, poultry processing facility. The IWTP will be modified and expanded from an average monthly capacity of 1.5 mgd to 2.0 mgd and will continue to discharge to Savannah Ditch via an outfall located to the west of Savannah Road and north of

Georgetown, in Sussex County, Delaware.

6. *Claude E. Lynch and Sons D–93–81.* An application for approval of a surface and ground water withdrawal project to supply up to 43.2 mg/30 days of water to the applicant's agricultural irrigation system from new Well Nos. 1 and 2, 16.3 mg/30 days of water from existing Pond No. 1 and to limit the withdrawal from all sources to 59.5 mg/30 days. The project is located in Kent County, Delaware.

7. *Buckingham Township D–93–82 CP.* A project to construct a 0.35 mgd lagoon/spray irrigation sewage treatment plant (STP) to serve the Cold Spring Creamery, Route 413, Buckingham Township, Bucks County, Pennsylvania. Aerated lagoons will provide secondary treatment and disinfection will be by chlorine contact prior to discharge to expanded spray irrigation fields. The new treatment lagoons will be located in Buckingham Township approximately 1500 feet east of the Plumstead Township boundary. The expanded spray irrigation area will be located adjacent to the existing spray irrigation fields located just north of the intersection at Cold Spring Creamery Road and Route 413.

8. *South Jersey Port Corporation D–94–16.* A stream encroachment project to increase the docking capability at the Beckett Street Terminal on the Delaware River in the City of Camden, Camden County, New Jersey. The applicant proposes to fill two acres of open water inshore of Berth No. 4 and use the filled space for a cargo staging area.

9. *Warwick Township Water and Sewer Authority D–94–19 CP.* An application for the consolidation and renewal of prior approvals of ground water withdrawal projects to supply up to 21.97 mg/30 days of water to the applicant's distribution system from existing Well Nos. 1, 2, 3, 4, 5, 6 and 8, and to retain the existing withdrawal limit from all wells of 21.97 mg/30 days. The project is located in Warwick Township, Bucks County, in the Southeastern Pennsylvania Ground Water Protected Area.

10. *Township of Lower Municipal Utilities Authority D–94–21 CP.* An application for approval of a ground water withdrawal project to supply up to 43 mg/30 days of water to the applicant's distribution system from recently acquired existing Well Nos. AP–1 and AP–2, and to limit the withdrawal from all wells to 93 mg/30 days. The project is located in Lower Township, Cape May County, New Jersey.

11. *Hatfield Quality Meats, Inc. D–94–34.* An application for approval of a ground water withdrawal project to supply up to 5.4 mg/30 days of water to the applicant's processing facility from new Well No. 10, and to increase the existing withdrawal limit of 9.5 mg/30 days from all wells to 14.9 mg/30 days. The project is located in Hatfield Township, Montgomery County, in the Southeastern Pennsylvania Ground Water Protected Area.

Documents relating to these items may be examined at the Commission's offices. Preliminary dockets are available in single copies upon request. Please contact George C. Elias concerning docket-related questions. Persons wishing to testify at this hearing are requested to register with the Secretary prior to the hearing.

Dated: July 26, 1994.

Susan M. Weisman,

Secretary.

[FR Doc. 94–18947 Filed 8–3–94; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF ENERGY

Oak Ridge Operations; Determination of Noncompetitive Financial Assistance

AGENCY: Department of Energy (DOE).

ACTION: Notice.

SUMMARY: DOE announces that pursuant to 10 CFR 600.7(b)(2)(i), it intends to issue on a noncompetitive basis a grant to Vanderbilt University, Nashville, TN, to continue providing academic training and sufficient on-the-job training to interns to enable them to function as professionals in environmental remediation and waste treatment resulting from the decontamination and decommissioning of nuclear facilities. The period of performance for the grant will be three years. The estimated cost is $833,973. First year funding will be $150,000.

PROCUREMENT REQUEST NO.: 05–940R22343.000.

PROJECT SCOPE: Vanderbilt University's May 27, 1994 application is for continuation of effort begun on a previous grant. This internship program provides six people a year with the proper academic training and sufficient on-the-job training to enable them to function as professionals in environmental remediation and waste treatment resulting from the decontamination and decommissioning of nuclear facilities. The grant, which supports the Student Assisted Remediation Program in Environmental Management, plays a major role in meeting the objective of providing young, trained personnel to enter the fields of environmental remediation and waste treatment. At the end of the first year of academic work, the students are assigned for three months to a DOE-owned contractor-operated facility or to a DOE prime contractor to gain first-hand experience in the field. To date, most of the graduating students have chosen to work in the areas for which they have trained, thereby meeting the primary objective of the program. In view of the nation's environmental consciousness related to cleanup of Department of Energy facilities, it is clear that the increase in the number of skilled personnel trained in environmental remediation and waste treatment as a result of the Vanderbilt University Internship Program will aid in strengthening the Department's position of assuring that contaminated site are properly decontaminated and decomissioned in an efficient and timely manner. In order to maintain continuity of a long-range program that began in 1984, eligibility for this award is restricted to Vanderbilt University.

FOR FURTHER INFORMATION CONTACT: Carolyn Davis, USDOE, Oak Ridge Operations, P.O. Box 2001, Oak Ridge, TN 37831–8622, (615) 576–0418.

Issued in Oak Ridge, TN on July 25, 1994.

Peter D. Dayton,

Director, Procurement and Contracts Division, Oak Ridge Operations.

[FR Doc. 94–19063 Filed 8–3–94; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. EG94–86–000, et al.]

CMS Operating S.A., et al.; Electric Rate and Corporate Regulation Filings

July 28, 1994.

Take notice that the following filings have been made with the Commission:

1. CMS Operating S.A.

[Docket No. EG94–86–000]

On July 21, 1994, CMS Operating S.A., Av. Roque Saenz Peña 1116, piso 9 (1035), Buenos Aires, Argentina, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

CMS Operating S.A. is a subsidiary of CMS Generation S.A., which is a subsidiary of CMS Enterprises Company, which in turn is a wholly-owned subsidiary of CMS Energy Corporation. Through affiliates, CMS Operating S.A. was pre-awarded on June

29, 1994, the right to operate the Lujan de Cuyo and Cruz de Piedra locations of Centrales Termicas Mendoza S.A., which have a nominal capacity exceeding 400 MW. The Facility is located near the City of Mendoza in Argentina.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

2. The City of Cleveland, Ohio v. The Cleveland Electric Illuminating Company

[Docket No. EL94–80–000]

Take notice that on July 20, 1994, the City of Cleveland, Ohio tendered for filing a complaint against the Cleveland Electric Illuminating Company for breaches of the 1975 Interconnection Agreement between the parties.

Comment date: August 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

3. Southern California Edison Company

[Docket No. ER88–83–011]

Take notice that on July 21, 1994, Southern California Edison Company tendered for filing its compliance filing in the above-referenced docket.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

4. Southern California Edison Company

[Docket No. ER91–201–004]

Take notice that on July 21, 1994, Southern California Edison Company tendered for filing its compliance filing in the above-referenced docket.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

5. Wisconsin Power and Light Company

[Docket No. ER94–158–000]

Take notice that on July 22, 1994, Wisconsin Power and Light Company (WP&L) tendered for filing a signed Service Agreement under WP&L's Bulk Power Tariff between itself and Consolidated Water Power Company. WP&L respectfully requests a waiver of the Commission's notice requirements, and an effective date of May 15, 1994.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

6. Northeast Empire L.P. #2

[Docket No. ER94–1448–000]

Take notice that on July 14, 1994, Northeast Empire L.P. #2 tendered for filing an amendment to its July 6, 1994, filing in the above-referenced docket.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

7. San Diego Gas & Electric Company

[Docket No. ER94–1455–000]

Take notice that on July 15, 1994, San Diego Gas & Electric Company (SDG&E) tendered for filing an Interchange Agreement (Agreement) between SDG&E and Eclipse Energy, Inc. (Eclipse).

SDG&E requests that the Commission allow the Agreement to become effective on the 15th of September, 1994, or at the earliest possible date.

Copies of this filing were served upon the Public Utilities Commission of the State of California and Eclipse.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

8. Pepperell Power Associates Limited Partnership

[Docket Nos. AC94–214–000 ER94–1474–000]

Take notice that on July 15, 1994, Pepperell Power Associates Limited Partnership tendered for filing a notice of termination of its Power Sale Agreement with the Commonwealth Electric Company and a request for waiver of the requirement to file a Form 1 for the calendar years 1993 and 1994.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

9. Cal Ban Corp.

[Docket Nos. QF83–333–002 and QF83–333–003]

On July 25, 1994, Cal Ban Corp. tendered for filing an amendment to its filing in this docket.

The amendment pertains to the technical aspects of the facility. No determination has been made that the submittal constitutes a complete filing.

Comment date: August 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–18977 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–P

Federal Energy Regulatory Commission

[Docket No. EG94–87–000, et al.]

Hermiston Power Partnership, et al.; Electric Rate and Corporate Regulation Filings

July 29, 1994.

Take notice that the following filings have been made with the Commission:

1. Hermiston Power Partnership

[Docket No. EG94–87–000]

On July 26, 1994, Hermiston Power Partnership, c/o Hermiston Power Company, P.O. Box 7867, Boise, ID 83707, filed with the Federal Energy Regulatory Commission ("Commission") an application for exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Hermiston Power Partnership intends to own and operate a multi-unit, natural gas-fired combined-cycle cogeneration facility with automatic generation control and related transmission and interconnection equipment and with a maximum net electric power production capacity of 461 megawatts. All of the facility's electric power net of the facility's operating electric power will be sold at wholesale to the Bonneville Power Administration, acting on behalf of the United States Department of Energy.

Comment date: August 19, 1994, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

2. PSI Energy In.

[Docket No. ER89–672–006]

Take notice that on January 13, and July 1993, and July 11, 1994, PSI Energy Inc. (PSI) submitted its informational filing for the Second half of 1992, First half of 1993 and First half of 1994 as required by Section T of its Transmission Service Tariff. Copies of PSI's informational filing are on file with the Commission and are available for public inspection.

3. National Electric Associates Limited Partnership

[Docket No. ER90–168–017]

Take notice that on July 19, 1994, National Electric Associates Limited Partnership (NEA) filed certain information as required by the Ordering Paragraph (L) of the Commission's March 20, 1990, order in Docket No. ER90–168–000. Copies of NEA's informational filing are on file with the Commission and are available for public inspection.

4. Chicago Energy Exchange of Chicago, Inc.

[Docket No. ER90–225–017]

Take notice that on July 14, 1994, Chicago Energy Exchange of Chicago, Inc. (Energy Exchange) filed certain information as required by the Ordering Paragraph (L) of the Commission's April 19, 1990, order in this proceeding, 51 FERC ¶61,054 (1990). Copies of Energy Exchange's informational filing are on file with the Commission and are available for public inspection.

5. Milford Power Limited Partnership

[Docket No. ER93–493–002]

Take notice that on July 5, 1994, Milford Power Limited Partnership (Partnership), filed certain information as required by the Commission's September 17, 1993, letter order in Docket No. ER93–493–000. Copies of Partnership's informational filing are on file with the Commission and are available for public inspection.

6. CRSS Power Marketing, Inc.

[Docket No. ER94–142–002]

Take notice that on July 12, 1994, CRSS Power Marketing, Inc. (CRSS) filed certain information as required by the Commission's December 30, 1993, letter order in Docket No. ER94–142–000. Copies of CRSS's informational filing are on file with the Commission and are available for public inspection.

7. Eastern Power Distribution, Inc.

[Docket No. ER94–964–002]

Take notice that on July 15, 1994, Eastern Power Distribution, Inc. (EDP) filed certain information as required by the Commission's April 5, 1994, letter order in Docket No. ER94–964–000. Copies of EDP's informational filing are on file with the Commission and are available for public inspection.

8. Maine Public Service Co.

[Docket No. ER94–1481–000]

Take notice that on July 22, 1994, Maine Public Service Company (Maine Public) filed an executed Service Agreement with Boston Edison Company. Maine Public states that the service agreement is being submitted pursuant to its tariff provision pertaining to the short-term non-firm sale of capacity and energy which establishes a ceiling rate at Maine Public's cost of service for the units available for sale.

Maine Public requests that the service agreement become effective on August 1, 1994, and requests waiver of the Commission's regulations regarding filing.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

9. Entergy Services, Inc.

[Docket No. ER94–1482–000]

Take notice that on July 22, 1994, Entergy Services, Inc. (Entergy Services) tendered for filing a Revised Attachment A to the Transmission Service Agreement (TSA) between Entergy Services and AES Power, Inc. Entergy Services states that the TSA sets out the transmission arrangements under the Entergy Operating Companies' Transmission Service Tariff over their transmission system for certain sales by AES to East Kentucky Power Cooperative, Inc. Revised Attachment A increases the level of service under the TSA to 5 MW.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

10. Arizona Public Service Co.

[Docket No. ER94–1483–000]

Take notice that on July 25, 1994, Arizona Public Service Company (APS) tendered for filing Amendment No. 3 to the Axis Station Agreement between Imperial Irrigation District (IID) and APS, the Axis Station Letter Agreement of Future Intentions and the Axis Committee Agreement on Natural Gas Service for Axis/Yucca Steam Power Plant (Committee Agreement) all related to APS-FPC Rate Schedule No. 5 APS has requested that the Commission disclaim jurisdiction over the Committee Agreement.

Copies of this filing have been served upon IID and the Arizona Corporation Commission.

Comment date: August 12, 1994, in accordance with Standard Paragraph E at the end of this notice.

11. San Diego Gas & Electric Co.

[Docket No. ER94–1484–000]

Take notice that on July 25, 1994, San Diego Gas & Electric Company (SDG&E) tendered for filing an Interchange Agreement between SDG&E and the City of Redding, (Redding).

SDG&E requests that the Commission allow the Agreement to become effective on the 1st day of October, 1994 or at the earliest possible date.

Copies of this filing were served upon the Public Utilities Commission of the State of California and Redding.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

12. San Diego Gas & Electric Co.

[Docket No. ER94–1485–000]

Take notice that on July 25, 1994 San Diego Gas & Electric Company (SDG&E) tendered for filing an Interchange Agreement between SDG&E and National Electric Associates Limited Partnership, (NEA).

SDG&E requests that the Commission allow the Agreement to become effective on the 1st day of October, 1994 or at the earliest possible date.

Copies of this filing were served upon the Public Utilities Commission of the State of California and NEA.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

13. Indiana Michigan Power Co.

[Docket No. ER94–1486–000]

Take notice that Indiana Michigan Power Company (I&M), on July 22, 1994, tendered for filing with the Commission Facility Request No. 5 to the existing Agreement, dated December 11, 1989, (1989 Agreement), between I&M and Wabash Valley Power Association, Inc. (WVPA). Facility Request No. 5 was negotiated in response to WVPA's request that I&M provide an additional delivery point at 138-kV for a new station to be operated by Noble County REMC (Co-op Name) and known as LaOtto Station. The Commission has previously designated the 1989 Agreement as I&M's Rate Schedule FERC No. 81.

As requested by, and for the sole benefit of WVPA, I&M proposes an effective date of October 31, 1994, for Facilities Request No. 5. A copy of this filing was served upon WVPA, the Indiana Utility Regulatory Commission, and the Michigan Public Service Commission.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

14. Ohio Power Co.

[Docket No. ER94–1487–000]

Take notice that American Electric Power Service Corporation (AEPSC), on July 25, 1994, tendered for filing a transmission service agreement, dated July 1, 1994, (TSA). The TSA, executed

by Cleveland Public Power (CPP) and Ohio Power Company (OPCO), provides for service to be made available to CPP pursuant to AEPSC FERC Electric Tariff Original Volume No. 1. An effective date of July 1, 1994, was requested.

A copy of the filing was served upon CPP and the Public Utility Commission of Ohio.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

15. Northeast Utilities Service Co.

[Docket No. ER94–1489–000]

Take notice that Northeast Utilities Service Company (NUSCO), on July 25, 1994, tendered for filing, a Service Agreement to provide non-firm transmission service to Maine Public Service Company (MPSC) under the NU system Companies' Transmission Service Tariff No. 2.

NUSCO states that a copy of the filing has been mailed to MPSC.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

16. Public Service Company of New Mexico

[Docket No. ER94–1490–000]

Take notice that on July 26, 1994, Public Service Company of New Mexico (PNM) tendered for filing a Service Schedule D to the Interconnection Agreement between PNM and the City of Anaheim, California (Anaheim). Service Schedule D provides for the sale of short term firm capacity between PNM and Anaheim.

Copies of the filing have been served upon Anaheim and the New Mexico Public Utility Commission.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

17. Public Service Company of New Mexico

[Docket No. ER94–1491–000]

Take notice that on July 26, 1994, Public Service Company of New Mexico (PNM) tendered for filing an Amendment Number One to Service Schedule E to an Interconnection Agreement between PNM and Utah Associated Municipal Power Systems (UAMPS). Amendment Number One provides for the addition of the Four Corners Generating Station delivery point and amends the monthly charge for San Juan Unit 4 Transmission Service.

PNM requests waiver of the Commission's notice requirements for an effective date of July 1, 1994, for Amendment Number One.

Copies of the filing have been served upon UAMPS and the New Mexico Public Utility Commission.

Comment date: August 15, 1994, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs:

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–19013 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–P

[Project No. 10942–001]

Skykomish River Hydro; Intent to Conduct Environmental Scoping Meetings and Site Visit

July 29, 1994.

The Federal Energy Regulatory Commission (FERC) has received an application for a license of the proposed Martin Creek Hydroelectric Project, Project No. 10942–001. The Martin Creek Hydroelectric Project is located on Martin Creek, about 7 miles east of Skykomish, Washington, in King County.

The FERC staff intends to prepare an Environmental Assessment (EA) on this hydroelectric project in accordance with the National Environmental Policy Act.

In the EA, we will consider both site-specific and cumulative environmental impacts of the project and reasonable alternatives, and will include an economic, financial, and engineering analysis.

The 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 by the Commission in reaching its final licensing decision.

Scoping Meetings

Staff will hold two scoping meetings. A scoping meeting oriented towards the public will be held on August 24, 1994 at 6 p.m., at the Skykomish School, 100 Railroad Avenue, Skykomish, Washington. A scoping meeting oriented towards the agencies will be held on August 25, 1994 at 9:30 a.m., at the Conference Room—Skykomish River Hydro, 1422 130th Avenue NE., Bellevue, Washington.

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 meeting.

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 scoping meetings will be recorded by a court reporter and all statements (oral and written) will become part of the formal record of the Commission proceedings on the Martin Creek 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 the 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 September 30, 1994.

All written correspondence should clearly show the following caption on the first page: Martin Creek Hydroelectric Project, FERC Project No. 10942–001.

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 Martin Creek Hydroelectric Project is planned for August 24, 1994. Those who wish to attend should plan to meet at 10 a.m. at the Skyriver Inn in Skykomish, Washington, and shortly thereafter, leave for the project site located about 7 miles away. For more details, contact Mr. Lon Covin, Skykomish River Hydro, at (206) 455–0234.

Any questions regarding this notice may be directed to Mr. Carl Keller, Environmental Coordinator at FERC, (202) 219–2831.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–18978 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–M

[Project Nos. 2290–006, et al.]

Hydroelectric Applications [Southern California; Edison Company, et al.]; Applications

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

1a. Type of Application: New License.

b. Project No.: P–2290–006.

c. Date Filed: December 27, 1991.

d. Applicant: Southern California Edison Company.

e. Name of Project: Kern River No. 3 Hydroelectric Project.

f. Location: In Sequoia National Forest, on the North Fork Kern River, in Kern and Tulare Counties, California. Townships 23–27 S, Ranges 31–33 E.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact: Mr. Gary Dudley, Southern California Edison Company, P.O. Box 800, Rosemead, CA 91770, Telephone (818) 302–8946.

i. FERC Contact: Kathleen Sherman (202) 219–2834.

j. Deadline Date: Filing and Service of Responsive Documents—The application is being re-noticed as ready for environmental analysis due to the recent filing of additional information related to whitewater boating studies. The Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions for the project *only* on those aspects of the license application which relate to the whitewater boating additional information filed. Comments, reply comments, recommendations, terms and conditions, and prescriptions which have already been filed with the Commission in response to the Commission's April 1, 1994, notice of the application's readiness for environmental analysis, need not be re-filed.

The Commission directs, pursuant to section 4.34(b) of the regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108 (May 20, 1991), that all comments, recommendations, terms and conditions and prescriptions concerning the additional information be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice. Notice of this application was issued on July 19, 1994.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must: (1) bear in all capital letters the title "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 1027, at the above address. Each filing must be accompanied by proof of service on all persons listed in service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

k. Status of Environmental Analysis: This application has been accepted for filing and is ready for environmental analysis at this time—see j above.

l. Description of the Project: The existing project consists of the following:

(1) the 26-foot-high Fairview dam on the North Fork Kern River; (2) the 5-foot-high Salmon Creek diversion dam; (3) the 8-foot-high Corral Creek diversion dam; (4) tunnels totalling 60,270 feet in length; (5) concrete flumes totalling 4,600 feet in length; (6) a 1,146 foot-long steel pipe siphon; (7) a forebay; (8) two 2,500-foot-long penstocks with diameters varying between 84 inches to 60 inches; (9) a powerhouse containing two generating units with a combined installed capacity of 40.2 MW and an average annual generation of capacity of 40.2 MW and an average annual generation of 186,357 MWh; (10) three 66 kV transmission lines, one 45 miles long, one 27 miles long and one 1,947 feet long; and (11) appurtenant facilities.

The Licensee is not proposing any changes to the existing project works.

m. Purpose of Project: All project energy generated would be utilized by the Licensee.

n. Development Application—Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with the public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

o. Available Location of Application: A copy of the application, as amended and supplemented is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, N.E., Room 3104, Washington, D.C., 20426, or by calling (202) 208–1371. A copy is also available for inspection and

reproduction at Southern California Edison Company, located at 2244 Walnut Grove Avenue, Rosemead, California, 91770 or by calling Mr. Gary Dudley at (818) 302–8946.

p. Scoping Process: In gathering background information for preparation of the Environmental Assessment for the issuance of a Federal hydropower license, staff of the Federal Energy Regulatory Commission conducted a scoping process to identify significant environmental issues related to the continued operation of the hydropower project. A scoping document was issued February 25, 1994, and comments were invited. Anyone who wishes to provide staff with further scoping comments related to the whitewater boating additional information, may do so by filing comments with the Commission. (See j above for filing procedure.) All scoping comments will be considered by staff in the preparation of the Environmental Assessment. Any further scoping comments should be filed by the deadline established above.

2a. Type of Application: Declaration of Intention.

b. Docket No. : DI94–4–000.

c. Date Filed : May 16, 1994.

d. Applicant : City of Nashua.

e. Name of Project : Nashua Mill Dam Project.

f. Location : On the Cedar River, in Chickasaw County, Nashua, Iowa.

g. Filed Pursuant to : Section 23(b) of the Federal Power Act, 16 U.S.C. § 817(b),

h. Applicant Contact : Rebecca Neal, City Clerk, City of Nashua, City Hall, Nashua, IA 50658, (515) 435–4156.

i. FERC Contact : Hank Ecton, (202) 219–2678.

j. Comment Date : September 1, 1994.

k. Description of Project: The proposed project will consist of: (1) a mill pond with a surface area of 700 acres; (2) a 16-foot-high, 250-long concrete dam; (3) an existing 82-foot-long powerhouse, containing two Leffel generators with a proposed capacity of 800 kilowatts; and (4) appurtenant facilities.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether the project: (1) would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. Purpose of Project: Applicant intends to use all energy produced.

m. This notice also consists of the following standard paragraphs: B, C1, and D2.

3a. Type of Application: Recreational Use of Project Lands.

b. Project No: 516–176.

c. Date Filed: November 30, 1993.

d. Applicant: South Carolina Electric and Gas Company.

e. Name of Project: Saluda.

f. Location: The proposed project would be located on the north bank of the Saluda River, below the dam at Lake Murray, in the general vicinity of the towns of Irmo and Chapin, South Carolina.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. § 791(a)–825(r).

h. Applicant Contact: Randolph H. Mahan, Assistant General Counsel, South Carolina Electric & Gas Company, P. O. Box 764, Columbia, SC 29218, (803) 748–3538.

i. FERC Contact: John K. Hannula, (202) 219–0116.

j. Comment Date: September 8, 1994.

k. Description of application: The applicant proposes to lease 117 acres of project land for the development of a multi-use park by the Irmo-Chapin Recreation Commission.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

4a. Type of Application: New License for Major Project.

b. Project No.: 2687–014.

c. Date filed: December 20, 1993.

d. Applicant: Pacific Gas & Electric Company.

e. Name of Project: Pit 1 Project.

f. Location: On the Fall River and the Pit River, near the towns of Fall River Mills, McArthur, and Burney, in Shasta County, California.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. § 791(a)–825(r).

h. Applicant Contact: Steve Christ, Project Manager, Pacific Gas & Electric Company, P.O. Box 770000, P10A, San Francisco, California 94177, (415) 973–2629.

i. FERC Contact: Mr. Michael Strzelecki, (202) 219–2827.

j. Deadline for Interventions and Protests: September 29, 1994.

k. Status of Environmental Analysis: This application is not ready for environmental analysis at this time—see attached paragraph E.

l. Description of Project: The project as licensed consists of: (1) a 15-foot-high concrete diversion structure on the Fall River forming a small impoundment; (2) a 40-foot-high earthen dam on the Fall River forming a 222-acre forebay impoundment; (3) an intake structure on each impoundment; (4) a 1,200-foot-long canal carrying water from each intake structure to a tunnel; (5) the 10,076-foot-long, 14-foot-high tunnel; (6) two 1,372-foot-long penstocks; (7) a powerhouse containing two generating units with a total installed capacity of 61 MW; (8) a 1,150-foot-long tailrace returning water to the Pit River; and (9) appurtenant facilities.

m. This notice also consists of the following standard paragraphs: B1 and E.

n. Available Locations of Applications: A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, N.E., Room 3104, Washington, D.C. 90426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at the offices of the Pacific Gas and Electric Company, 77 Beale Street, San Francisco, California, or by calling Mr. Steve Christ at (415) 973–2629.

5a. Type of Application: Preliminary Permit.

b. Project No.: 11489–000.

c. Date filed: June 17, 1994.

d. Applicant: Magma Power Company.

e. Name of Project: Big Mountain Modular Pumped Storage.

f. Location: On Big Mountain and near Sanpete Valley, near the city of Ephraim in Sanpete County, Utah, partially on U.S. lands administered by the Bureau of Land Management. Townships 13, 14, 15, and 16 South, Range 2 East.

g. Filed Pursuant to: Federal Power Act, 16 USC §§ 791(a)–825(r).

h. Applicant Contact: Mr. David R. Herrick, 4365 Executive Drive, Suite 900, San Diego, CA 92121, (619) 622–7800.

i. FERC Contact: James Hunter at (202) 219–2839.

j. Comment Date: September 26, 1994.

k. Description of Project: The proposed project would not be located on any natural body of water, but would consist of: (1) a 225-foot-high, 1,500-foot-long embankment impounding the 77-acre upper reservoir in a natural basin on Big Mountain; (2) 8,600 feet of tunnel and penstock, including a surge shaft; (3) earthern embankments totaling 7,100 feet long, with a maximum height of 180 feet, containing the 102-acre lower reservoir at the foot of the mountain; (4) an underground, 60-foot-diameter caisson-type powerhouse at the lower

reservoir with an installed capacity of 200 megawatts, with a switchyard at the surface; and (5) a 19-mile-long transmission line connecting to PacifiCorp's existing transmission system. Water for the initial fill and for make-up would be purchased from existing water rights holders, and is expected to come from the local aquifer.

The project would generate an estimated 627.5 Gwh of energy annually. The estimated cost of the studies to be conducted under the preliminary permit is $1,000,000. No new roads would be needed for conducting studies under the preliminary permit.

l. Purpose of Project: Project power would be sold to PacifiCorp.

m. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C, and D2.

6a. Type of Application: Declaration of Intention.

b. Project No.: DI94–1–000.

c. Date Filed: April 4, 1994.

d. Applicant: Town of Estes Park.

e. Name of Project: Fall River Hydroelectric Station.

f. Location: Fall River, near Estes Park, in Larimer County, Colorado.

g. Filed Pursuant to: Section 23(b) of the Federal Power Act, 16 U.S.C. § 817(b).

h. Applicant Contact: Mr. Michael Mangelsen, Assistant to the Director, Estes Park Light & Power Department, P.O. Box 1200, Estes Park, CO 80517, (303) 586–5331.

i. FERC Contact: Etta Foster, (202) 219–2679.

j. Comment Date: September 8, 1994.

k. Description of Project: The existing Fall River Hydroelectric Station consists of: (1) the existing Cascade dam diversion structure; (2) a 30-inch wide, 5,300-foot-long penstock; (3) a powerhouse containing 2 generating units with a total rated capacity of 880 kW; (4) a transmission line connected to the Town's municipal distribution grid; and (5) appurtenant facilities.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether or not the project: (1) would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. Purpose of Project: Applicant proposes to rehabilitate the the flood damage project and resume operation of the facility.

m. This notice also consists of the following standard paragraphs: B, C1, and D2.

7a. Type of Application: Amendment of Preliminary Permit.

b. Project No.: 11391–001.

c. Date filed: June 6, 1994.

d. Applicant: City of Boulder, Colorado.

e. Name of Project: Boulder Lindsay.

f. Location: On Bull Gulch, in Jefferson County, Colorado. T.2S., R.70W., and T.2S., R.71W.

g. Filed Pursuant to: Federal Power Act 16 USC §§ 791(a)–825(r).

h. Applicant Contact: Mr. Karl Kumli, III, Krassa, Lindholm, Kumli & Madsen, 4888 Pearl East circle, Suite 202W, Boulder, CO 80301, (303) 442–2156.

i. FERC Contact: Michael Spencer at (202) 219–2846.

j. Comment Date: September 15, 1994.

k. Description of amendment: The proposed amendment would reduce the amount of land originally reserved for the project to about 323.6 acres. The project features would remain the same as those stated in the preliminary permit, issued June 30, 1993. A detailed land description is included in the amendment application. A map of the amended project is included with this notice.

l. Purpose of Project: Project power would be sold.

m. This notice also consists of the following standard paragraphs: A8, A10, B, C, and D2.

8a. Type of Application: Major License.

b. Project No.: 3574–004.

c. Date filed: October 18, 1993.

d. Applicant: Continental Hydro Corporation.

e. Name of Project: Tiber Dam Hydroelectric Project.

f. Location: At the U.S. Department of the Interior, Bureau of Reclamation's Tiber Dam, on the Marias River in Liberty County, Montana. Township 30 North, Range 5 East, Sections 28, 29, 32, and 33.

g. Filed Pursuant to: Federal Power Act 16 USC §§ 791(a)–825(r)

h. Applicant Contact: Mr. Robert L. Winship, Vice President, Continental Hydro Corporation, 745 Atlantic Avenue, 10th Floor, Boston, MA 02111–2735, (617) 357–9029.

i. FERC Contact: James Hunter at (202) 219–2839.

j. Deadline Date: Deadline for filing Interventions, Protests, or Competing Applications (see attached paragraph D8), and also for filing Written Scoping Comments (see item (l) below)—October 8, 1994.

k. Status of Environmental Analysis: The application is not ready for environmental analysis at this time—see attached paragraph D8.

l. Intent To Prepare An Environmental Assessment And Invitation For Written Scoping Comments: The Commission staff (staff) intends to prepare an Environmental Assessment (EA) on the 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 economic, financial, and engineering analyses.

A draft EA will be issued and circulated for review by all interested parties. All timely filed comments on the draft EA will be analyzed by the staff and considered in the final EA. The staff's conclusions and recommendations will then be presented for the Commission's consideration in reaching its final licensing decision.

Scoping: Interested individuals, organizations, and agencies with environmental expertise are invited to assist the staff in identifying the scope of environmental issues that should be analyzed in the EA by submitting written scoping comments. To help focus those comments, a scoping document outlining subject areas to be addressed in the EA will be mailed to agencies and interested individuals on the Commission mailing list. Copies of the scoping document may also be requested from the staff.

Persons who have views on the issues or information relevant to the issues may submit written statements for inclusion in the public record. Those written comments should be filed with the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, DC, 20426, by the deadline date shown in item (j) above. All written correspondence should clearly show the following caption on the first page: Tiber Dam Hydroelectric Project, FERC No. 3574.

Intervenors 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.

m. Description of Project: The proposed project would utilize releases from the existing Tiber Dam and Lake Elwell and would consist of: (1) a 6-foot-diameter, 105-foot-long steel penstock connecting to the existing river outlet pipe; (2) a 52.5-foot-long, 35.7-foot-wide powerhouse adjacent to the existing stilling basin, containing a generating unit with an installed capacity of 7.5 megawatts; (3) a tailrace channel returning flows to the river; and (4) a 115–KV, 1.0-mile-long transmission line connecting to an existing Western Area Power Administration substation.

n. Purpose of Project: Power generated at the project will be sold to Montana Power Company or another utility in the area.

o. This notice also consists of the following standard paragraphs: A2, A9, B1, and D8.

p. Available Locations of Application: A copy of the application, as amended and supplemented, is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, N.E., Room 3104, Washington, D.C. 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at the applicant's office (see item (h) above).

9a. Type of Application: Surrender of License.

b. Project No: 10141–005.

c. Date Filed: May 26, 1994.

d. Applicant:
William C. Porter Farm Company.

e. Name of Project:
Olson Creek Hydroelectric Project.

f. Location:
On Olson Creek in Skagit County, Washington (T. 35 N., R. 10 E.).

g. Filed Pursuant to:
Federal Power Act, 16 U.S.C. Section 791(a)—825(r).

h. Applicant Contact:
William C. Porter, P. O. Box 809, Marblemount, WA 98267, (206) 873–9600.
Charles Fulmer, 6174 N.E. 187th Place, Seattle, WA 98155, (206) 486–3437.

i. FERC Contact:
Diane M. Murray, (202)219–2682.

j. Comment Date: September 9, 1994.

k. Description of Project: The licensee states that the project is infeasible to construct at this time.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

10a. Type of Application: Preliminary Permit (Amended to change identity of Applicant).

b. Project No.:
11457–000.

c. Date filed:
January 18, 1994.

d. Applicant:
Greenfields Irrigation District—changed from Sun River Partners.

e. Name of Project:
Turnbull Drop.

f. Location:
At the existing Bureau of Reclamation Sun River Canal System, near Fairfield, in Teton County, Montana. Township 21N, Range 4W, Sections 1–3, and Township 22N, Range 4W, Section 36.

g. Filed Pursuant to:
Federal Power Act 16 U.S.C. §§ 791(a)—825(r)

h. Applicant Contact:
Mr. Ted Sorenson, 5203 South 11th East, Idaho Dalls, ID 93404, (208) 522–8069.

i. FERC Contact:
Michael Spencer at (202) 219–2846.

j. Comment Date:
September 8, 1994.

k. Description of Project: The proposed project utilize the Bureau of Reclamation's Sun River Canal System and would consist of: (1) an existing drop inlet structure; (2) a 9,000-foot-long, 8.5-foot-diameter penstock; (3) a powerhouse containing a generating unit with a capacity of 9.8 MW and an estimated average annual generation of 25.0 GWh; and (4) a 2- mile-long transmission line.

No new access road will be needed to conduct the studies. The applicant estimates that the cost of the studies to be conducted under the preliminary permit would be $35,000.

l. Purpose of Project: Project power would be sold.

m. This notice also consists of the following standard paragraphs: A10, B, C, and D2.

Standard Paragraphs

A2. Development Application—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

A5. Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b)(1) and (9) and 4.36.

A7. Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b)(1) and (9) and 4.36.

A8. Preliminary Permit—Public notice of the filing of the initial preliminary permit application, which has already been given, established the due date for filing competing preliminary permit applications or notices of intent. Any competing preliminary permit or development application or notice of intent to file a competing preliminary permit or development application must be filed in response to and in compliance with the public notice of the initial preliminary permit application. No competing applications or notices of intent to file competing applications may be filed in response to this notice. A competing license application must conform with 18 CFR 4.30 (b)(1) and (9) and 4.36.

A9. Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

A10. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The

term of the proposed preliminary permit will be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

B1. Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

C. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION', "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, Room 1027, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's must also be sent to the Applicant's representatives.

D8. Filing and Service of Responsive Documents—The application is not ready for environmental analysis at this time; therefore, the Commission is not now requesting comments, recommendations, terms and conditions, or prescriptions.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," or "COMPETING APPLICATION;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 1027, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

E. Filing and Service of Responsive Documents—The application is not ready for environmental analysis at this time; therefore, the Commission is not now requesting comments, recommendations, terms and conditions, or prescriptions.

When the application is ready for environmental analysis, the Commission will notify all persons on the service list and affected resource agencies and Indian tribes. If any person wishes to be placed on the service list, a motion to intervene must be filed by the specified deadline date herein for such motions. All resource agencies and Indian tribes that have official responsibilities that may be affected by the issues addressed in this proceeding, and persons on the service list will be able to file comments, terms and conditions, and prescriptions within 60 days of the date the Commission issues a notification letter that the application is ready for an environmental analysis. All reply comments must be filed with the Commission within 105 days from the date of that letter.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 1027, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Dated: July 29, 1994, Washington, D.C.

Lois D. Cashell,

Secretary.

[FR Doc. 94–19014 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket Nos. RP93–127–003 and RP93–102–004]

Columbia Gas Transmission Corporation; Report of Refunds

July 29, 1994.

Take notice that on February 10, 1994, Columbia Gas Transmission Corporation (Columbia) tendered for filing a refund report pertaining to the flowthrough of Order No. 94 refunds.

Columbia states that it is filing the refund report pursuant to a Commission order on rehearing dated January 12, 1994, which rejected a settlement between Columbia and Panhandle Eastern Pipeline Company related to Order No. 94 and directed Columbia to refund amounts collected, with interest.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 385.211 of the Commission's Regulations. All such protests should be filed on or before August 5, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–18979 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–248–001]

K N Interstate Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

July 29, 1994.

Take notice that on July 26, 1994, K N Interstate Gas Transmission Co. (KNI) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1–A, the following tariff sheets with an proposed effective date of September 1, 1994:

First Revised Sheet No. 4–E
First Revised Sheet No. 4–F

KNI states that the proposed changes will adjust KNI's fuel and loss reimbursement percentages applied to firm and interruptible transportation and no-notice service pursuant to Section 15 of KNI's FERC Gas Tariff, Second Revised Volume No. 1–B.

KNI states that copies of this filing were served upon the company's jurisdictional customers, and interested public bodies.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before August 5, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–18980 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP85–60–006]

Overthrust Pipeline Co.; Report of Refunds

July 29, 1994.

Take notice that on March 1, 1994, Overthrust Pipeline Company (Overthrust) tendered for filing a refund report. Overthrust states that the report documents refunds of amounts pertaining to and detailing the Deferred Income Tax (DIT) refund payments for the years 1992 and 1993.

Overthrust states that it is filing the refund report pursuant to a Commission order dated May 21, 1991, "Order Approving Settlement with Modifications" in Docket Nos. RP85–60–000 and –002. Overthrust explains that Article V of the settlement as modified, requires Overthurst to file an annual report 60-days after making the actual DIT refunds.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Regulations. All such protests should be filed on or before August 5, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–18981 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. GT94–29–000]

Transcontinental Gas Pipe Line Corp.; Report of Refunds

July 29, 1994.

Take notice that on February 18, 1994, Transcontinental Gas Pipe Line Corporation (TGPL) tendered for filing a refund report. TGPL states that the report documents refunds of amounts pertaining to a refund from National Fuel Gas Supply Corporation, (National Fuel) a portion of which relates to firm transportation which TGPL utilizes to render service under its Rate Schedule NPSE.

TGPL states that the refund, covering the period July 1, 1992, through July 31, 1993, results from a Commission order dated December 30, 1993, in Docket Nos. RP92–73–000 and RS92–21–000, *et al.* Pursuant to section 8.01(i) of TGPL's NIPPs-SE Rate Schedules x-314, x-315, x-317, x-318 and x-324, TGPL states that it refunded each NPSE customer their proportional share of the amount received from National Fuel.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Regulations. All such protests should be filed on or before August 5, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–18982 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP94–687–000, et al.]

Florida Gas Transmission Company, et al. Natural Gas Certificate Filings

July 29, 1994.

Take notice that the following filings have been made with the Commission:

1. Florida Gas Transmission Company

[Docket No. CP94–687–000]

Take notice that on July 27, 1994, Florida Gas Transmission Company (Applicant), 1400 Smith Street, Houston, Texas 77002, filed in Docket No. CP94–687–000 for approval under Sections 157.205 and 157.212 to construct and operate, a meter station which will serve as a delivery point for AIM Pipeline Company (Aim), all as more fully set forth in the request which

is on file with the Commission and open to public inspection.

Applicant proposes to turn an above ground meter station and receipt point into a delivery point for transmission of gas to AIM. The proposed delivery point is located on Applicant's Bassfield Lateral in Jefferson Davis County, Mississippi. Applicant proposes to deliver 2,000 MMBtu/d at the delivery point.

Applicant states that deliveries will be made under an interruptible transportation service agreement with AIM and will not impact Applicants peak day delivery requirements or annual gas deliveries.

The meter station was used to measure gas receipts which Applicant purchased at the Harper No. 1 well from Apache Corporation, successor-in-interest to Florida Exploration Company. The metering facility is no longer in use because the Harper No. 1 well has been depleted and the sales agreement terminated.

Comment date: September 12, 1994, in accordance with Standard Paragraph G at the end of this notice.

2. Columbia Gas Transmission Corporation

[Docket No. CP94–688–000]

Take notice that on July 27, 1994, Columbia Gas Transmission Corporation (Columbia), Post Office Box 1273, Charleston, West Virginia 25325–1273, filed in Docket No. CP94–688–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to construct and operate the facilities necessary to establish seven additional points of delivery to two existing customers, Columbia Gas of Ohio, Inc. and Mountaineer Gas Company, under the blanket certificate issued in Docket No. CP86–240–000, pursuant to Section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Columbia asserts that the proposed delivery points will establish seven new points of delivery for residential consumption for firm transportation service under Part 284 of the Commission's regulations and existing authorized Rate Schedules and within certificated entitlements. Columbia estimates that the design day quantity at Columbia Gas of Ohio will be 1.5 Dth and the annual quantity will be 150 Dth, the design day quantity at Mountaineer Gas Company will be 9.0 Dth and the annual quantity will be 900 Dth.

Columbia estimates that the cost to install the new taps will be approximately $150 per tap which will be treated as an O&M Expense.

Columbia states that the quantities to be provided through the new delivery points will be within Columbia's authorized level of services. Further, Columbia asserts that there will be no impact on Columbia's existing design day and annual obligations to the customers as a result of the construction and operation of the new delivery points.

Comment date: September 12, 1994, in accordance with Standard Paragraph G at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or to make any protest with reference to said application should on or before the comment date, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate and/or permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

G. Any person or the Commission's Staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 94–19015 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. CP93–434–001, et al.]

NorAm Gas Transmission Company, et al.; Natural Gas Certificate Filings

July 27, 1994.

Take notice that the following filings have been made with the Commission:

1. NorAm Gas Transmission Company

[Docket No. CP93–434–001]

Take notice that on July 22, 1994, NorAm Gas Transmission Company (NGT), formerly Arkla Energy Resources Company, 1600 Smith Street, Houston, Texas 77002, filed in Docket No. CP93–434–001 an amendment to its original application seeking abandonment authority required for NGT to effect the sale and transfer to UtiliCorp United, Inc. (UtiliCorp) of certain existing natural gas transmission lines, together with equipment and facilities pertinent thereto, located in the State of Kansas and services provided by means therefore, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

NGT states that on June 7, 1993, it filed an application in this docket seeking permission and approval to abandon by sale to UtiliCorp all NGT jurisdictional facilities located in the State of Kansas in order to implement the Acquisition Agreement executed May 7, 1993. It is stated that under the Acquisition Agreement, NGT and NorAm agreed to sell and transfer to UtiliCorp both those local distribution facilities located in Kansas and currently owned and operated by NorAm's Arkansas Louisiana Gas Company (ALG) distribution division, as well as NGT's jurisdictional

transmission facilities. It is stated that the transferred facilities would then be operated by UtiliCorp's division, Peoples Natural Gas (PNG), as distribution utility facilities, with PNG continuing to provide retail services to ALG's customer's and offering transportation or other substitute services to NGT's current customers. In connection therewith, NGT states that the proposed abandonment contemplated the agreement by NGT and PNG to enter into a Capacity Lease Agreement affecting a portion of the facilities to be transferred pursuant to which NGT would continue to provide services to the City of Winfield, Kansas for the remainder of the term of the then current service agreement between NGT and Winfield.

It is stated that Winfield protested the application and requested a hearing, raising concerns with respect to continuation of the jurisdictional service to Winfield following the expiration of the Capacity Lease and as to the jurisdictional status of the arrangement. NGT states that it and PNG have engaged in discussions to resolve Winfield's concerns and those presented by the Commission staff at the May 19, 1994, technical conference convened in this proceeding. It is stated that those negotiations have resulted in the agreement in principle of NGT, NorAm and UtiliCorp to amend the Acquisition Agreement.

NGT states that the primary purpose of the amendment will be to delete certain facilities from the list of facilities to be conveyed to UtiliCorp and to delete the Capacity Lease from the arrangement. It is stated that the deleted facilities, which are more particularly described in the amended application, will be retained by NGT, allowing it to continue to provide direct transportation service to the City of Winfield, Kansas.

Comment date: August 17, 1994, in accordance with Standard Paragraph F at the end of this notice.

2. Texas Eastern Transmission Corporation

[Docket No. CP94–6–001]

Take notice that on July 21, 1994, Texas Eastern Transmission Corporation (Texas Eastern), 5400 Westheimer Court, Houston, Texas 77056–5310, filed in Docket No. CP94–6–001 an amendment (Amendment) to its original application filed in the captioned proceeding on October 1, 1993, pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the installation of incremental pipeline and compression facilities necessary for Texas Eastern to render an incremental firm transportation service for CNG Transmission Corporation (CNG). Texas Eastern states that it filed the Amendment to revise the proposed facilities necessary to render the service for CNG and to revise the proposed initial rates to be charged for the incremental service for CNG, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Texas Eastern states that the revised initial rate is the result of an increase requested by CNG and agreed to by Texas Eastern in the quantities on gas to be transported for CNG and the facility changes.

In the original application, Texas Eastern proposed to construct and operate certain replacement pipeline and compression facilities to increase its mainline transmission capacity between the existing interconnection with CNG at the Crayne Farm meter station, in Waynesburg County, Pennsylvania, and the existing interconnection of Texas Eastern's system with CNG's Line PL–1, near the Chambersburg Compressor Station in Chambersburg County, Pennsylvania. Texas Eastern proposed to provide an incremental 100,000 Dekatherms per day (Dth/d) of transportation capacity for CNG. Texas Eastern states that CNG proposed to utilize this capacity to render firm transportation service for CNG customers served off of CNG's PL–1 Line.[1]

Instead of the facilities additions set forth in Section V of the original application, Texas Eastern requests authorization to:

(a) Install, own and operate a 6,500 horsepower compressor addition at Texas Eastern's existing compressor station at Uniontown, in Greene County, Pennsylvania;

(b) Construct, install, own and operate 9.71 miles of 36-inch replacement pipeline on Texas-Eastern's Line No. 1 between the existing Uniontown and Bedford Compressor Stations in Fayette County Pennsylvania;[2]

(c) Construct, install, own and operate 4.22 miles of 36-inch replacement pipeline on Texas Eastern's Line No. 1 between the existing Bedford and Chambersburg Compressor Stations in Bedford County, Pennsylvania; and

(d) Charge an incremental reservation rate of $7.343 per Dth, as a NGA section 7(c) initial rate separately stated as part of Texas Eastern's Part 284 FT–1 Rate Schedule.

Texas Eastern submits that the Amendment reflects the increase in firm transportation service to CNG from an MDQ of 100,000 Dth/d to 105,000 Dth/d, and the changed location and quantity of replacement pipeline necessary to provide the corresponding increase in firm capacity for CNG. Texas Eastern states that CNG has informed it that CNG intends to notify the Commission in the near future that CNG intends to render 105,000 Dth/d of firm downstream transportation service for the CNG customers.

Texas Eastern proposes to build the facilities in order to provide the incremental 105,000 Dth/d capacity required to render such service. The facilities proposed will be ready for service by November 1, 1995. It is estimated that the total capital costs of the proposed compression and pipeline facilities in 1995 dollars, is $39,899,000.

For the Part 284 service to be rendered to CNG pursuant to Texas Eastern's existing Rate Schedule FT–1 using the new capacity contemplated in the application, Texas Eastern proposes to charge CNG, as a NGA section 7 initial charge, an incremental Reservation Charge separately stated as part of Texas Eastern's Part 284 Rate Schedule FT–1 rates. Based upon the annual cost of the proposed facility additions, Texas Eastern proposes an initial monthly Reservation Charge of $7.343 per Dth/d for the firm incremental transportation services beginning November 1, 1995.

Comment date: August 17, 1994, in accordance with Standard Paragraph F at the end of this notice.

3. Columbia Gas Transmission Corporation

[Docket No. CP94–675–000]

Take notice that on July 21, 1994, Columbia Gas Transmission Corporation (Columbia), 1700 MacCorkle Avenue, S.E., Charleston, West Virginia 25314, filed in Docket No. CP94–675–000 a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) for authorization to: (1) reassign quantities of gas to be delivered at Virginia Natural

[1] On November 18, 1993, in Docket No. CP94–89–000, CNG filed a related application describing the services it proposes to render for the CNG Customers.

[2] Texas Eastern states that the first 2.04 miles of replacement pipeline were previously authorized in Texas Eastern's ITP Project in Docket No. CP92–184–000, *et al.* on July 16, 1993. However, it is stated that due to a change in the market requirements, such facilities are no longer required for the project, and Texas Eastern will file an amendment to its ITP Project to reflect the changes to the ITP facilities.

Gas Company (VNG) delivery points[3], and (2) construct and operate various appurtenant facilities along Columbia's transmission pipeline system to accommodate the delivery shifts, under Columbia's blanket certificate issued in Docket No. CP83–76–000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Columbia proposes to perform the reassignment of deliveries without affecting any of its other customers since Columbia has sufficient capacity on its existing pipeline system to accomplish the task. The total volumes to be delivered do not exceed the total volumes authorized prior to the request. However, due to current operational restrictions, the following appurtenant facility modifications, normally done pursuant to Section 2.55(a) of the General Policy, must be made to accommodate the reassignment and subsequent station Maximum Daily Delivery Obligation (MDDO) changes.

—Revamp the Measuring Station No. 802750, located on the discharge side of the Bickers Compressor Station in Greene County, Virginia.
—Replace the regulator inlet piping to Goochland Measurement and Regulation Station No. 831076 in Goochland County, Virginia.
—Install regulation on Line VM–107 at Mainline Valve No. 8 in Goochland County, Virginia.
—Install regulation from Line VM–108 to Line VM–107 at Mainline Valve No. 12 in Chesterfield County, Virginia.
—Replace a 3-inch regulator setting with a 6-inch regulator setting at Petersburg regulator Station in Prince George county, Virginia.
—Replace a 6-inch regulator setting with a 4-inch regulator setting at Newport News No. 2 Measurement and Regulation Station in James City County, Virginia.

The estimated cost of the appurtenant facility modification is $1,897,500, including the "gross-up" due to taxes. VNG will reimburse Columbia 100% for the construction. The anticipated in-service date for the modification and subsequent reassignment of deliveries is November 1, 1994. Columbia says that it will comply with all of the environmental requirements of Sections 157.206(d) prior to the construction of any facilities.

Comment date: September 12, 1994, in accordance with Standard Paragraph G at the end of this notice.

4. Transwestern Pipeline Company

[Docket No. CP94–676–000]

Take notice that on July 21, 1994, Transwestern Pipeline Company (Transwestern), 1400 Smith Street, Houston, Texas 77002, filed in Docket No. CP94–676–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to install and operate a tap and valve at a new point of delivery, for the transportation of natural gas to the Sid Richardson Gasoline Co. (Sid Richardson) located in Winkler County, Texas, under Transwestern's blanket certificate issued in Docket No. CP82–534–000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Transwestern is proposing to transport up to 700 Mcf of natural gas per day to Sid Richardson on an interruptible basis, under Transwestern's Rate Schedule ITS–1. It is stated that Sid Richardson is a producer, who proposes to use the gas as fuel for a compressor unit it owns. It is further stated that Transwestern will transport the fuel gas to Sid Richardson pursuant to Transwestern's blanket transportation authority granted in Docket No. CP88–133–000 and Section 284.223 of the Commission's Regulations.

Transwestern estimated the cost of the proposed facilities to be approximately $10,700. It is stated that Sid Richardson will reimburse Transwestern for the cost of the facilities.

Comment date: September 12, 1994, in accordance with Standard Paragraph G at the end of this notice.

5. Algonquin Gas Transmission Corporation

[Docket No. CP94–684–000]

Take notice that on July 26, 1994, Algonquin Gas Transmission Corporation (Algonquin), 1284 Soldiers Field Road, Boston, Massachusetts 02135, filed in Docket No. CP94–684–000 a request pursuant to Sections 157.205, 157.212, and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212 and 157.216) for authorization to construct and operate facilities at three existing metering and regulating stations to increase the capacity for deliveries at those stations to Consolidated Edison Company of New York, Inc. (Con Ed) and to abandon the facilities that are replaced by the new facilities, under the blanket certificate issued in Docket No. CP87–317–000, pursuant to Sections 7(c) and 7(b) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

It is stated that Con Ed is a shipper under several of Algonquin's rate schedules, and has requested increased delivery capacity at three existing points of interconnection between Con Ed and Algonquin for deliveries under Algonquin's tariff. Algonquin states that Con Ed has requested the construction of appurtenant facilities at existing meter stations in Peekskill, Cortlandt, and Yorktown, New York. It is indicated that the construction will involve changes to regulators, meter run headers, meter tubes, heater piping, relief valves, and station instrumentation. Algonquin states that these facility changes will allow increased maximum daily deliveries at the Peekskill Station from 15,937 million to 19,364 million Btu, at the Cortlandt Station from 3,562 million Btu to 4,002 million Btu, and at the Yorktown Station from 3,562 million Btu to 19,434 million Btu. Algonquin estimates that the facility changes will cost $427,600, which will be reimbursed by Con Ed upon the two parties finalizing an appropriate agreement.

Algonquin states that it has sufficient system delivery flexibility to accomplish these deliveries without detriment or disadvantage to its other customers. It is also indicated that Algonquin's tariff permits Algonquin, at its option and with the customer's consent, to add facilities and to be reimbursed by the customer for the cost of those facilities.

Comment date: September 12, 1994, in accordance with Standard Paragraph G at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or to make any protest with reference to said application should on or before the comment date, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will

[3] Proposed reassignment: (a) 33,475 Dekatherms per day (Dth/d) from two VNG delivery taps located in Newport News and James City County, Virginia to VNG's Norfolk delivery tap located in Chesapeake, Virginia, and (b) 15,000 Dth/d from Newport News No. 2 Gate Station to Newport News No. 1 Gate Station.

not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate and/or permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 94–19016 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. ER94–1181–000]

C.C. Pace Resources, Inc.; Issuance of Order

July 29, 1994.

On April 25, 1994, June 21, 1994, and June 23, 1994, C.C. Pace Resources, Inc. [doing business as C.C. Pace Energy Services (Pace)] submitted for filing a rate schedule under which Pace will engage in wholesale electric power and energy transactions as a marketer. Pace also requested waiver of various Commission regulations. In particular, Pace requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuance of securities and assumptions of liability by Pace.

On July 25, 1994, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Pace should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Absent a request for hearing within this period, Pace is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interests, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Pace's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 24, 1994.

Copies of the full text of the order are available from the Commission's Public Reference Branch, room 3308, 941 North Capitol Street NE., Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 94–19017 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER94–1247–000]

NorAm Energy Services, Inc.; Issuance of Order

July 29, 1994.

On May 11, 1994 and June 10, 1994, NorAm Energy Services, Inc. (NES) submitted for filing a rate schedule under which NES will engage in wholesale electric power and energy transactions as a marketer. NES also requested waiver of various Commission regulations. In particular, NES requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by NES.

On July 25, 1994, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by NES should file a motion to intervene or protests with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Absent a request for hearing within this period, NES is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interests, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of NES's issuance of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 24, 1994.

Copies of the full text of the order are available from the Commission's Public Reference Branch, room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 94–19018 Filed 8–3–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER94–1362–000]

Texican Energy Ventures, Inc.; Issuance of Order

July 29, 1994.

On June 14, 1994, Texican Energy Ventures, Inc. (Texican) submitted for

filing a rate schedule under which Texican will engage in wholesale electric power and energy transactions as a marketer. Texican also requested waiver of various Commission regulations. In particular, Texican requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Texican.

On July 25, 1994, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Texican should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Absent a request for hearing within this period, Texican is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; povided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interests, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Texican's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 24, 1994.

Copies of the full text of the order are available from the Commission's Public Reference Branch, room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 94–19019 Filed 8–3–94; 8:45 am]

BILLING CODE 6717-01-M

Office of Civilian Radioactive Waste Management

Process for Evaluating the Suitability of the Yucca Mountain Site for Development as a Repository for High-Level Radioactive Waste and Spent Nuclear Fuel

AGENCY: Office of Civilian Radioactive Waste Management, Department of Energy.

ACTION: Notice.

SUMMARY: Through this Notice, the Department of Energy makes four announcements regarding the process for evaluating the suitability of the Yucca Mountain site for development as a repository for high-level radioactive waste and spent nuclear fuel. 1) The Department announces the availability of Summary Reports of the May 21, 1994 stakeholder meeting held in Las Vegas, Nevada. 2) The Department announces its decision to use the Siting Guidelines (10 CFR Part 960) as they currently exist. 3) The Department announces the availability of a draft description of the process for evaluating the suitability of the Yucca Mountain site for public comment. 4) The Department announces stakeholder meetings to elicit the views of the general public on the proposed process and particularly the proposed opportunities for external involvement. The Department invites interested parties to provide written comments during the term specified in this Notice.

DATES: Written comments on the Draft Summary Reports of the May 21, 1994 stakeholder meeting and the draft description of the proposed process are due on or before October 3, 1994. The meetings will be held on August 27, 1994 from 9 am to 5 pm (PDT) at the Stardust Hotel in Las Vegas, Nevada, and on August 30, 1994 from 9 am to 5 pm (EDT) at the Renaissance Hotel, in Washington, DC.

ADDRESSES: Written comments should be submitted to: Dr. Jane R. Summerson, U.S. Department of Energy, Yucca Mountain Site Characterization Office, 101 Convention Center Drive, Las Vegas, NV 89109, (702) 794–5317 (Phone), (702) 794–7907 (Fax).

FOR FURTHER INFORMATION AND COPY OF DRAFT PROCESS CONTACT: Dr. Jane R. Summerson, U.S. Department of Energy, Yucca Mountain Site Characterization Office, 101 Convention Center Drive, Las Vegas, NV 89109, (702) 794–5317 (Phone), (702) 794–7907 (Fax).

SUPPLEMENTARY INFORMATION:

I. Summary Reports

The Department of Energy (Department) held a public meeting on May 21, 1994, in Las Vegas, Nevada (59FR19680). The purposes of the meeting were to follow-up on a previous stakeholder meeting held in August 1993; to update stakeholders on Yucca Mountain site characterization activities; and to provide an opportunity to discuss the development of a process to evaluate the suitability of the Yucca Mountain site for development as a repository. Through this Notice, the Department announces that the Summary Reports of the meeting are available upon request.

II. Decision on the Use of 10 CFR Part 960

Issued in 1984, DOE's 10 CFR Part 960 siting guidelines cover all phases of the siting process including the screening and comparison of several sites in order to select three for detailed characterization as potential repository sites. The Department has considered a range of options concerning the application of the guidelines, from revising them through the rulemaking process to simply continuing to use them in their present form and has found that the guidelines are applicable to the site suitability process. The Department has decided that it will not amend the siting guidelines. Therefore, in making suitability decisions that are required at this stage of the siting process, the Department will use the guidelines as they are currently written. Their use, however, will be subject to the programmatic changes and reconfiguration provided in the Nuclear Waste Policy Amendments Act of 1987 Because the Amendments Act eliminated all of the pre-characterization stages by requiring the Secretary to proceed with site characterization at Yucca Mountain and to cease investigation of all other potential sites for the first repository, comparative evaluation is no longer relevant. Accordingly, the Program will not utilize the comparative portions of the guidelines for purposes of the suitability assessment of the Yucca Mountain site. This means that the Program will not make specific evaluations of the favorable and potentially adverse conditions since these tests are primarily for use in comparing sites.

III. Availability of the draft description of the process for evaluating the suitability of the Yucca Mountain site

The Department is developing a process for evaluating the suitability of the Yucca Mountain Site for a repository for high-level radioactive waste and spent fuel. Through this Notice, the Department announces that a draft description of the proposed process is available for public comment. Written comments on the draft description of the proposed process are due as set forth near the beginning of this notice.

IV. Stakeholder Meetings

As part of the comment process discussed above, two day-long public meetings have been scheduled as set forth near the beginning of this notice. The meeting will provide an opportunity for representatives from the DOE to explain the draft description of the process and to receive the views and comments of the public on the proposed process and, in particular, opportunities for public involvement.

Issued in Washington, DC on July 29, 1994.

Daniel A. Dreyfus,

Director, Office of Civilian Radioactive Waste Management.

[FR Doc. 94–19062 Filed 8–3–94; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5027–5]

Acid Rain Program: Notice of Final Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of permits.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is approving 5-year nitrogen oxides compliance plans, according to the Acid Rain Program regulations (40 CFR part 76), for the following 2 utility plants: Burlington and Prairie Creek in Iowa.

FOR FURTHER INFORMATION: Contact Jon Knodel, (913) 551–7622, EPA Region 7, Air and Toxics Division, 726 Minnesota Ave., Kansas City, KS 66101.

Dated: July 26, 1994.

Brian J. McLean,

Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 94–19059 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5026–9]

Acid Rain Program: Final Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of permits.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is issuing, as a direct final action, 5-year Phase I Acid Rain Permits to 39 utility plants in accordance with the Acid Rain Program regulations (40 CFR part 72).

DATES: The permits will become final on September 13, 1994, except those permits on which EPA receives significant adverse comment by September 6, 1994. If EPA receives significant adverse comment on a permit, EPA will withdraw the direct final issuance of that permit and simultaneously repropose the permit. Such reproposal will provide an opportunity for public comment and requests for a public hearing.

ADDRESSES: *Administrative Records.* The administrative record for the permits, except information protected as confidential, may be viewed during normal operating hours at these locations:

For plants in Massachusetts and New Hampshire: EPA Region 1, JFK Building, One Congress St., Boston, MA 02203.

For plants in Indiana, Michigan, Ohio, and Wisconsin: EPA Region 5, Ralph H. Metcalfe Federal Bldg., 77 West Jackson Blvd., Chicago, IL 60604.

For plants in Iowa: EPA Region 7, 726 Minnesota Ave., Kansas City, KS 66101.

For plants in Utah and Wyoming: EPA Region 8, 999 18th St., Suite 500, Denver, CO 80202.

Comments. Send comments to the following addresses:

For plants in Massachusetts and New Hampshire: EPA Region 1, Air, Pesticides, and Toxics Management Division, Attn: Linda Murphy, Director (address above).

For plants in Indiana, Michigan, Ohio, and Wisconsin: EPA Region 5 (A–18J), Air and Radiation Division, Attn: David Kee, Director (address above).

For plants in Iowa: EPA Region 7, Air and Toxics Division, Attn: Jon Knodel (address above).

For plants in Utah and Wyoming: EPA Region 8, Air and Toxics Division, Attn: Patricia Hull, Director (address above).

Submit comments in duplicate and identify the permit 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 all units in the permit. In the comment, include objections to the permit and the legal, factual, or other basis for the objections. This information will be used by EPA to determine if the comment is a significant adverse comment.

FOR FURTHER INFORMATION CONTACT: Contact the following persons for more information about a permit listed in this notice:

For plants in Massachusetts and New Hampshire, Ian Cohen, (617) 565–3229.

For plants in Indiana, Genevieve Nearmyer, (312) 353–4761; in Michigan and Wisconsin, Beth Valenziano, (312) 886–2703; and in Ohio, Allan Batka, (312) 886–7316.

For plants in Iowa, Jon Knodel, (913) 551–7622.

For plants in Utah and Wyoming, Mark Komp, (303) 293–0956.

SUPPLEMENTARY INFORMATION: Title IV of the Clean Air Act directs EPA to establish a program to reduce the adverse effects of acidic deposition by promulgating rules and issuing permits to emission sources subject to the program. On January 11, 1993, EPA promulgated final rules implementing the program. Subsequently, several parties filed petitions for review of the rules with the U.S. Court of Appeals for the District of Columbia Circuit. On November 18, 1993, EPA published a notice of proposed revisions to rules regarding Phase I substitution and reduced utilization plans (sections 404 (b) and (c) and 408(c)(1)(B) of the Act). On May 4, 1994, EPA and other parties signed a settlement agreement addressing the substitution and reduced utilization issues.

In today's action, EPA is issuing permits that are consistent with the May 4, 1994 settlement. Except as noted below, EPA approves for 1995–1999 all compliance options for which EPA deferred action for 1996–1999 in the draft permits. In addition, except as noted below, the numbers of substitution and compensating unit allowances allocated to each unit for 1995–1999 are identical to the numbers of allowances allocated to each unit for 1995 in the draft permits. The additional allowances discussed below, according to the settlement, are a one-time allocation and entail a simultaneous deduction of an equal number of allowances in a future year. Upon activation of conditionally-approved plans, substitution or compensating unit allowances are allocated for the remaining years the plan is in effect. EPA issues the following permits:

Brayton Point in Massachusetts.

Mount Tom in Massachusetts: 10,708 substitution allowances for each year

and 736 additional allowances to unit 1 upon activation of substitution plan, and 736 additional allowances if the unit becomes affected for nitrogen oxides (NO_X).

Salem Harbor in Massachusetts: 5,710 compensating allowances for 1 year and 845 additional allowances to unit 1 upon activation of reduced utilization plan, and disapproval of part of reduced utilization plan for remaining 4 years; 5,698 compensating allowances for 1 year and 998 additional allowances to unit 2 upon activation of reduced utilization plan, and disapproval of part of reduced utilization plan for remaining 4 years; 9,055 compensating allowances for 1 year and 1,672 additional allowances to unit 3 upon activation of reduced utilization plan, and disapproval of part of reduced utilization plan for remaining 4 years.

Merrimack in New Hampshire.

Newington in New Hampshire: 20,127 substitution allowances for each year and 440 additional allowances to unit 1 upon activation of substitution plan.

H T Pritchard in Indiana: 1,458 substitution allowances for each year and 1,384 additional allowances to unit 5, and 1,458 compensating allowances for 1 year and 692 additional allowances to unit 5 upon activation of reduced utilization plan, and disapproval of reduced utilization plan for remaining 4 years; no change for unit 6.

Petersburg in Indiana: No change for units 1 and 2; 15,471 substitution allowances for each year and 1,218 additional allowances to unit 3, and 15,471 compensating allowances for 1 year and 609 additional allowances to unit 3 upon activation of reduced utilization plan, and disapproval of reduced utilization plan for remaining 4 years; 12,864 substitution allowances for each year and 5,040 additional allowances to unit 3, and 12,864 compensating allowances for 1 year and 2,520 additional allowances to unit 4 upon activation of reduced utilization plan, and disapproval of reduced utilization plan for remaining 4 years.

Rockport in Indiana: 21,581 substitution allowances for each year and 355 additional allowances to unit MB1 upon activation of substitution plan, and 355 additional allowances if the unit becomes affected for NO_X.

B C Cobb in Michigan: 5,325 substitution allowances for each year and 619 additional allowances to unit 4 upon activation of substitution plan, and 619 additional allowances if the unit becomes affected for NO_X; 5,511 substitution allowances for each year and 599 additional allowances to unit 5 upon activation of substitution plan, and 599 additional allowances if the unit becomes affected for NO_X.

Dan E Karn in Michigan: 10,151 substitution allowances for each year and 577 additional allowances to unit 1 upon activation of substitution plan, and 577 additional allowances if the unit becomes affected for NO_x; 10,984 substitution allowances for each year and 777 additional allowances to unit 2 upon activation of substitution plan, and 777 additional allowances if the unit becomes affected for NO_x; no change for units 3 and 4.

J C Weadock in Michigan: 5,437 substitution allowances for each year and 796 additional allowances to unit 7 upon activation of substitution plan, and 796 additional allowances if the unit becomes affected for NO_x; 5,451 substitution allowances for each year and 743 additional allowances to unit 8 upon activation of substitution plan, and 743 additional allowances if the unit becomes affected for NO_x.

J H Campell in Michigan: No change for units 1 and 2; 25,847 substitution allowances for each year and 324 additional allowances to unit 3 upon activation of substitution plan, and 324 additional allowances if the unit becomes affected for NO_x.

J R Whiting in Michigan: 4,188 substitution allowances for each year and 355 additional allowances to unit 1 upon activation of substitution plan, and 377 additional allowances if the unit becomes affected for NO_x; 4,304 substitution allowances for each year and 348 additional allowances to unit 2 upon activation of substitution plan, and 348 additional allowances if the unit becomes affected for NO_x; 5,498 substitution allowances for each year and 451 additional allowances to unit 3 upon activation of substitution plan, and 451 additional allowances if the unit becomes affected for NO_x.

Presque Isle in Michigan.

Cardinal in Ohio.

Conesville in Ohio.

Picway in Ohio.

Poston in Ohio: 0 substitution allowances and 3,797 additional allowances to unit 1; 0 substitution allowances and 3,542 additional allowances to unit 2; 0 substitution allowances and 4,642 additional allowances to unit 3.

Tidd in Ohio.

Alma in Wisconsin: 2,207 substitution allowances for each year and 2,898 additional allowances to unit B4 upon activation of substitution plan, and 2,898 additional allowances if the unit becomes affected for NO_x; 3,624 substitution allowances for each year and 4,531 additional allowances to unit B5 upon activation of substitution plan, and 4,531 additional allowances if the unit becomes affected for NO_x.

Columbia in Wisconsin.

Edgewater in Wisconsin: 4,493 substitution allowances for each and 754 additional allowances to unit 3 upon activation of substitution plan; no changes to units 4 and 5.

Genoa in Wisconsin.

J P Madgett in Wisconsin: 6,407 substitution allowances for each year and 455 additional allowances to unit B1 upon activation of substitution plan, and 455 additional allowances if the unit becomes affected for NO_x.

Nelson Dewey in Wisconsin.

North Oak Creek in Wisconsin.

Port Washington in Wisconsin: 956 substitution allowances for each year and 1,012 additional allowances to unit 1 upon activation of substitution plan, and 1,012 additional allowances if the unit becomes affected for NO_x; 2,354 substitution allowances for each year and 1,428 additional allowances to unit 2 upon activation of substitution plan, and 1,428 additional allowances if the unit becomes affected for NO_x; 1,965 substitution allowances for each year and 1,143 additional allowances to unit 3 upon activation of substitution plan, and 1,143 additional allowances if the unit becomes affected for NO_x; 1,623 substitution allowances for each year and 1,122 additional allowances to unit 4 upon activation of substitution plan, and 1,122 additional allowances if the unit becomes affected for NO_x, 0 substitution allowances and 3,412 additional allowances to unit 5 upon activation of substitution plan, and 3,412 substitution allowances if the unit becomes affected for NO_x.

Pulliam in Wisconsin: 488 substitution allowances for each year and 28 additional allowances to unit 3 upon activation of substitution plan, and 28 additional allowances if the unit becomes affected for NO_x; 750 substitution allowances for each year and 23 additional allowances to unit 4 upon activation of substitution plan, and 23 additional allowances if the unit becomes affected for NO_x; 2,097 substitution allowances for each year and 157 additional allowances to unit 5 upon activation of substitution plan, and 157 additional allowances if the unit becomes affected for NO_x; 2,844 substitution allowances for each year and 94 additional allowances to unit 6 upon activation of substitution plan, and 94 additional allowances if the unit becomes affected for NO_x; 7,317 substitution allowances for each year and 244 additional allowances to unit 7 upon activation of substitution plan,

and 244 additional allowances if the unit becomes affected for NO_x; no change to unit 8.

Rock River in Wisconsin: 5,398 substitution allowances for each year and 498 additional allowances to unit 1 upon activation of substitution plan; 4,034 substitution allowances for each year and 1,673 additional allowances to unit 2 upon activation of substitution plan.

South Oak Creek in Wisconsin.

Stoneman in Wisconsin: 355 substitution allowances for each year and 649 additional allowances to unit B1 upon activation of substitution plan, and 649 additional allowances if the unit becomes affected for NO_X; 447 substitution allowances for each year and 826 additional allowances to unit B2 upon activation of substitution plan, and 926 additional allowances if the unit becomes affected for NO_X.

Valley in Wisconsin: 3,633 substitution allowances for each year and 42 additional allowances to unit 1 upon activation of substitution plan, and 42 additional allowances if the unit becomes affected for NO_X; 3,671 substitution allowances for each year and 42 additional allowances to unit 2 upon activation of substitution plan, and 42 additional allowances if the unit becomes affected for NO_X; 3,372 substitution allowances for each year and 32 additional allowances to unit 3 upon activation of substitution plan, and 32 additional allowances if the unit becomes affected for NO_X; 3,280 substitution allowances for each year and 31 additional allowances to unit 4 upon activation of substitution plan, and 31 additional allowances if the unit becomes affected for NO_X.

Weston in Wisconsin: 1,579 substitution allowances for each year and 634 additional allowances to unit 1 upon activation of substitution plan, and 634 additional allowances if the unit becomes affected for NO_X; 3,580 substitution allowances for each year and 1,737 additional allowances if the unit becomes affected for NO_X; no change for unit 3.

Burlington in Iowa: disapproval of reduced utilization plans and parts of plans for 4 years for unit 1.

Prairie Creek in Iowa: no change for unit 3; disapproval of reduced utilization plans and parts of reduced utilization plans for unit 4.

Sutherland in Iowa: 8,430 compensating allowances for 1 year and 468 additional allowances to unit 3 upon activation of reduced utilization plan and disapproval of reduced utilization plans and parts of plans for remaining 4 years.

Gadsby in Utah: 0 substitution allowances for 1995 and 1996 and 2,890 additional allowances to unit 3.

Jim Bridger in Wyoming: 4,968 substitution allowances for 1995 and 1996 and 28,342 additional allowances to unit BW71; 4,859 substitution allowances for 1995 and 1996 and 27,760 additional allowances to unit BW72; 4,655 substitution allowances for 1995 and 1996 and 26,578 additional allowances to unit BW73.

Wyodak in Wyoming: 6,434 substitution allowances for 1995 and 1996 and 20,842 additional allowances to unit BW91.

Dated: July 26, 1994.

Brian J. McLean,

Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 94–19060 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–M

[FRL–5026–8]

Meeting of the Environmental Statistics Advisory Committee

The Environmental Statistics Technical Advisory Committee will hold two meetings. The first meeting will be held in conjunction with the annual meeting of the American Statistical Association in Toronto, Ontario, Canada on August 16, 1994. The meeting will be in Rooms D and E of the Sheraton Centre Hotel from 1:30 to 3:30 pm. The committee will discuss topics and plans for future reviews. They will also be briefed by officials of the Office of Management and Budget and the US Environmental Protection Agency concerning current activities pertinent to the charge of the committee.

The second meeting will be held at The Hall of States, 444 North Capitol Street, NW., Washington, DC on September 16, 1994. The meeting will be in Rooms 283–285 from 9:00 am to 5:00 p.m.. The committee will discuss specific issues in the field of environmental statistics with recommendations for research and operational areas.

Anyone wishing to speak at either or both meetings of the committee should make a request in writing to Dr. Barry D. Nussbaum, Environmental Statistics and Information Division, OPPE, Mail Code 2163, US Environmental Protection Agency, Washington, DC 20460. Public statements will be limited to ten minutes. For more information please contact Dr. Nussbaum at 202–260–1493 or FAX at 202–260–4968.

Dated: July 27, 1994.

Arthur T. Koines,

Deputy Director, OSPED, OPPE, Approving Official.

[FR Doc. 94–18958 Filed 8–3–94; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL RESERVE SYSTEM

AMH Holding Company; Formation of, Acquisition by, or Merger of Bank Holding Companies

The company listed in this notice has applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that application or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Comments regarding this application must be received not later than August 29, 1994.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. AMH Holding Company, Morehead, Kentucky; to become a bank holding company by acquiring The Citizens Bancorp of Morehead, Inc., Morehead, Kentucky, and thereby indirectly acquire The Citizens Bank, Morehead, Kentucky. In connection with this application AMH will then merge with The Citizens Bank of Morehead, Inc., Morehead, Kentucky.

Board of Governors of the Federal Reserve System, July 29, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–19004 Filed 8–3–94; 8:45 am]

BILLING CODE 6210–01–F

AmSouth Bancorporation; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has 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.

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 August 29, 1994.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. AmSouth Bancorporation, Birmingham, Alabama; to acquire Community Federal Savings Bank, Fort Oglethorpe, Georgia, and thereby engage in operating a savings and loan, pursuant to § 225.25(b)(9) of the Board's Regulation Y. In connection with this application Applicant also has applied to acquire AmSouth Interim Federal Savings Bank, Rome, Georgia.

Board of Governors of the Federal Reserve System, July 29, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–19005 Filed 8–3–94; 8:45 am]

BILLING CODE 6210–01–F

John W. Gay, III, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 24, 1994.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. John W. Gay, III, Scottsboro, Alabama; to acquire an additional .01 percent, for a total of 23.72 percent, of the voting shares of FNS Bancshares, Inc., Scottsboro, Alabama, and thereby indirectly acquire First National Bank, Scottsboro, Alabama.

B. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Robert L. and Arthena Lydick, Clovis, New Mexico; to acquire an additional .59 percent, for a total of 10.58 percent, of the voting shares of Western Bancshares of Clovis, Inc., Carlsbad, New Mexico, and thereby indirectly acquire Western Bank of Clovis, Clovis, New Mexico.

Board of Governors of the Federal Reserve System, July 29, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–19006 Filed 8–3–94; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[CDC–488]

Announcement of Cooperative Agreement to the World Health Organization

Summary

The Centers for Disease Control and Prevention (CDC) announces the availability of funds for fiscal year (FY) 1994 for a cooperative agreement with the World Health Organization (WHO) for research initiatives related to chronic disease prevention and health promotion. Annually, chronic diseases are responsible for significant illness, death, economic cost, and diminished quality of life for millions of individuals worldwide. Improving methods of reaching and sustaining healthy lifestyles, promoting health education and disease prevention, and reducing high-risk activities which result in disease infection will result in significant reduction in mortality and morbidity. Approximately $312,000 is available in FY 1994 to fund this program. It is expected that the award will begin on or about September 29, 1994, for a 12-month budget period within a project period of up to 3 years. Funding estimates may vary and are subject to change. Continuation awards within the project period will be made on the basis of satisfactory progress and availability of funds.

The purpose of this program is for WHO to coordinate the dissemination of comprehensive chronic disease information and health promotion programmatic expertise among relevant agencies, nations, and health-care professionals worldwide. Findings from this project will be useful in further reducing the excessive burden of chronic disease mortality in the United States and in improving the provision of care through more simple and less expensive forms of technology, as well as contributing immeasurably to reducing the excessive burden of chronic disease mortality throughout the world.

The CDC will collaborate in the design of research protocols, assist in the analysis and interpretation of data generated from each project, provide, as needed, other programmatic consultation and guidance in support of the program, provide continuing updates on scientific and operational developments in the areas of categorical and comprehensive chronic disease

prevention and control, participate in the development of plans for the sharing and dissemination of program and research data and information, and assist in defining the scope, the development, and dissemination of plans for chronic disease prevention, research, and control.

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 to reduce morbidity and mortality and to improve the quality of life. This announcement focuses on the priority areas of Health Promotion and Disease Prevention. (For ordering a copy of "Healthy People 2000," see the section WHERE TO OBTAIN ADDITIONAL INFORMATION.)

Authority

This program is authorized under 22 U.S.C. 2151b and Section 301(a) of the Public Health Service Act, as amended.

Smoke-Free Workplace

The Public Health Service strongly encourages all grant recipients to provide a smoke-free workplace and promote the non-use of tobacco products. This is consistent with the PHS mission of promoting the protection and advancement of an individual's physical and mental health.

Eligible Applicant

Assistance will be provided only to WHO for this project. No other applications are solicited. The program announcement and application kit have been sent to WHO.

WHO is the only International/Intergovernmental agency qualified to conduct the research activities under this cooperative agreement because it has:

A. A unique position among the world's health agencies as the technical agency for health within the United Nations.

B. Access to all national health promotion and disease prevention programs and potential research sites through its six regional offices located in Washington, DC; Copenhagen, Denmark; Alexandria, Egypt; Brazzaville, Congo; Delhi, India; and Manila, Philippines.

C. WHO is uniquely qualified to conduct research activities that have specific relevance to the mission and objectives of CDC and which have the potential to advance knowledge that benefits the United States.

D. In collaboration with other international organizations, WHO works to accomplish its mission by disseminating information related to chronic disease program needs and services, recommends and advocates improved policies and programs, and provides consultation and guidance at the international, national, and local level for systems of coordinated care for persons with chronic or disabling conditions.

E. WHO offers special opportunities for furthering research programs through the use of unusual talent resources, populations, or environmental conditions in other countries that are not readily available in the United States or that provide augmentation of existing United States resources.

Executive Order 12372 Review

This application is not subject to review under Executive Order 12372, Intergovernmental Review of Federal Programs.

Public Health System Reporting Requirements

This program is not subject to the Public Health System Reporting Requirements.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance number for this program is 93.283.

Where To Obtain Additional Information

In you are interested in obtaining additional information on this program, please refer to Announcement Number 488 and contact Gordon R. Clapp, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 314, Mailstop E–18, Atlanta, GA 30305, telephone (404) 842–6508.

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) referenced in the SUMMARY may be obtained through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325, telephone (202) 783–3238.

Dated: July 28, 1994.

Joseph R. Carter,

Acting Associate Director for Management and Operations, Centers for Disease Control and Prevention (CDC).

[FR Doc. 94–18989 Filed 8–3–94; 8:45 am]

BILLING CODE 4163–18–P

Food and Drug Administration

[Docket No. 94N–0196]

Hazard Analysis Critical Control Point Systems; Invitation to Participate in a Voluntary HACCP Pilot Program for the Food Manufacturing Industry

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that it intends to conduct a pilot program in which volunteers from the food manufacturing industry will use the Hazard Analysis Critical Control Point (HACCP) system. This pilot program is intended to provide information that FDA can use in deciding whether to propose to adopt and, should it decide to do so, in developing and implementing a regulatory system in which food manufacturers are required to operate based on HACCP principles. FDA expects that the pilot program will involve a small number of firms making products presenting a range of risks. FDA is inviting individual firms that wish to participate in this program to submit letters of interest.

DATES: Letters of interest from individual firms must be submitted by October 3, 1994.

ADDRESSES: Submit letters of interest to the Office of Policy, Planning, and Strategic Initiatives (HFS–4), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

FOR FURTHER INFORMATION CONTACT: John E. Kvenberg, Center for Food Safety and Applied Nutrition (HFS–4), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–4010.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321 *et seq*), FDA acts to help ensure that foods in interstate commerce are safe. To achieve this goal of safe foods, FDA engages in a range of activities, including providing guidance about measures that manufacturers can take to ensure the safety of their products. One such measure is the adoption of HACCP, a systematic approach to the identification and control of biological, chemical, and physical hazards associated with the production of a particular food. HACCP is recognized as being particularly effective in limiting the risks from the hazards presented by food processing because each firm tailors the HACCP approach to fit its specific product, processing, and distribution conditions.

For example, the low-acid canned food regulations contained in part 113 (21 CFR part 113) incorporate the principles of HACCP in a manner designed to prevent *Clostridium botulinum* outgrowth and toxin production in thermally processed, low-acid foods packaged in hermetically sealed containers.

In the **Federal Register** of January 28, 1994 (59 FR 4142), FDA published a proposal to establish regulations to require the implementation of HACCP programs by the seafood industry. The agency is now considering action to extend HACCP beyond seafood to the other food products, domestic and imported, that it regulates. Elsewhere in this issue of the **Federal Register**, FDA intends to publish an advance notice of proposed rulemaking (ANPRM) that requests comments on the application of HACCP to the food industry. After the comments to the ANPRM are evaluated and as FDA gathers information from the pilot program that is the subject of this notice, the agency may begin rulemaking to expand HACCP to other segments of the food industry.

To collect information on how HACCP might be implemented in the food industry, FDA is announcing a pilot program designed to provide insight into the problems, costs, and benefits of developing and implementing HACCP for firms that produce a variety of food products. This program will also provide the agency with information on the implications for the agency of implementing a HACCP system. The agency invites individual firms to submit letters of interest in participating in this voluntary program. FDA will select firms with a goal of ensuring that the participants in the program produce products that present a range of potential hazards, have a range of scientific capabilities, have processing facilities of varying sizes, and have a range of HACCP experience. FDA anticipates that this program will provide the selected firm as well as the agency with extremely useful practical experience.

The potential benefits to industry from participation in the pilot program include: (1) An opportunity to work with FDA to determine how best to apply HACCP in the firm's particular plant or segment of the food industry, (2) the chance to engage in a scientific dialogue with FDA, (3) an opportunity to contribute to the development of sound regulatory policy relative to food safety hazards, and (4) an opportunity to learn how firms can reduce the likelihood of recalls or seizures.

Participation in this pilot program offers several benefits to FDA and to the consumer: (1) Experience gained during this program may allow the agency to generalize what it has found and to make its insights available to the whole food industry, (2) the agency will gain experience that it can rely on in deciding whether HACCP is practicable for the food industry as a whole, and (3) the agency will be able to determine how it can better focus its monitoring of food safety to concentrate on areas of greatest public health need. Moreover, the agency intends to make a summary of the results of the pilot program publicly available, which should help other firms, both inside and outside the segments of the food industry represented in the program, to develop and implement their own HACCP programs, should they choose to do so, or should the agency require that they do so. This will also serve to increase public understanding of, and involvement in this new food safety regimen.

FDA requests that individual firms submitting letters of interest provide information concerning the nature of their products, the size of their processing facility, the processing techniques that they use to manufacture their products, their scientific capability (e.g., research and development programs, quality control laboratories), and the extent to which, and how, they employ HACCP (e.g., Does the firm have valid HACCP plans? Is it operating under those plans? If not, does the firm have the capability to develop and implement HACCP plans?). FDA will consider these factors in reviewing the letters of interest as a basis for identifying a limited number of individual firms that, in the judgment of the agency, are best suited to participate in the program. After a list of potential participants has been compiled, FDA will review the regulatory status and inspectional history of each firm on the list.

FDA will meet with the firms that have expressed an interest in participating in the program. At this meeting, FDA will present the details of the voluntary HACCP pilot program. If a firm is still interested in participation in the program, it will be visited by the team of FDA employees that will be responsible for the pilot program (the FDA HACCP Pilot Core Team) and by representatives of the local FDA district office. Representatives of a trade association may also participate in the visit if invited by the firm. The purpose of the visit will be to allow FDA to assess how well the firm fits within the agency's goals for the pilot program and to review the firm's HACCP plan, if one exists. Based on the results of these visits, the FDA HACCP Pilot Core Team will select the firms that will participate in the program. Because FDA's resources are limited, only a few firms can be selected.

Each firm selected to participate in the pilot program will be expected to design, develop, and implement its own HACCP program tailored to control the hazards presented in producing its products and by its processing facility. FDA will assist each firm that it selects in developing a HACCP program that, at minimum, includes: An employee training program on HACCP principles; a written general sanitation program that the firm will use to maintain its production facility in a sanitary manner, in accordance with FDA's regulation, "Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Human Food" (21 CFR part 110); and a written HACCP plan based upon the HACCP principles outlined by the National Advisory Committee on Microbiological Criteria for Food for each product covered by the program. FDA will expect each firm that participates in the program to agree to: (1) FDA review of its HACCP program before the firm participates in the pilot program, (2) FDA HACCP-based inspections of its processing facility, (3) FDA review of the firm's regularly scheduled internal monitoring to determine the degree of compliance with the HACCP plan, and (4) use of its own resources to accomplish assigned efforts (e.g., developing HACCP plans, training employees on the HACCP principles, conducting audits of HACCP programs) during the course of the program.

FDA intends to implement this program on a carefully controlled basis. Within 6 weeks of the date that a firm is accepted and operational in its HACCP program, FDA will conduct an initial verification inspection to determine the firm's compliance with its HACCP program. The firm will be expected to submit monthly verification reports to the FDA HACCP Pilot Core Team for evaluation. FDA will conduct subsequent verification inspections as appropriate.

Interested firms are invited to submit a letter of interest to Office of Policy, Planning, and Strategic Initiatives (HFS–4), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 200 C St. SW., Washington, DC 20204. Letters of interest must be submitted by October 3, 1994.

Dated: July 28, 1994.
Michael R. Taylor,
Deputy Commissioner for Policy.
[FR Doc. 94–18969 Filed 8–1–94; 8:45 am]
BILLING CODE 4160–01–F

[Docket No. 94N–0287]

Glaxo, Inc., et al.; Withdrawal of Approval of 13 Abbreviated Antibiotic Applications and 2 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of 13 abbreviated antibiotic applications (AADA's) and 2 abbreviated new drug applications (ANDA's). The holders of the applications notified the agency in writing that the drug products were no being longer marketed and requested that the approval of the applications be withdrawn.

EFFECTIVE DATE: September 6, 1994.

FOR FURTHER INFORMATION CONTACT: Lola E. Batson, Center for Drug Evaluation and Research (HFD–360), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1038.

SUPPLEMENTARY INFORMATION: The holders of the applications listed in the table below have informed FDA that these drug products are no longer being marketed and have requested that FDA withdraw approval of the applications. The applicants have also, by request, waived their opportunity for a hearing.

Application no.	Drug	Applicant
AADA 61–231	Crystalline Penicillin G Potassium (bulk)	Glaxo, Inc., Five Moore Dr., P.O. Box 13358, Research Triangle Park, NC 27709.
AADA 61–232	Crystalline Penicillin G Sodium (bulk)	Do.
AADA 61–324	Penicillin G Procaine (bulk)	Do.
AADA 61–491	Penicillin G Procaine Type "A" (bulk)	Do.
AADA 61–705	Tetracycline Hydrochloride Tablets, U.S.P., 250 milligrams (mg) and 500 mg.	The Upjohn Co., 7000 Portage Rd., Kalamazoo, MI 49001.
AADA 61–743	Erythromycin Stearate Tablets, U.S.P., 250 mg	Purepac Pharmaceutical Co., 200 Elmora Ave., Elizabeth, NJ 07207.
AADA 61–945	Sterile Penicillin G Potassium Buffered (bulk)	Glaxo, Inc.
AADA 629–053	Rifampin, U.S.P., (nonsterile bulk)	Marion Merrill Dow, Inc., Marion Park Dr., Kansas City, MO 64134–0627.
AADA 62–213	Sterile Penicillin G Sodium Buffered (bulk)	Glaxo, Inc.
AADA 62–297	Ampicillin for Oral Squibb, Suspension,U.S.P., 125 mg/5 milliliters (mL) and 250 mg/5 mL.	Bristol-Myers Co., P.O. Box 4755, Syracuse, NY 13221–4755.
AADA 62–399	Neomycin and Polymyxin B Sulfates and Hydrocortisone Otic Suspension, U.S.P..	Pharmafair, Inc., 110 Kennedy Dr., Hauppauge, NY 11788.
AADA 62–404	Sterile Cephalothin Sodium, U.S.P. (bulk)	Glaxo, Inc.
AADA 62–435	Cephalothin Sodium for Injection, U.S.P.	Do.
ANDA 88–101	Naphazoline Hydrochloride Ophthalmic Solution, U.S.P., 0.1%.	Pharmafair, Inc.
ANDA 88–230	Tropicamide Ophthalmic Solution, U.S.P., 1%	Do.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research (21 CFR 5.82), approval of the applications listed above, and all amendments and supplements thereto, is hereby withdrawn, effective September 6, 1994.

Dated: July 26, 1994.
Janet Woodcock,
Director, Center for Drug Evaluation and Research.
[FR Doc. 94–18971 Filed 8–3–94; 8:45 am]
BILLING CODE 4160–01–F

DPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Centers for Disease Control and Prevention; Statement of Organization, Functions, and Delegations of Authority

Part H, Chapter HC (Center for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772-67776, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 59 FR 1749, dated January 12, 1994, and corrected at 59 FR 4720-4721, dated February 1, 1994) is amended to reflect the establishment of the Office of Equal Employment Opportunity within the Office of the Director, Centers for Disease Control and Prevention (CDC).

Section HC-B, Organization and Functions, is hereby amended as follows:

After the functional statement for the *CDC Washington Office (HCA6),* insert the following:

Office of Equal Employment Opportunity (HCA9)

(1) Provides advice and guidance to the Director, Centers for Disease Control and Prevention (CDC), and the Director, Office of Program Support, on matters relating to equal employment opportunity (EEO) and participates in the development of CDC-wide EEO policies and procedures; (2) plans, develops, implements, coordinates, directs, and evaluates comprehensive programs in EEO and Civil Rights; (3) provides counsel, advice, and recommendations to the CDC Centers, Institute, and Offices (CIO) on EEO concerns and responsibilities, and represents CDC in dealings with Federal and non-Federal agencies and organizations on the full range of EEO activities; (4) directs the planning and development of the agency's multi-year Affirmative Employment Plan; (5) administers the EEO complaints and

resolution systems; analyzes formal investigative reports; and prepares proposed decisions for the Director, CDC; (6) develops and directs the implementation of special emphasis programs for groups of minority, female, and/or handicapped employees, including training and program evaluation activities directed to meet individual and systemic special needs and employee concerns of these particular groups; and (7) identifies potential and current problem areas by working closely with CIO Directors; Director, Human Resources Management Office; Affirmative Employment Coordinators; and other managers and EEO Officials.

Dated: March 17, 1994.

Donna E. Shalala,

Secretary.

[FR Doc. 94-18939 Filed 8-3-94; 8:45 am]

BILLING CODE 4160-18-M

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies and Laboratories That Have Withdrawn From the Program

AGENCY: Substance Abuse and Mental Health Services Administration, HHS (Formerly: National Institute on Drug Abuse, ADAMHA, HHS).

ACTION: Notice

SUMMARY: The Department of Health and Human Services notifies Federal agencies of the laboratories currently certified to meet standards of Subpart C of Mandatory Guidelines for Federal Workplace Drug Testing Programs (53 FR 11979, 11986). A similar notice listing all currently certified laboratories will be published during the first week of each month, and updated to include laboratories which subsequently apply for and complete the certification process. If any listed laboratory's certification is totally suspended or revoked, the laboratory will be omitted from updated lists until such time as it is restored to full certification under the Guidelines.

If any laboratory has withdrawn from the National Laboratory Certification Program during the past month, it will be identified as such at the end of the current list of certified laboratories, and will be omitted from the monthly listing thereafter.

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh, Division of Workplace Programs, Room 13A-54, 5600 Fishers Lane, Rockville, Maryland 20857; Tel.: (301) 443-6014.

SUPPLEMENTARY INFORMATION:

Mandatory Guidelines for Federal Workplace Drug Testing were developed in accordance with Executive Order 12564 and section 503 of Pub. L. 100-71. Subpart C of the Guidelines, "Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies," sets strict standards which laboratories must meet in order to conduct urine drug testing for Federal agencies. To become certified an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification a laboratory must participate in an every-other-month performance testing program plus periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are *not* to be considered as meeting the minimum requirements expressed in the HHS Guidelines. A laboratory must have its letter of certification from SAMHSA, HHS (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Guidelines, the following laboratories meet the minimum standards set forth in the Guidelines:

Aegis Analytical Laboratories, Inc., 624 Grassmere Park Rd., Suite 21, Nashville, TN 37211, 615-331-5300.

Alabama Reference Laboratories, Inc., 543 South Hull St., Montgomery, AL 36103, 800-541-4931/205-263-5745.

Allied Clinical Laboratories, 201 Plaza Boulevard, Hurst, TX 76053, 817-282-2257.

American Medical Laboratories, Inc., 14225 Newbrook Dr., Chantilly, VA 22021, 703-802-6900.

Associated Pathologists Laboratories, Inc. 4230 South Burnham Ave., Suite 250, Las Vegas, NV 89119-5412, 702-733-7866.

Associated Regional and University Pathologists, Inc. (ARUP), 500 Chipeta Way, Salt Lake City, UT 84108, 801-583-2787.

Baptist Medical Center—Toxicology Laboratory, 9601 I-630, Exit 7, Little Rock, AR 72205-7299, 501-227-2783 (formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Bayshore Clinical Laboratory, 4555 W. Schroeder Dr., Brown Deer, WI 53223, 414-355-4444/800-877-7016.

Bioran Medical Laboratory, 415 Massachusetts Ave., Cambridge, MA 02139, 617-547-8900.

Cedars Medical Center, Department of Pathology, 1400 Northwest 12th Ave., Miami, FL 33136, 305-325-5810.

Center for Laboratory Services, a Division of LabOne, Inc., 8915 Lenexa Dr., Overland Park, Kansas 66214, 913-888-3927.

Centinela Hospital Airport Toxicology Laboratory, 9601 S. Sepulveda Blvd., Los Angeles, CA 90045, 310-215-6020.

Clinical Reference Lab, 11850 West 85th St., Lenexa, KS 66214, 800-445-6917.

Cox Medical Centers, Department of Toxicology, 1423 North Jefferson Ave., Springfield, MO 65802, 800-876-3652/417-836-3093.

CPF MetPath Laboratories, 21007 Southgate Park Blvd., Cleveland, OH 44137-3054, (Outside OH) 800-338-0166/(Inside OH) 800-362-8913 (formerly: Southgate Medical Laboratory; Southgate Medical Services, Inc.).

Damon/MetPath, 8300 Esters Blvd., Suite 900, Irving, TX 75063, 214-929-0535 (formerly: Damon Clinical Laboratories).

Dept. of the Navy, Navy Drug Screening Laboratory, Great Lakes, IL, Building 38-H, Great Lakes, IL 60088-5223, 708-688-2045/708-688-4171.

Dept. of the Navy, Navy Drug Screening Laboratory, Norfolk, VA, 1321 Gilbert St., Norfolk, VA 23511-2597, 804-444-8089 ext. 317.

Doctors Laboratory, Inc., P.O. Box 2658, 2906 Julia Dr., Valdosta, GA 31604, 912-244-4468.

Drug Labs of Texas, 15201 I-10 East, Suite 125, Channelview, TX 77530, 713-457-3784.

DrugProof, Division of Laboratory of Pathology of Seattle, Inc., 1229 Madison St., Suite 500, Nordstrom Medical Tower, Seattle, WA 98104, 800-898-0180/206-386-2672 (formerly: Laboratory of Pathology of Seattle, Inc.).

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Rd., Warminster, PA 18974, 215-674-9310.

Eagle Forensic Laboratory, Inc., 950 N. Federal Highway, Suite 308, Pompano Beach, FL 33062, 305-946-4324.

ElSohly Laboratories, Inc., 5 Industrial Park Dr., Oxford, MS 38655, 601-236-2609 (moved 6/16/93).

Expresslab, Inc., 405 Alderson St., Schofield, WI 54476, 800-627-8200 (formerly: Alpha Medical Laboratory, Inc., Employee Health Assurance Group).

General Medical Laboratories, 36 South Brooks St., Madison, WI 53715, 608-267-6267.

Harrison Laboratories, Inc., 9930 W. Highway 80, Midland, TX 79706, 800-725-3784/915-563-3300 (formerly: Harrison & Associates Forensic Laboratories).

HealthCare/MetPath, 24451 Telegraph Rd., Southfield, MI 48034, Inside MI:

800–328–4142/Outside MI: 800–225–9414 (formerly: HealthCare/Preferred Laboratories).
Jewish Hospital of Cincinnati, Inc., 3200 Burnet Ave., Cincinnati, OH 45229, 513–569–2051.
Laboratory Specialists, Inc., 113 Jarrell Dr., Belle Chasse, LA 70037, 504–392–7961.
Marshfield Laboratories, 1000 North Oak Ave., Marshfield, WI 54449, 715–389–3734/800–222–5835.
Maryland Medical MetPath, 1901 Sulphur Spring Rd., Baltimore, MD 21227, 410–536–1485 (formerly: Maryland Medical Laboratory, Inc., National Center for Forensic Science).
Med-Chek/Damon, 4900 Perry Hwy., Pittsburgh, PA 15229, 412–931–7200 (formerly: Med-Chek Laboratories, Inc.).
MedExpress/National Laboratory Center, 4022 Willow Lake Blvd., Memphis, TN 38175, 901–795–1515.
Medical College Hospitals Toxicology Laboratory, Department of Pathology, 3000 Arlington Ave., Toledo, OH 43699–0008, 419–381–5213.
Medical Science Laboratories, 11020 W. Plank Court, Wauwatosa, WI 53226, 414–476–3400.
MedTox Laboratories, Inc., 402 W. County Rd. D, St. Paul, MN 55112, 800–832–3244/612–636–7466.
Methodist Hospital of Indiana, Inc., Department of Pathology and Laboratory Medicine, 1701 N. Senate Blvd., Indianapolis, IN 46202, 317–929–3587.
Methodist Medical Center Toxicology Laboratory, 221 N.E. Glen Oak Ave., Peoria, IL 61636, 800–752–1835/309–671–5199.
MetPath, Inc.. 1355 Mittel Blvd., Wood Dale, IL 60191, 708–595–3888.
MetPath, Inc., One Malcolm Ave., Teterboro, NJ 07608, 201–393–5000.
Metropolitan Reference Laboratories, Inc., 2320 Schuetz Rd., St. Louis, MO 63146, 800–288–7293.
National Drug Assessment Corporation, 5419 South Western, Oklahoma City, OK 73109, 800–749–3784, (formerly: Med Arts Lab).
National Health Laboratories Incorporated, 5601 Oberlin Dr., Suite 100, San Diego, CA 92121, 619–455–1221.
National Health Laboratories Incorporated, 2540 Empire Dr., Winston-Salem, NC 27103–6710, Outside NC: 919–760–4620/800–334–8627/Inside NC: 800–642–0894.
National Health Laboratories Incorporated, d.b.a. National Reference Laboratory, Substance Abuse Division, 1400 Donelson Pike, Suite A–15, Nashville, TN 37217, 615–360–3992/800–800–4522.
National Health Laboratories Incorporated, 13900 Park Center Rd., Herndon, VA 22071, 703–742–3100.
National Psychopharmacology Laboratory, Inc., 9320 Park W. Blvd., Knoxville, TN 37923, 800–251–9492.
National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 805–322–4250.
Nichols Institute Substance Abuse Testing (NISAT), 7470–A Mission Valley Rd., San Diego, CA 92108–4406, 800–446–4728/619–686–3200 (formerly: Nichols Institute).
Northwest Toxicology, Inc., 1141 E. 3900 South, Salt Lake City, UT 84124, 800–322–3361.
Occupational Toxicology Laboratories, Inc., 2002 20th St., Suite 204A, Kenner, LA 70062, 504–465–0751.
Oregon Medical Laboratories, P.O. Box 972, 722 East 11th Ave., Eugene, OR 97440–0972, 503–687–2134.
Pathology Associates Medical Laboratories, East 11604 Indiana, Spokane, WA 99206, 509–926–2400.
PDLA, Inc. (Princeton), 100 Corporate Court, So. Plainfield, NJ 07080, 908–769–8500/800–237–7352.
PharmChem Laboratories, Inc., 1505–A O'Brien Dr., Menlo Park, CA 94025, 415–328–6200/800–446–5177.
PharmChem Laboratories, Inc., Texas Division, 7606 Pebble Dr., Fort Worth, TX 76118, 817–595–0294 (formerly: Harris Medical Laboratory).
Physicians Reference Laboratory, 7800 West 110th St., Overland Park, KS 66210, 913–338–4070/800–821–3627 (formerly: Physicians Reference Laboratory Toxicology Laboratory).
Poisonlab, Inc., 7272 Clairemont Mesa Rd., San Diego, CA 92111, 619–279–2600/800–882–7272.
Puckett Laboratory, 4200 Mamie St., Hattiesburgh, MS 39402, 601–264–3856/800–844–8378.
Regional Toxicology Services, 15305 N.E. 40th St., Redmond, WA 98052, 206–882–3400.
Roche Biomedical Laboratories, Inc., 1120 Stateline Rd., Southaven, MS 38671, 601–342–1286.
Roche Biomedical Laboratories, Inc., 69 First Ave., Raritan, NJ 08869, 800–437–4986.
Roche CompuChem Laboratories, Inc., A Member of the Roche Group, 3308 Chapel Hill/Nelson Hwy., Research Triangle Park, NC 27709, 919–549–8263/800–833–3984 (formerly: CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory).
Roche CompuChem Laboratories, Inc., Special Division, A Member of the Roche Group, 3308 Chapel Hill/Nelson Hwy., Research Triangle Park, NC 27709, 919–549–8263 (formerly: CompuChem Laboratories, Inc.—Special Division).
Scientific Testing Laboratories, Inc., 463 Southlake Blvd., Richmond, VA 23236, 804–378–9130.
Scott & White Drug Testing Laboratory, 600 S. 25th St., Temple, TX 76504, 800–749–3788.
S.E.D. Medical Laboratories, 500 Walter NE, Suite 500, Albuquerque, NM 87102, 505–848–8800.
Sierra Nevada Laboratories, Inc., 888 Willow St., Reno, NV 89502, 800–648–5472.
SmithKline Beecham Clinical Laboratories, 7600 Tyrone Ave., Van Nuys, CA 91045, 818–376–2520.
SmithKline Beecham Clinical Laboratories, 801 East Dixie Ave., Leesburg, FL 32748, 904–787–9006 (Formerly: Doctors & Physicians Laboratory).
SmithKline Beecham Clinical Laboratories, 3175 Presidential Dr., Atlanta, GA 30340, 404–934–9205 (Formerly: SmithKline Bio-Science Laboratories).
SmithKline Beecham Clinical Laboratories, 506 E. State Pkwy., Schaumburg, IL 60173, 708–885–2010 (Formerly: International Toxicology Laboratories).
SmithKline Beecham Clinical Laboratories, 400 Egypt Rd., Norristown, PA 19403, 800–523–5447 (Formerly: SmithKline Bio-Science Laboratories).
SmithKline Beecham Clinical Laboratories, 8000 Sovereign Row, Dallas, TX 75247, 214–638–1301 (formerly: SmithKline Bio-Science Laboratories).
South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 219–234–4176.
Southwest Laboratories, 2727 W. Baseline Rd., Suite 6, Tempe, AZ 85283, 602–438–8507.
St. Anthony Hospital (Toxicology Laboratory), P.O. Box 205, 1000 N. Lee St., Oklahoma City, OK 73102, 405–272–7052.
St. Louis University Forensic Toxicology Laboratory, 1205 Carr Lane, St. Louis, MO 63104, 314–577–8628.
Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 314–882–1273.
Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260.
TOXWORX Laboratories, Inc., 6160 Variel Ave., Woodland Hills, CA 91367, 818–226–4373 (formerly: Laboratory Specialists, Inc.; Abused Drug Laboratories; MedTox Bio-

Analytical, a Division of MedTox Laboratories, Inc.).
UNILAB, 18408 Oxnard St., Tarzana, CA 91356, 800–492–0800/818–343–8191 (formerly: MetWest-BPL Toxicology Laboratory).

The following laboratory withdrew from the Program on June 16:
Precision Analytical Laboratories, Inc., 13300 Blanco Rd., Suite #150, San Antonio, TX 78216, 210–493–3211.

The following laboratory will be withdrawing from the Program on August 12:
Saint Joseph Hospital Toxicology Laboratory, 601 N. 30th St., Omaha, NE 68131–2197, 402–449–4940.

Richard Kopanda,
Acting Executive Officer, Substance Abuse and Mental Health Services Administration.
[FR Doc. 94–18798 Filed 8–3–94; 8:45 am]
BILLING CODE 4160–20–U

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Closure of Public Lands; Oregon

AGENCY: Bureau of Land Management, Lakeview District, Klamath Falls RA OR–014–4333–04 G4237.

ACTION: Public notice of emergency road closures and use restrictions in the Klamath River Canyon and Topsy Recreation Site.

SUMMARY: Notice is hereby given that all public lands in Sections 23, 26, 34, and 35 of T. 40 S., R. 6 E., and Section 3 of T. 41 S., R. 6 E., Willamette Meridian (W.M.) between the canyon access road west of the upper Klamath River and the river itself are closed to all motorized vehicle access. Two developed campground roads, located in the SW¼ of Section 26, T. 40 S., R. 6 E. and the SE¼ of Section 34, T. 40 S., R. 6 E., W.M., are exempt from this closure. Motorized use in these two campgrounds is restricted to the existing roadbed and designated parking areas. In Section 35, T. 40 S., R. 6 E., W.M., motorized vehicle use on public land between the east canyon rim and the river is restricted to the main access road. Existing "Jeep" trails in this section will be open to non-motorized use only.

Pacific Power and Light Company and government agency vehicles used for administrative, emergency, or law enforcement purposes are exempt from this motorized vehicle closure.

The purpose of this closure is to protect the river bank and riparian vegetation, cultural resources, wildlife habitat, vegetation, soils, and semi-wilderness and scenic qualities along the Klamath River from damage and disruption by motorized vehicles. The authority for this closure is 43 CFR 8341.2 and 43 CFR 8365.2–4. The closure will remain in effect until an off-highway vehicle (OHV) designation plan for the upper Klamath River Canyon is completed.

In addition, the following are use restrictions for four developed recreation sites in or near the Klamath River Canyon:

The whitewater boat access, in the NE¼SE¼ of Section 14, T. 40 S., R. 6 E., W.M., is closed to the public from ½ hour after sunset to ½ hour before sunrise. Camping, overnight parking, or fire building, the discharge or use of firearms, other weapons, or fireworks, between the river and the access road from ¼ mile above the site to ¼ mile below the site, is not permitted. Unattended vehicles within the posted turn-around area ⅛ mile past the boat access entrance is prohibited.

All campsites at the Klamath River Campground, located in SW¼ of Section 26, T. 40 S., R. 6 E., W.M., are restricted to camping parties of no more than twelve people and two motor vehicles. All campsites at Turtle Primitive Group Campground, located in the SE¼ of Section 34, T. 40 S., R. 6 E., W.M., are restricted to camping parties between eight and thirty-five people from May 1st to October 1st., from October through April, camping parties can be between one and thirty-five people at each campsite. The discharge or use of firearms, other weapons, or fireworks is not permitted between the main access road and river from ¼ mile above each site to ¼ mile below each site.

At these two campgrounds as well as Topsy Recreation Site, located in NW¼ of Section 6, T. 40 S., R. 7 E., W.M., all pets must be secured to a leash no longer than six feet at all times. Human waste can be deposited only in toilet facilities. Unreasonable noise that disturbs other visitors is prohibited. Personal property cannot be left unattended for over twenty-four hours; personal property left unattended beyond such time is subject to disposition under the Federal Property and Administration Service Act of 1949, as amended (40 U.S.C. 484(m)). Entering or remaining in these recreation sites between 9:00 p.m. and 6: a.m., except as an occupant, is not permitted. Open fires are to be built in existing firegrates only. Chopping, cutting, or injuring of live trees is prohibited. Moving any table, fire grate, barrier, garbage can, or other equipment at all recreation sites mentioned is prohibited. The speed limit in all recreation sites is ten M.P.H.

Camping parties at Topsy Recreation Site are limited to no more than twelve people and two motor vehicles per campsite. Horses are not allowed within this site. The discharge or use of firearms, other weapons, or fireworks is not permitted between Topsy Road and the J.C. Boyle Reservoir from ⅛ mile above to ⅛ mile below this site.

Finally, all public lands in the Klamath River Canyon from J.C. Boyle Powerhouse, located in NE¼ of Section 14, T. 40 S., R. 6 E., W.M., to the Oregon/California border, are closed to firearms target shooting, from

May 1st to October 1st. This restriction does not affect legal hunting of game birds and animals.

These restrictions are necessary to prevent resource damage to soil, vegetation, wildlife habitat, to protect visitors from accidents and crime, to protect public facilities and campsites from vandalism and theft, and to promote semi-wilderness and scenic qualities in the Klamath River Canyon. The authority for these use restrictions is found under 43 CFR 8365. These use restrictions will remain in effect until a river management plan for the upper Klamath River is completed.

SUPPLEMENTARY INFORMATION: Any person who fails to comply with these closures and restrictions is subject to the penalties provided in 8360.0–7. Violations are punishable by a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months.

FOR FURTHER INFORMATION CONTACT: Lee Buschkowsky or Scott Senter, Lakeview District, Klamath Falls Resource Area, 2795 Anderson Avenue, Building 25, Klamath Falls, OR 97603, (503) 883–6916.

Dated: July 12, 1994.
A. Barron Bail,
Klamath Falls Resource Area Manager.
[FR Doc. 94–18950 Filed 8–3–94; 8:45 am]
BILLING CODE 4310–33–M

[CO–030–4210–05; COC56965]

Realty Action Non Competitive Sale of Lands; Colorado

AGENCY: Department of the Interior, Bureau of Land Management.

ACTION: Designation of public lands located in San Miguel County, Colorado as being suitable for disposal out of federal ownership through sale.

SUMMARY: The following described public lands have been determined to be suitable for disposal by sale utilizing non-competitive procedures, at not less

than the fair market value as determined by an appraisal completed by a Federal or independent appraiser using the principals contained in the "Uniform Appraisal Standards for Federal Land Acquisitions". Authority for the sale is Section 203 of Public Law 94–597, the Federal Land Policy and Management Act of 1976.

New Mexico Principal Meridian, Colorado

T. 44 N., R. 11 W.,
Sec. 33: Lot 12.

Containing .4 acres.

The lands will not be offered for sale until at least 60 days after the date of publication of this notice in the **Federal Register**.

This land is being offered as a direct non-competitive sale to Mark Natichioni. BLM has determined a direct sale is necessary to protect existing equities in the land and to resolve an inadvertent unauthorized occupancy of said land.

In the event of a sale, the mineral interests shall be conveyed simultaneously with the surface interest. The mineral interests being offered for conveyance have no known mineral value. Upon acceptance of a direct sale offer, the purchaser shall be required to make application for conveyance of those mineral interests.

Upon publication of this notice in the **Federal Register**, the land will be segregated from all forms of appropriation under the public land laws, including the general mining laws. This segregation will terminate upon issuance of a patent or 270 days from the date of this publication.

The patent, when issued, will contain a reservation for a right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. 945.

FOR FURTHER INFORMATION CONTACT: Additional information about this sale is available for review at the Bureau of Land Management, Montrose District Office, 2465 South Townsend Avenue, Montrose, Colorado 81401. Comments shall be submitted by September 19, 1994 to the Montrose District Manager. Any adverse comments will be reviewed by the District Manager, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, this realty action will become the final determination of the Department of the Interior.

Dated: July 21, 1994.

Phillip W. Dwyer,

Acting District Manager.

[FR Doc. 94–18945 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–JB–M

[NV–930–04–4210–05; N58101]

Realty Action: Lease and Sale of Public Land for Recreation and Public Purpose, Pershing County, NV

SUMMARY: In response to an application from the Pershing County Fair and Recreation Board for an eighteen hole championship golf course, the following described land has been identified as suitable for lease and sale and will be classified for lease and sale under the Recreation and Public Purpose Act, as amended (43 U.S.C. 869, et seq.):

Mount Diablo Meridian, Nevada

T. 27 N., R. 31 E.,
Sec. 7, E½SE¼NE¼, NE¼SW¼SE¼, S½SW¼SE¼, E½SE¼;
Sec. 8, SW¼NW¼, W½SW¼;
Sec. 18, N½NE¼, E½NE¼NW¼.

Totalling approximately 350 acres.

The lands are not required for Federal purposes. Disposal is consistent with the Bureau's planning for the area and would be in the public's interest.

FOR FURTHER INFORMATION CONTACT: Chuck Valentine, Realty Specialist, 705 East 4th Street, Winnemucca, NV 89445, telephone (702) 623–1500.

SUPPLEMENTARY INFORMATION: The public lands are being offered to the Pershing County Fair and Recreation Board for the operation of an eighteen hole championship golf course. The site will be used for a golf course, practice range, putting green, club house, practice/teaching facility and a pro shop.

The lease and/or patent, when issued will contain the following reservations to the United States:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States pursuant to the Act of August 30, 1890 (43 U.S.C. 945).

2. All mineral deposits in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe. And will be subject to:

1. Those rights for highway purposes which have been granted to Nevada Department of Transportation, its successors or assigns, by permit No. Nev–048800, under the Act of November 9, 1921 (23 U.S.C. Sec 18).

2. Those rights for communication line purposes which have been granted to Bell Telephone Company of Nevada, its successors or assigns, by permit No. N–12799, under the Act of March 4, 1911 (43 U.S.C. 961).

3. Those rights for natural gas pipeline purposes which have been granted to Southwest Gas Corporation, its successors or assigns, by permit No. Nev–058689, under the Act of February 25, 1920 (30 U.S.C. 185 Sec. 28).

4. Those rights for power transmission line purposes which have been granted to Sierra Pacific Power Company, its successors or assigns, by permit No. N–12800, under the Act of March 4, 1911 (43 U.S.C. 961). The above described lands were segregated from all forms of appropriations under the public land laws, including the general mining laws, but not the Recreation and Public Purpose Act and the Mineral Leasing Laws in the January 14, 1994, publication of the **Federal Register**. The lands will continue to be segregated as per the subject notice.

For a period of 45 days from the date of publication of the Notice in the **Federal Register**, interested parties may submit comments to the District Manager, 705 E. Fourth Street, Winnemucca, Nevada 89445. Any adverse comments will be reviewed by the State Director. In absence of any adverse comments, the classification of the lands described in this Notice will become effective 60 days from the date of publication in the **Federal Register**.

Dated: July 26, 1994.

Robert J. Neary,

Acting District Manager, Winnemucca.

[FR Doc. 94–18946 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–HC–M

[OR–015–94–4210–05; GP4–180]

Bureau of Land Management

Withdrawal of Public Lands From Sale Offering

AGENCY: Bureau of Land Management, Interior, Lakeview District.

ACTION: Withdrawal of Sale Parcels OR 36285 and OR 49389 from Public Sale Offering.

Notice is given that sale parcels OR 36285 and OR 49389, previously published for public sale offering in the **Federal Register** April 11, 1986, Vol. 51, No. 70, Page 12573 and July 22, 1993, Vol. 58, No. 139, Pages 39225 and 39226, respectively, are hereby withdrawn from sale.

The subject parcels were advertised for public sale by notice in the above **Federal Register** volumes pursuant to section 203 of the Federal Land Policy and Management Act of 1976, (90 Stat. 2750, 43 U.S.C. 1713) and have not sold. These parcels will be reconsidered for

future public sale offering upon public request only.

Ted A. Davis,

Acting Manager, Lakeview Resource Area.

[FR Doc. 94–18949 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–33–M

Bureau of Land Management

[CA–060–65–5101–10–B045, CA–31587]

Intent To Consider and Amendment to the California Desert Conservation Area Plan of 1980 and To Prepare an Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent, Amendment.

SUMMARY: Notice is hereby given that the California Desert District of the Bureau of Land Management (BLM), pursuant to regulatory procedures for land use planning under the Federal Land Policy and Management Act of 1976 (43 CFR 1610.5–S), intends to amend the **Federal Register** Notice dated July 18, 1994, page 36448, to consider an amendment to the California Desert Conservation Area Plan for the purpose of identifying public land areas which may be suitable for wind energy development and to analyze the impacts of any proposed amendment and alternatives in an environmental impact statement (EIS). The purpose of this notice is to extend the closing date for receiving public scoping comments from August 12, 1994 to September 9, 1994.

DATES: Written comments on this proposed plan amendment and associated EIS will be accepted on or before September 9, 1994. The public is also invited to make comments at the following public scoping meetings:

Tuesday, July 26, 1994—Recreation Hall, Junction of "O" and Barstow Streets, Mojave, California—6:30 p.m.

Wednesday, July 27, 1994—Reecreation District Gym, 410 West "D" St., Tehachapi, California—6:30 p.m.

Thursday, July 28, 1994—Weldon School, Highway 178 and Fay Ranch Road, Weldon, California—6:30 p.m.

Tuesday, August 9, 1994—Ed Oakly Hall, Caliente Creek Road, Twin Oaks, California—6:30 p.m.

Only four public scoping meetings are planned at this time.

ADDRESSES: Please mail comments, issues and concerns to Ahmed Mohsen, Team Leader, Bureau of Land Management, Ridgecrest Resource Area, 300 S. Richmond Rd., Ridgecrest, CA 93555, Attn: Wind Energy PA/EIS.

FOR FURTHER INFORMATION CONTACT: Ahmed Mohsen, Environmental Coordinator, at the above address or telephone (619) 375–7125.

Lee Delaney,

Area Manager.

[FR Doc. 94–18983 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–84–M

Bureau of Land Management

[WO–221–94–4410–02–241A]

Draft Environmental Impact Statement for Rangeland Reform '94 and Request for Public Comment

AGENCY: Bureau of Land Management, Interior

ACTION: Notice; extension of comment period.

SUMMARY: The public comment period for the Draft Environmental Impact Statement (EIS) for Rangeland Reform '94 is hereby extended to September 9, 1994. The draft EIS has been prepared in accordance with Section 102(2)(c) of the National Environmental Policy Act of 1969 by the Department of the Interior, Bureau of Land Management (BLM), with the cooperation of the Department of Agriculture, Forest Service.

DATES: Written comments on the draft EIS must be postmarked no later than September 9, 1994. Comments received after this date may not be considered in preparation of the final EIS.

ADDRESSES: Comments on the draft EIS should be sent to: Rangeland Reform '94, P.O. Box 66300, Washington, D.C. 20035–6300.

FOR FURTHER INFORMATION CONTACT: Write to the above address or call Jim Fox, Bureau of Land Management, (202) 452–7740, or Jerry McCormick, Forest Service, (202) 205–1457. To obtain a copy of the draft EIS, please call or visit your nearest BLM Resource Area office or Forest Service National Forest Supervisor's office.

SUPPLEMENTARY INFORMATION: The Bureau of Land Management and the Forest Service are proposing to change policies and regulations within their Federal rangeland management programs. These actions are intended to improve and restore a significant portion of rangeland ecosystems and to improve and maintain biodiversity, while providing for sustainable development on lands administered by the two agencies. The two agencies are also proposing to revise the formula used to determine fees charged for grazing livestock on Federal lands in the 17 western states.

The Bureau of Land Management, with the cooperation of the Forest Service, has prepared a draft EIS analyzing the environmental effects of the proposed changes in their rangeland management programs. The draft EIS is a national-level, programmatic analysis. It documents the ecological, economic, and social impacts that would result from alternative fee formulas and from reforming, or not reforming, other elements of the Federal rangeland management program. Five management alternatives are considered in detail: Current Management (No Action), BLM-Forest Service Proposed Action; Livestock Production; Environmental Enhancement; and No Grazing. Seven grazing fee formula alternatives are also analyzed: Current Public Rangeland Improvement Act (PRIA) (No Action); Modified PRIA; BLM-Forest Service Proposed Action; Regional Fees; Federal Forage Fee; PRIA with Surcharges; and Competitive Bidding.

Dated: August 1, 1994.

Jonathan P. Deason,

Director, Office of Environmental Policy and Compliance.

[FR Doc. 94–19075 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–84–P

[UTU—65252]

Utah; Proposed Reinstatement of Terminated Oil and Gas Lease

In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97–451), a petition for reinstatement of oil and gas lease UTU–65252 for lands in San Juan County, Utah, was timely filed and required rentals accruing from May 1, 1994, the date of termination, have been paid.

The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre and 16⅔ percent, respectively. The $500 administrative fee has been paid and the lessee has reimbursed the Bureau of Land Management for the cost of publishing this notice.

Having met all the requirement for reinstatement of the lease as set out in Section 31 (d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate lease UTU–65252 effective May 1, 1994, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Robert Lopez,

Chief, Minerals Adjudication Section.

[FR Doc. 94–19045 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–DQ–M

[WY-920-41-5700; WYW112663]

Proposed Reinstatement of Terminated Oil and Gas Lease

July 26, 1994.

Pursuant to the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2-3(a) and (b)(1), a petition for reinstatement of oil and gas lease WYW112663 for lands in Johnson County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5.00 per acre, or fraction thereof, per year and 16⅔ percent, respectively.

The lessee has paid the required $500 administrative fee and $125 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW112663 effective July 1, 1993, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Pamela J. Lewis,

Supervisory Land Law Examiner.

[FR Doc. 94-19046 Filed 8-3-94; 8:45 am]

BILLING CODE 4310-22-M

[ID-030-04-406A-02; ID-30066]

Realty Actions; Sales, Lease, etc.: Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Action, Amendment of the Medicine Lodge Resource Management Plan (RMP)/Notice of Realty Action, Direct Sale of Public Land in Jefferson County, Idaho.

SUMMARY: Pursuant to Bureau of Land Management (BLM) planning regulations (43 CFR 1600) the Idaho Falls District, BLM, proposes to amend the Medicine Lodge RMP and offer the following 1120 acres of public land at direct sale to Jefferson County. These lands have been examined and have been determined to be suitable for disposal pursuant to Section 203 of the Federal Land Policy and Management Act of 1976, at no less than the appraised fair market value of $84,000.

Boise Meridian

T. 6N., R. 33E.

Sec. 14, all;
Sec. 15, E½, SW¼.

When patented, the lands will be subject to the following rights and reservations:

Reservations

A right-of-way for ditches and canals constructed by the authority of the United States (Act of August 30, 1890).

Rights

Those rights granted to the Idaho Department of Transportation under right-of-way IDI-014761 for a Federal Aid Highway (Act of August 27, 1958).

Continued use of the land by valid right-of-way holders is proper subject to the terms and conditions of the grant. Administrative responsibility previously held by the United States will be assumed by the patentee following issuance of patent.

DATES: The land will be offered for sale no sooner than October 3, 1994.

Upon publication of this notice in the **Federal Register** the lands described above will be segregated from appropriation under the public land laws, including the mining laws, for a period of 270 days or until patent is issued, whichever occurs first.

ADDRESSES: Bureau of Land Management, 940 Lincoln Road, Idaho Falls, Idaho 83401.

ADDITIONAL INFORMATION CONTACT: Additional information concerning the sale, or a copy of the plan amendment, may be obtained from Bruce Bash, Realty Specialist, at the above address, or by calling 208-524-7521.

Any party who participated in the plan amendment and is adversely affected by the amendment may protest this action only as it affects issues submitted for the record during the planning process. The protest shall be in writing and filed with the State Director within 30 days of this notice.

For a period of 45 days from the date of publication of this notice in the **Federal Register** interested parties may submit comments to the District Manager, Idaho Falls District, at the above address. Any adverse comments will be reviewed by the State Director who may sustain, modify, or vacate this realty action. In the absence of any planning protests or objections regarding the sale, this realty action will become the final action of the Department of the Interior and the planning amendment will be in effect.

Dated: July 22, 1994.

Gary Bliss,

Associate District Manager.

[FR Doc. 94-19047 Filed 8-3-94; 8:45 am]

BILLING CODE 4310-GG-M

[CA-942-5700-10]

Filing of Plats of Survey; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested state and local government officials of the latest filing of Plats of Survey in California.

EFFECTIVE DATES: Filing was effective at 10:00 a.m. on the date of submission to the Bureau of Land Management (BLM), California State Office, Public Room.

FOR FURTHER INFORMATION CONTACT: Clifford A. Robinson, Chief, Branch of Cadastral Survey, Bureau of Land Management (BLM), California State Office, 2800 Cottage Way, Room E-2845, Sacramento, CA 95825, 916-978-4775.

SUPPLEMENTARY INFORMATION: The plats of Survey of lands described below have been officially filed at the California State Office, Sacramento, CA.

Humboldt Meridian, California

T. 9 N., R. 3 E.,—Dependent resurvey, (Group 1183) accepted April 8, 1994, to meet certain administrative needs of the National Park Service, Redwood National Park.

T. 11 N., R. 6 E.,—Metes-and-bounds survey, (Group 1177) accepted June 10, 1994, to meet certain administrative needs of the U.S. Forest Service, Six Rivers and Klamath National Forests.

Mount Diablo Meridian, California

T. 12 N., R. 17 W.,—Dependent resurvey, subdivision of section 1 and metes-and-bounds survey, (Group 1095) accepted April 8, 1994, to meet certain administrative needs of the Bureau of Indian Affairs, Sacramento Area Office.

T. 13 N., R. 17 E.,—Supplemental plat of sections 21 and 28, accepted April 29, 1994, to meet certain administrative needs of the U.S. Forest Service, Lake Tahoe Basin Management Unit.

T. 48 N., R. 11 W.,—Corrective dependent resurvey, dependent resurvey, and metes-and-bounds survey of Tracts 37 through 48, (Group 888) accepted May 16, 1994, to meet certain administrative needs of the U.S. Forest Service, Rogue River National Forest.

T. 48 N., R. 11 W.,—Metes-and-bounds survey of Tract 49, (Group 1171) accepted May 16, 1994, to meet certain administrative needs of the U.S. Forest Service, Rogue River National Forest.

T. 30 N., R. 3 E.,—Department resurvey, and metes-and-bounds survey of Tract 37, (Group 1187) accepted June 2, 1994, to meet certain administrative needs of the U.S. Forest Service, Lassen National Forest.

T. 44 N., R. 6 E.,—Supplemental plat of NW ¼ section 19, accepted June 20, 1994, to meet certain administrative needs of the

U.S. Forest Service, Modoc National Forest.

T. 28 S., R. 27 E.,—Supplemental plat of the NW ¼ section 6, accepted June 21, 1994, to meet certain administrative needs of the BLM, Bakersfield District, Caliente Resource Area.

T. 29 S., R. 30 E.,—Supplemental plat of the SW ¼ section 34, accepted June 21, 1994, to meet certain administrative needs of the BLM, Bakersfield District, Caliente Resource Area.

San Bernardino Meridian, California

T. 12 N., R. 1 E.,—Dependent resurvey, (Group 1154) accepted April 12, 1994, to meet certain administrative needs of the BLM, California Desert District, Barstow Resource Area.

T. 8 N., R. 3 W.,—Supplemental plat of the SE ¼ section 23 and section 24, accepted May 6, 1994, to meet certain administrative needs of the BLM, California Desert District, Barstow Resource Area.

T. 8 N., R. 3 W.,—Supplemental plat of section 26 and the E ½ of section 27, accepted May 6, 1994, to meet certain administrative needs of the BLM, California Desert District, Barstow Resource Area.

T. 8 N., R. 3 W.,—Supplemental plat of section 34 and the NW ¼ of section 35, accepted May 6, 1994, to meet certain administrative needs of the BLM, California Desert District, Barstow Resource Area.

T. 5 S., R. 4 W.,—Dependent resurvey of Mineral Survey No. 3540 (Cancelled), (Group 1167) accepted June 29, 1994, to meet certain administrative needs of the BLM, California Desert District, Palm Springs/South Coast Resource Area.

T. 9 N., R. 23 E.,—Retracment and dependent resurvey, subdivision of section 29, and metes-and-bounds survey, (Group 991) accepted June 30, 1994, to meet certain administrative needs of the Arizona BLM, Yuma District Office, Havasu Resource Area.

All of the above listed survey plats are now the basic record for describing the lands for all authorized purposes. The survey plats have been placed in the open files in the BLM, California State Office, and are available to the public as a matter of information. Copies of the survey plats and related field notes will be furnished to the public upon payment of the appropriate fee.

Dated: July 28, 1994.

Clifford A. Robinson,

Chief, Branch of Cadastral Survey.

[FR Doc. 94–19048 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–40–M

Bureau of Reclamation

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information reproduced below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). An expedited review has been requested in accordance with the Act, since allowing for the normal review period would adversely affect the public interest for the reasons given below. Approval has been requested by July 30, 1994. Comments and suggestions on the proposal should be made directly to the bureau clearance officer listed below and to the Office of Management and Budget, Paperwork Reduction Project (1006–XXXX), Washington DC 20503; Telephone 202–395–7340.

Title: Glen Canyon Environmental Studies Passive-Use Values Study.

OMB Approval Number: 1006–XXXX.

Abstract: Individuals who may not physically use certain unique or significant resources may hold some value for their existence and preservation. Passive-use or non-use economic value is a monetary measure of this value. Studies completed under the Glen Canyon Environmental Studies Program have shown that the operation of Glen Canyon Dam affects downstream natural and cultural resources in Glen Canyon National Recreation Area and Grand Canyon National Park. If individuals hold passive-use value for resources affected by the timing and amount of the releases from the dam, the magnitude of these values could be influenced by changes in the way the dam is operated. A small (pilot) test survey was completed earlier (OMB clearance number 1006–0013). Data obtained during the pilot test supported the hypothesis that members of the general public hold passive-use value for these resources and that the magnitude of these values may change across operational alternatives. A full scale (final) survey is now proposed. Information for the final survey will be collected from a random sample of the U.S. population in an effort to quantify passive-use value for a range of dam operation strategies. This information will be available for use by decision makers as they assess the trade-offs between recreation benefits, power production benefits, and passive-use benefits associated with different strategies for operating Glen Canyon Dam.

Reason for Expedited Review: Data collected under this information has been requested for possible consideration in reaching a Record of Decision on the final Glen Canyon Dam Environmental Impact Statement (GCDEIS). The Grand Canyon Protection Act of 1992 stipulates the completion of the final GCDEIS by October 30, 1994. In order to meet this schedule, it will be necessary to begin survey administration as soon as clearance is obtained.

Frequency: Once.

Description of Respondents: Residents of the U.S., aged 18 or more.

Estimated Completion Time: ½ hour.

Responses: 5,950.

Burden Hours: 2,975.

Bureau Clearance Officer: Larry Schulz, 303–236–6769.

Dated: July 13, 1994.

Murlin Coffey,

Chief, Supply and Services Division.

[FR Doc. 94–19049 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–94–M

Fish and Wildlife Service

Availability of a Draft Recovery Plan for the Carolina Heelsplitter for Review and Comment

AGENCY: Fish and Wildlife Service. Interior.

ACTION: Notice of document availability and public comment period.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of a technical/agency draft recovery plan for Carolina heelsplitter (*Lasmigona decorata*). This rare freshwater mussel inhabits cool, slow-moving, small- to medium-sized streams and rivers. The Carolina heelsplitter currently has a very fragmented, relict distribution but historically was known from several locations within the Catawaba River and Pee Dee River systems in North Carolina and the Saluda and Pee Dee River systems in South Carolina. The species is presently know to be surviving in only four streams—Waxhaw Creek (Catawba River system) Union County, North Carolina; Goose Creek (Pee Dee River system), Union County, North Carolina; Lynches River (Pee Dee River system), Chesterfield, Lancaster, and Kershaw Counties, South Carolina; and Flat Creek (Pee Dee River system), a tributary to the Lynches River in Lancaster County, South Carolina. It has been reduced to a few short reaches of each of these streams, primarily as a result of impoundments and general deterioration of water quality resulting

from siltation and other pollutants contributed by poor land use practices. The Service solicits review and comment from the public on this draft plan.

DATES: Comments on the draft recovery plan must be received on or before October 3, 1994 to receive consideration by the Service.

ADDRESSES: Persons wishing to review the agency draft recovery plan may obtain a copy by contacting the Asheville Field Office, U.S. Fish and Wildlife Service, 330 Ridgefield Court, Asheville, North Carolina 28806 (Telephone 704/665–1195). Written comments and materials regarding the plan should be addressed to the Field Supervisor at the above address. Comments and materials received are available on request for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. John Fridell at the address and telephone number shown above (Ext. 225).

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 considered necessary for conservation of the species, establish criteria for recognizing 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, as amended (16 U.S.C. 1531 et seq.) (Act), 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 a 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 also take these comments into account in the course of implementing approved recovery plans.

The primary species considered in this draft recovery plan is the Carolina heelsplitter (*Lasmigona decorata*). The area of emphasis for recovery actions is the upper Catawba River and Pee Dee River systems in south-central North Carolina and north-central South Carolina and the Saluda River system in northwestern South Carolina Habitat protection, reintroduction, and preservation of genetic material are major objectives of this recovery plan.

Public Comments Solicited

The Service solicits written comments on the recovery plan described. All comments received by the date specified above will be considered prior to approval of the plan.

Authority: The authority for this action is Section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: July 29, 1994.

Brian P. Cole,

Field Supervisor.

[FR Doc. 94–19040 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–55–M

Office of Surface Mining Reclamation and Enforcement

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related form and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made to the Bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029–0104), Washington, DC 20503, telephone 202–395–7340.

Title: Acid Mine Drainage Abatement and Treatment Program—30 CFR 876.

OMB Number: 1029–0104.

Abstract: This Part establishes the procedures and requirements for States and Indian Tribes to create an Acid Mine Drainage Abatement and Treatment program. The information is needed to assure compliance with the Surface Mining Control and Reclamation Act.

Bureau Form Number: None.

Frequency: On occasion.

Description of Respondents: State and Indian Tribes.

Estimated Completion Time: 350 hours.

Annual Responses: 7.

Annual Burden Hours: 2,450.

Bureau Clearance officer: John A. Trelease (202) 343–1475.

Dated: May 17, 1994.

Andrew F. DeVito,

Chief, Branch of Environmental and Economic Analysis.

[FR Doc. 94–19024 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–05–M

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related form and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirements should be made directly to the Bureau clearance officer and to the Office of Management and Budget Paperwork Reduction Project (1029–0098), Washington, DC 20503, telephone 202–395–7340.

Title: Petition Process for Designation of Federal Lands as Unsuitable for All or Certain Types of Surface Coal Mining Operations and for Termination of Previous Designations, 30 CFR 769.

OMB Number: 1029–0098.

Abstract: This Part establishes the minimum procedures and standards for designating Federal lands unsuitable for all or certain types of surface coal mining operations and for terminating designations pursuant to petition. The information requested will aid the regulatory authority in the decision-making process to approve or disapprove a request to designate or terminate an area as unsuitable.

Bureau Form Number: None.

Frequency: On occasion.

Description of Respondents: Individuals, Industry, and Environmental Groups.

Annual Responses: 2.

Annual Burden Hours: 150.

Estimated Completion Time: 75 hours.

Bureau clearance officer: John A. Trelease (202) 343–1475.

Dated: April 12, 1994.

Andrew F. DeVito,

Chief, Branch of Environmental and Economic Analysis.

[FR Doc. 94–19025 Filed 8–3–94; 8:45 am]

BILLING CODE 4310–05–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. Judith Groves, Interstate Commerce Commission, Section of Environmental Analysis, Room 3219, Washington, DC 20423, (202) 927–6203 or (202) 927–6245.

Comments on the following assessment are due 15 days after the date of availability:

AB–290 (SUB–NO. 145X), NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN MUSCOGEE COUNTY, GEORGIA. EA available 7/29/94.

Comments on the following assessment are due 30 days after the date of availability:

AB–3 (SUB–NO. 116X), MISSOURI PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN SMITH COUNTY, TEXAS. EA available 7/26/94.

AB–55 (SUB–NO. 488X), CSX TRANSPORTATION, INC.—ABANDONMENT AND DISCONTINUANCE—IN ROCKBRIDGE COUNTY, VIRGINIA. EA available 7/29/94.

AB–3 (SUB–NO. 115), MISSOURI PACIFIC RAILROAD COMPANY—ABANDONMENT—IN MIAMI, FRANKLIN AND OSAGE COUNTIES, KANSAS (HOISINGTON SUBDIVISION AND TOPEKA INDUSTRIAL LEAD). EA available 7/29/94.

Vernon A. Williams,

Acting Secretary.

[FR Doc. 94–19011 Filed 8–3–94; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as Amended

In accordance with Department policy, 28 CFR 50.7 and 42 U.S.C. 9622(d)(2), notice is hereby given that a proposed Consent Decree in *United States* v. *Para-Chem Southern, Inc.*, Civil Action Number 6:94–1973–3, was lodged on July 22, 1994, with the United States District Court for the District of South Carolina, Greenville Division.

This case concerns an active latex, acrylic compounds and adhesives manufacturing plant. Portions of the area surrounding the manufacturing plant were used for disposal of process wastes. The facility is located on a 100 acre parcel of land on State Highway 14 in Simpsonville, South Carolina, known as the Para-Chem Southern, Inc. Superfund Site (the "Site"). Pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9606 and 9607(a), the Complaint in this action seeks recovery of all future costs to be incurred by the United States at the Site,[1] and injunctive relief for the Site, namely, implementation of the remedy selected by EPA in a Record of Decision ("ROD") dated September 27, 1993. The ROD provides for pumping and treatment of groundwater combined with biological treatment of sludge as the selected remedy for the Site.

Defendant Para-Chem Southern, Inc. has agreed in the proposed Consent Decree to pay the United States all future costs of overseeing the implementation of the remedy which are estimated to be between $300,000 and $1,000,000 depending upon which actions are necessitated. Para-Chem also has agreed to implement the remedy selected by EPA for the Site. The cost of the selected remedy is approximately $5,498,000.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Pare-Chem Southern, Inc.*, DOJ Ref. #90-11–2–919.

The proposed Consent Decree may be examined at the office of the United States Attorney, District of South Carolina, 300 E. Washington Street, Greenville, South Carolina; the Office of the United States Environmental Protection Agency, Region IV, 345 Courtland Street, N.E., Atlanta, Georgia; and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, DC 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $63.00 (25 cents per page reproduction costs), payable to the Consent Decree Library for a copy of the Consent Decree with attachments (ROD, Statement of Work and Site map) or a check in the amount of $20.75, for a copy of the proposed Consent Decree without those attachments.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 94–18948 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–01–M

[1] The past costs were addressed in a Section 122(h)(1) Cost Recovery Agreement entered on September 2, 1993.

Lodging a Final Judgment by Consent Pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)

Notice is hereby given that on July 21, 1994, a proposed consent decree in *United States* v. *Virginia Properties, Inc.*, Civ. A. No. 3:94CV498, was lodged with the United States District Court for the Eastern District of Virginia. The complaint in this action seeks recovery of costs and injunctive relief under Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, Public Law 99–499, 42 U.S.C. 9606, 9607(a). This action involves the Rentokil/Virginia Properties, Inc. Superfund Site located in Richmond, Virginia.

Under the proposed Consent Decree, Virginia Properties, Inc. will pay $278,618.42, to reimburse the Superfund for costs incurred by the United States in performing certain response actions at the Rentokil/Virginia Properties Superfund Site. The Decree also requires Virginia Properties to perform the remedial action for the Site selected in the June 22, 1993 Record of Decision issued by the United States Environmental Protection Agency ("EPA"). The Decree reserves the right of the United States to recover future response costs and seek further injunctive relief against the settling defendants for conditions at the Site that are not known by the United States at the time of entry of this decree.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty days from the date of publication of this notice. Comments should be addressed to the Assistant Attorney General of the

Environment and Natural Resources Division, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044, and should refer to *United States* v. *Virginia Properties, Inc.*, DOJ Reference No. 90–11–3–1093.

The proposed consent decree may be examined at the Office of the United States Attorney for the Eastern District of Virginia, 600 E. Main Street, Suite 1800, Richmond, Va. 23219; Region III Office of the Environmental Protection Agency, 841 Chestnut Street, Philadelphia, Pa.; and at the Consent Decree Library, 1120 "G" Street, N.W., 4th Floor, Washington, D.C. 20005, (202)624–0892. A copy of the proposed decree may be obtained in person or by mail from the Consent Decree Library at the address listed above. In requesting a copy, please refer to the reference case and number, and enclose a check in the amount of $20.75 (25 cents per page reproduction costs), payable to the Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment and Natural Resources.

[FR Doc. 94–18952 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–10–M

Membership of the U.S. Department of Justice's 1994 Senior Executive Service Performance Review Boards

AGENCY: Department of Justice.

ACTION: Notice of the U.S. Department of Justice's 1994 Senior Executive Service Performance Review Boards.

SUMMARY: Pursuant to the requirements of 5 U.S.C. 4314(c)(4), the U.S. Department of Justice announces the membership of its Senior Executive Service (SES) Performance Review Boards (PRBs). The purpose of the PRBs are to provide fair and impartial review of SES performance appraisals and bonus and recertification recommendations. The PRBs will make recommendations to the Deputy Attorney General regarding the final performance ratings to be assigned, SES bonuses to be awarded, and the recertification of SES career appointees.

FOR FURTHER INFORMATION CONTACT:

Henry Romero, Director, Personnel Staff, Justice Management Division, U.S. Department of Justice, Washington, D.C. 20530, (202) 514–6788.

Paul W. Mathwin,

Executive Secretary, Senior Executive Resources Board.

Senior Executive Service Performance Review Board Members

Antitrust Division

Norman Familant, Chief, Economic Litigation Section
Andrew S. Joskow, Chief, Economic Regulatory Section
Gail Kursh, Chief, Professions and Intellectual Property Section

Civil Division

Jeffrey Axelrad, Branch Director, Torts Branch
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Douglas Letter, Special Litigation Counsel, Appellate Staff

Civil Rights Division

Arthur E. Peabody, Chief, Special Litigation Section
William Ho-Gonzales, Special Counsel, Office of Special Counsel for Immigration-Related Unfair Employment Practices
John Wodatch, Chief, Public Access Section

Community Relations Service

Jeffrey L. Weiss, Acting Director

Environment and Natural Resources Division

Pauline H. Milius, Chief, Policy, Legislation and Special Litigation Section
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Richard L. DeHaan, Counsel to the Director, OLE Relocation Program

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John P. Chase, Director of Internal Audit
Joan C. Higgins, Assistant Commissioner, Detention and Deportation
Kenneth E. Lopez, Director of Security
Lawrence J. Weinig, Assistant Commissioner, Adjudications and Nationality

United States Marshals Service

Joseph B. Enders, Assistant Director, Management and Planning.

[FR Doc. 94–18951 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–01–M

Antitrust Division

United States v. Tele-Communications, Inc. and Liberty Media Corporation Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(a) and (b), the United States publishes below the comments it received on the proposal Final Judgment in *United States* v. *Tele-Communications, Inc. and Liberty Media Corporation*, Civil Action No. 94–0948, United States District Court for the District of Columbia, together with the response of the United States to those comments.

Copies of the response are available on request for inspection and copying in Room 3233 of the Antitrust Division, U.S. Department of Justice, Tenth Street and Pennsylvania Avenue, NW., Washington, DC 20530 and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, Third and

Constitution Avenue, NW., Washington, DC 20001.

Constance K. Robinson,

Director of Operations, Antitrust Division.

Response to Public Comments

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. 16(b)–(h))("APPA"), the United States of America hereby files its Response to Public Comments.

I.

Introduction

The United States has carefully reviewed the comments submitted on the proposed Final Judgment and remains convinced that entry of the proposed Final Judgment is in the public interest.

II.

Background

This action was commenced on April 28, 1994, when the United States filed a complaint alleging that the defendant's proposed merger violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. On the same date, the United States submitted a proposed Final Judgment and a Stipulation between the United States and the dependents pursuant to which the United States and the defendants consented to entry of the proposed Final Judgment. The Stipulation provides that the proposed Final Judgment may be entered by the Court after completion of the procedures required by the APPA.

III.

Compliance With the APPA

Upon publication of this Response in the **Federal Register**, the procedures required by the APPA prior to entry of the proposed Final Judgment were completed, and the Court is free to enter the proposed Final Judgment.

IV.

Response to Public Comments

The Department has received two comments relating to the proposed Final Judgment. The first comment, filed by K. Lawrence Kemp, a bankruptcy trustee, was filed on behalf of Dennis F. Gianotti, the owner of GTV, a regional sports video programming company which has filed for bankruptcy in the United States Bankruptcy Court for the Western District of Pennsylvania. The second comment was submitted by GTE Service Corporation, on behalf of its affiliated domestic telephone operating companies and GTE Laboratories Incorporated.

The issue of the standard of judicial review, raised by the comments, will be discussed below in Section IV(C).

A. K. Lawrence Kemp

Mr. Kemp submitted a copy of an antitrust complaint that has been filed on behalf of Mr. Gianotti and GTV. The complaint alleges that KBL Sports Network, Inc. and the defendants have attempted to monopolize sports television programming of collegiate athletics for cable distribution in Western Pennsylvania by interfering with Mr. Gianotti's and GVT's exclusive rights to produce and distribute such programming. Among other allegations, the complaint alleges that defendants refused carriage of GTV programming as part of an attempt to monopolize. Mr. Kemp asserts that for the reasons alleged in the aforementioned complaint, he objects to the proposed Final Judgment.

The proposed Final Judgment does not directly address issues relating to competition among firms seeking television production and distribution rights for sports events.[1] The Department has no basis for a general concern that the proposed transaction will lessen competition among firms competing for television rights for sports events. However, to the extent that defendants discriminate against non-affiliated programming in the selection, terms, or conditions of carriage, such conduct is encompassed within the proposed Final Judgment.

Section IV(A) of the proposed Final Judgment enjoins defendants' cable systems and multichannel subscription television distributors ("MSTDs") from discriminating against non-affiliated video programmers in the selection, terms, or conditions of carriage, where the effect of such conduct is unreasonably to restrain competition. This provision does not create an automatic right of access for any individual video programmer to any of defendants' individual MSTDs, nor is it intended to inhibit good faith negotiations between defendants and unaffiliated programmers regarding the terms and conditions of carriage. However, where the effect of discrimination by defendants is to restrain competition, such conduct is prohibited.

In addition, Section IV(C) extends the prohibitions set forth in Section IV(A) to prevent defendants from seeking or supporting, with respect to any MSTD in which defendants have any financial interest but do not control, conduct that would violate Section IV(A) if engaged in by defendants.

By prohibiting conduct by defendants that might restrain competition in the provision of video programming, the Department believes that the anticompetitive effects of the proposed merger alleged in the Complaint will be fully remedied. The Department's view as to the sufficiency of this relief also rests on the existence of Sections 12 and 19 of the Cable Television Protection and Competition Act, Pub. L. 102–385, 106 Stat. 1460 (1992) ("1992 Cable Act"), and its implementing Federal Communications Commission ("FCC") regulations, as well as the judgments recently entered in *U.S.* v. *Primestar Partners, L.P., et al.*[2] and *State of New York, et al.* v. *Primestar Partners, L.P., et al.*[3] ("Primestar cases").

B. GTE Service Corporation

GTE supports the entry of the proposed Final Judgment but argues that its duration is too short. In addition, GTE expresses concern that the proposed Final Judgment would allow defendants to withdraw highly appealing programming from distribution—and specifically from competing systems—upon expiration of the proposed Final Judgment.

GTE recommends (1) that the term of the existing provisions of the proposed Final Judgment be increased from five to seven years; and (2) that upon expiration of this seven year period, defendants should be restrained from withdrawing any programming from distribution in a particular market unless that market is found to be subject to "effective competition" within the meaning of Section 623(l)(1) of the 1992 Cable Act[4] or unless such programming is withdrawn from all markets, specifically including any and all systems in which defendants have an interest.

In the *Competitive Impact Statement*, the United States explains why it limited the term of the proposed Final Judgment to five years. The five year term reflects the United States' "recognition that this industry is one that has experienced major changes in MSTD technologies that are on-going, and the effects of the 1992 Cable Act and its implementing FCC regulations."[5] The United States continues to believe that for this

[1] The omission of this issue from the proposed Final Judgment, however, in no way signifies an opinion by the Department as to the merits of the GTV private lawsuit, nor does entry of the proposed Final Judgment in any way effect the private lawsuit.

[2] No. 93 Civ. 3913 (S.D.N.Y. Apr. 4, 1994).

[3] 1993–2 Trade Cas. (CCH) ¶¶ 70,403–4 (S.D.N.Y. Sept. 14, 1993).

[4] 47 U.S.C. 543(l)(1).

[5] *U.S.* v. *TCI, et al.*, Competitive Impact Statement at 8.

transaction in this industry, with changing technology, substantial new entry as well as recent and substantial government regulation, a term of five years is a sufficient period of time and is in the public interest.

The United States also believes that it is in the public interest not to place additional restrictions upon defendants after the expiration of the proposed Final Judgment. Federal antitrust laws as well as the 1992 Cable Act and its implementing FCC regulations should provide adequate protection against potential anticompetitive behavior in programming distribution upon expiration of the proposed Final Judgment.

C. Standard of Judicial Review

The APPA requires that proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed final judgment "is in the public interest." In making that determination, the court may consider:

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e) (emphasis added). The courts have recognized that the term "public interest" "take[s] meaning from the purposes of the regulatory legislation." *NAACP* v *Federal Power Comm'n*, 425 U.S. 662, 669 (1976); *United States* v *American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). Since the purpose of the antitrust laws is to "preserv[e] free and unfettered competition as the rule of trade," *Northern Pacific Railway Co.* v *United States*, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition. *United States* v *Waste Management, Inc.*, 1985–2 Trade Cas. ¶66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[6] Rather, absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the public interest finding, should

* * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. *United States* v *Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. ¶61,508, at 71,980 (W.D. Mo. 1977).

It is also unnecessary for the district court to "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981). Precedent requires that

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[7]

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every conceivable anticompetitive effect of a merger or whether it mandates certainty of free competition in the future. The court may reject the agreement of the parties as to how the public interest is best served only if it has "exceptional confidence that adverse antitrust consequences will result * * *" *United States* v. *Western Electric Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993).

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[8] Under the public interest standard, the Court's role is limited to determining whether the proposed decree is within the "zone of settlements" consistent with the public interest, not whether the settlement diverges from the Court's view of what would best serve the public interest. *United States* v. *Western Electric Co.*, 993 F.2d at 1576 (quoting *United States* v. *Western Electric Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990).

Clearly, there has been no showing that the proposed settlement constitutes an abuse of the Department's discretion or that it is not within the zone of settlements consistent with the public interest. The proposed Final Judgment would enjoin defendants' cable systems and other multichannel subscription television distributors from discriminating against non-affiliated video programmers in the selection, terms, or conditions of carriage where the effect of such conduct is unreasonably to restrain competition. Defendants also would be enjoined, with respect to their video programming, from refusing to license on nondiscriminatory terms to any competing multichannel subscription television distributor where the effect of such conduct is unreasonably to restrain competition. The Department believes that entry of the proposed Final Judgment willfully remedy the

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[6] 119 Cong. Rec. 24598 (1973). See *United States* v *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93–1463, 93rd Cong. 2d Sess. 8–9, reprinted in (1974) U.S. Code Cong. & Ad. News 6536, 6538.

[7] *United States* v *Bechtel*, 648 F.2d at 666 (quoting *United States* v *Gillette Co.*, 406 F. Supp. at 716). See *United States* v *BNS, Inc.*, 858 F.2d 456, 463 (9th Cir. 1988); *United States* v *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); see also *United States* v *American Cyanamid Co.*, 719 F.2d at 565

[8] *United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C.), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1982) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. at 716); *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky 1985).

anticompetitive effects of the proposed merger alleged in the Complaint, by prohibiting conduct by defendants that might restrain competition in the provision of video programming or multichannel subscription television distribution.

Respectfully submitted,

N. Scott Sacks, Patricia A. Shapiro,
Attorneys, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Washington, D.C. 20001, (202) 514–5815.

May 31, 1994.

Richard L. Rosen, Chief, Communications and Finance Section, Antitrust Division, Department of Justice, 555 Fouth Street, NW, Room 8104, Washington, DC 20001.

Re: Telecommunications, Inc., and Liberty Media Proposed Final Judgment and Competitive Impact Statement

Dear Mr. Rosen: Please be advised the I represent myself as bankruptcy trustee and Dennis F. Gianotti t/d/b/a GTV in a civil action pending in United States Bankruptcy for the Western District of Pennsylvania which bears upon the suitability of the proposed merger and its impact on competition in video programming. A copy of that Complaint is enclosed for your review and for inclusion in the record concerning this matter. For the reason stated in the Complaint, objection is made to the proposed final judgment and competitive impact statement.

Very truly yours,

K. Lawrence Kemp

KLK:jj
c. D.F. Gianotti
Encl.

United States District Court for the Western District of Pennsylvania

Civil Action No. 93–1564

Amended Complaint

Dennis F. Gianotti, individually and trading and doing business as GTV and K. Lawrence Kemp, Trustee in Bankruptcy for Dennis F. Gianotti, bring this civil action against KBL Sports Network, Inc., for compensatory damages in excess of $50,000.00 together with liquidated damages, punitive damages and attorneys fees, and, in support thereof respectfully represent as follows:

Jurisdiction

1. This Court has subject matter jurisdiction because this action is based in part on 15 U.S.C. 1,2 and 18 and thus subject matter jurisdiction is confered by 15 U.S.C. 15.

2. This Court has personal jurisdiction over defendant, KBL Sports Network, Inc., (hereinafter "KBL") as it regularly conducts business in this state and within the geographic territory assigned to this Court and maintains an office at 1301 Grandview Avenue, Pittsburgh, Pennsylvania, and has in the past maintained a place of business in the Ramada Hotel in Pittsburgh, Pennsylvania.

3. This Court has personal jurisdiction over Tele-Communications, Inc., (hereinafter "TCI") as it regularly conducts or has conducted business in the State of Pennsylvania and because the transactions and occurrences out of which the causes of action arise took place within the State of Pennsylvania.

4. This Court has personal jurisdiction over Liberty Media, Inc., as it regularly conducts or has conducted business in the State of Pennsylvania and because the transactions and occurrences out of which the causes of action arise took place within the State of Pennsylvania.

5. Venue exists in this Court pursuant to 28 U.S.C. 1391(b) because all claims arose in this district; and pursuant to 28 U.S.C. 1391(c) because defendant is a corporation which is doing business in this district.

Parties

6. Dennis F. Gianotti is an individual who resides in the City of New Kensington, Westmoreland County, Pennsylvania, and his traded under the name of GTV and will hereafter be referred to as "Gianotti."

7. K. Lawrence Kemp was appointed interim trustee of the bankruptcy case of Gianotti and Nancy C. Gianotti, his wife, at No. 91–03156 BM in the United States Bankruptcy Court for the Western District of Pennsylvania.

8. The claims made herein are assets of the said bankruptcy case except to the extent exempted or surplus beyond that needed to pay claims and administrative expenses.

9. Defendants are corporations organized under the laws of Colorado which do substantial business in Western Pennsylvania.

Factual Background

10. Gianotti was engaged in the business of producing television programs primarily for use on cable television and primarily of a sports nature.

11. On or about October 19, 1989, Gianotti entered into a written agreement with the University of Pittsburgh Athletic Department for the production of certain sports telecasts. The Agreement was for a term of two years from October 21, 1989, to October 21, 1991. The Agreement gave exclusive broadcast and cable distribution rights to Gianotti. The Agreement provided for an exclusive 30-day negotiating period following October 21, 1991.

12. During the term of the said Agreement, Gianotti produced various sports television programs involving University of Pittsburgh athletic events and arranged for the viewing of such programs through KBL.

13. Gianotti provided KBL with a copy of his said Agreement with the University of Pittsburgh Athletic Department prior to the first cable distribution of such a program.

14. Although Gianotti's dealings were formally with KBL, he was paid for programming by checks of TCI mailed to his address is Pennsylvania from TCI's office.

15. Before the end of the term of the said agreement, in August, 1991, KBL successfully negotiated directly with the University of Pittsburgh Athletic Department to provide for the production of the same sports events covered by the said Agreement.

16. In the spring of 1991, in order to harm Gianotti's chances of extending his contractual relationship with the University of Pittsburgh, KBL refused to provide cable distribution of University of Pittsburgh men's baseball games and other sports events such as auto racing from Gianotti.

17. In a concerted effort to take over Gianotti's business, KBL cancelled his Steeler Talk Show and replaced it with its own Sports Beat.

18. KBL directly approached and contracted with advertisers developed by Gianotti, such as Carriage Limousine and Coors Beer.

19. In February, 1991, in a meeting between William Craig, a managerial employee of KBL, and Gianotti, William Craig told Gianotti that KBL would not distribute any University of Pittsburgh athletic events unless KBL could distribute men's basketball. When Gianotti offered to produce men's basketball, William Craig rejected the offer and advised him that KBL wanted to negotiate that directly with the University of Pittsburgh.

20. At and after the meeting, Gianotti offered to buy or barter time to get his programs distributed by defendant, but KBL refused to quote him a price.

21. KBL is and was owned directly or indirectly by TCI.

22. TCI directly or indirectly (through its subsidiary TCI of Pennsylvania, Inc.) dominated the Metropolitan Pittsburgh cable television market by having approximately half the cable television subscribers in the said market.

23. Because KBL was owned by TCI and/or Liberty (the two of which were related) which had more than half the cable subscribers in this area, KBL could and did exercise market power over collegiate sports television programming in the Metropolitan Pittsburgh area.

24. The existence of market power by KBL and TCI is evidenced by the following:

(a) One of TCI's subsidiaries, TCI of Pennsylvania, refused to deal with TCS, an entity which first acquired cable television transmission rights to Pittsburgh Pirate baseball games.

(b) TCI through various of its subsidiaries refused to deal with Sportschannel, an entity which offers sports programming of national and regional interest. If TCI of Pennsylvania had carried Sportschannel, Sportschannel would have competed with KBL for rights to regional sports events.

(c) KBL reasonably believed it could impose a seat fee on commercial establishments such as bars which provide a television set for its patrons to watch programs on KBL and actually did impose such a fee.

(d) KBL refused to deal with Gianotti on programming it previously found acceptable for the sole purpose of eliminating him as an intermediary between sports programming sources such as the University of Pittsburgh and other programming sources on the one side and KBL and the cable television systems on the other.

(e) KBL and/or TCI is now attempting to acquire the Pittsburgh Pirates so that it can control broadcast, telecast and cable casting of Pirate games.

(f) TCI became a co-owner of K-Prime Partners, Limited Partnership also known as Primestar on February 8, 1990, in an effort to dominate video sports programming.

(g) TCI through its subsidiary TCI of Pennsylvania, Inc., has had the only cable television service within the City of Pittsburgh between 1984 and the present.

(h) In December, 1993, TCI of Pennsylvania had approximately 385,000 cable television subscribers in the Metropolitan Pittsburgh area, more than half the total subscribers in this area.

(i) TCI directly or indirectly through a subsidiary bought the City of Pittsburgh cable television franchise from Warner Cable Corp. in 1984 for approximately $93,400,000.00.

(j) The Chief Executive Officer of TCI is John Malone, who also owns 50.4% of the common stock of Liberty Media, Inc., a Colorado business corporation. TCI and Liberty Media through their various subsidiaries have 10 million cable television subscribers, more than 25% of the total number of cable television subscribers of the United States.

(k) John Malone, TCI and Liberty Media during the past two decades have embarked on a course of conduct designed to control cable television and by acquiring control over programming sources, technology and franchises. In particular, TCI and Liberty have, during this period of time acquired

(1) 22% of Turner Broadcasting which provides TBS, TNT, CNN and the Cartoon Network.

(2) 49% of QVC

(3) 49% of the Discovery Channel

(4) 42% of the Home Shopping Network

(5) 33% of Court TV

(6) 21% of Home Team Sports

(7) 68% of SportsCom

(8) 18% of Black Entertainment Network

(9) 90% of Encore

(10) 15.6% of The Family Channel

(11) 15% of Interactive Network

(l) In addition TCI and/or Liberty Media have become involved in partnerships or joint ventures in The Children's Channel, the Parliamentary Channel, TeleWest, The Sega Channel and Viewer Controlled Cable Television.

(m) In April, 1993, KBL acquired exclusive broadcast rights for 4 years for the Pittsburgh Penguins for approximately $22,000,000.00. This acquisition enabled KBL to sell rights to certain games to broadcast stations such as KDKA–TV and to institute pay-per-view as to certain games.

(n) KBL also acquired exclusive television broadcasting rights to the Pittsburgh Pirates.

(o) KBL, after contracting with the University of Pittsburgh for men's basketball, was able to charge an additional fee to cable system operators for such programming, a fee over and above the regular charge for KBL programming

25. John Malone, through TCI and its subsidiaries and liberty Media and its subsidiaries has engaged in an effort to exercise monopolistic control over programming sources by the above acquisitions and by encouraging independent programming sources, such as The Learning Channel, to merge into entities over which they have control such as, The Discovery Channel.

26. The elimination of GTV as a programming source enabled KBL, an entity controlled by Malone, TCI and/or Liberty Media, to deal directly with the University of Pittsburgh on terms favorable to defendants for basketball by tying the acceptance of minor sports programming to basketball.

Count I

27. By its conduct Defendants have violated 15 U.S.C. § 1 in that KBL has, by contracting directly with the University of Pittsburgh Athletic Department to produce and distribute sports events covered by the Agreement with Gianotti, restrained trade and commerce by interfering with Gianotti's opportunity to do business with the University of Pittsburgh.

28. One of the purposes of KBL said conduct was to monopolize sports television production of collegiate athletics for cable distribution in Western Pennsylvania in violation of 15 U.S.C. § 2.

29. Another of the purposes of KBL said conduct was to tie the distribution of men's basketball to the distribution of other sports events in order to deprive others from an opportunity to telecast or distribute by cable men's basketball programs.

30. Defendants' conduct had a substantially adverse affect on competition in that it eliminated a major cable television programming source and left Defendants in the position to exercise market power over the origination of sports programming for cable television in the Pittsburgh Metropolitan Area.

31. KBL is capable of monopolizing this market because of its relationship with TCI of Pennsylvania, Inc., which has more than half the cable subscribers in the Pittsburgh Metropolitan Area.

32. In this instance and in the past, defendants and their affiliated corporations have used refusals to deal with program sources as a means to exercise their market power to control programming sources.

33. The various actions taken by defendants and their affiliated corporations have decreased competition by eliminating Gianotti and possibly others such as TCS and possibly discouraging them and others from entering this expanding market.

34. Although broadcast television stations also show some local sports events, they are restrained by two factors:

(a) Because of their necessity to maintain certain minimum numbers of viewers and correspondingly certain minimum advertising rates, they cannot show minor collegiate athletic events or other sports and non-sports programming not designed to appeal to significant segments of the Viewing population.

(b) Defendants through their acquisition of exclusive rights to University of Pittsburgh Basketball, the Pittsburgh Penguins and the Pittsburgh Pirates now control which of these events can be shown on regular broadcast stations. For example, WPXI Channel 11 had to contract with KBL to be able to show certain University of Pittsburgh Basketball games.

35. Because of the conduct of defendants, Gianotti was forced out of the business he was building which in 1990 generated gross receipts of $325,102.65 and a net profit to him of $12,273.80.

36. Gianotti was the largest source of independent local video programming in the Pittsburgh Metropolitan area between 1988 and 1990.

37. Had defendants not so conducted themselves, Gianotti's business would have grown and he would have been able to earn far more than $50,000.00.

38. The fair market value of Gianotti business prior to the said course of conduct of defendants was in excess of $100,000.00.

39. Pursuant to 15 U.S.C. 15 plaintiffs are entitled to recover threefold the damages sustained plus prejudgment interest plus attorneys fees.

Wherefore, Plaintiffs request judgment against Defendant for $300,000.00 plus interest from October 21, 1991, at the federal judgment rate plus reasonable attorneys fees.

Count II

40. In violation of 15 U.S.C. 18, KBL acquired an asset of Gianotti in the form of his exclusive right to negotiate a renewal of his contract with the University of Pittsburgh Athletic Department, where the effect of such acquisition substantially lessened competition by driving Gianotti out of business chilling interest in entry into this market by others, depriving advertisers and sports teams of alternatives and tended to create a monopoly in the production of sports television programming for cable distribution.

41. Because of the conduct of defendants, Gianotti was forced out of the business he built up which in 1990 generated gross receipts of $325,102.65 and a net profit to him of $12,273.80.

42. Had defendants not so conducted themselves, Gianotti's business would have grown and he would have been able to earn far more than $50,000.00.

43. The fair market value of the Gianotti's business prior to the said course of conduct of defendants was in excess of $100,000.00.

44. Pursuant to 15 U.S.C. 15 plaintiffs are entitled to recover threefold the damages sustained plus prejudgment interest plus attorneys fees.

Wherefore, Plaintiffs request judgment against Defendant for $300,000.00 plus interest from October 21, 1991, at the federal judgment rate plus reasonable attorneys fees.

Count III

45. By dealing directly with the University of Pittsburgh Athletic Department before the expiration of the exclusive negotiating period under the Department's contract with Gianotti, KBL tortiously interfered with his advantageous contractual and business relationship with the Department.

46. By dealing directly with Gianotti's advertisers such as Carriage Limousine and Coors Beer, KBL tortiously interfered with his advantageous business relationships with them.

47. Because of the conduct of KBL, Dennis F. Gianotti was forced out of the business he built up which in 1990 generated gross receipts of $325,102.65 and a net profit to him of $12,273.80.

48. Had KBL not so conducted itself, Gianotti's business would have grown and he would have been able to earn far more than $50,000.00.

49. The fair market value of the Gianotti's business prior to the said course of conduct of defendants was in excess of $100,000.00.

Wherefore, Plaintiffs demand compensatory damages of at least $100,000.00 and such punitive damages as the court deems just.

K. Lawrence Kemp,

Kemp and Kemp, Attorneys for Plaintiffs, 953 Fifth Avenue, New Kensington, PA 15068, (412) 339–4363, PA ID #21926.

Certificate of Service

I, K. Lawrence Kemp, hereby certify that on February 7, 1994, I served the foregoing Amended Complaint by sending a true and correct copy of the same by first class United States Mail, postage prepaid, addressed as follows: Michael E. Lowenstein, Reed, Smith, Shaw & McClay, P.O. Box 2009, Pittsburgh, PA 15230.

K. Lawrence Kemp

United States District Court for the District of Columbia

Civil Action No. 94–0948

Comments of GTE

GTE Service Corporation, on behalf of its affiliated domestic telephone operating companies and GTE Laboratories Incorporated (GTE), herewith respectfully submits these Comments to the proposed Final Judgment in the above-captioned action.

I. Introduction

Although the proposed Final Judgment (hereinafter, Consent Decree) is a worthy attempt to stem the anti-competitive conduct rampant in the cable industry today—of which Tele-Communications, Inc. (TCI) and Liberty Media Corp. (Liberty) are major players—it suffers from two primary flaws. First, the term of the Consent Decree is clearly inadequate. Second, the Consent Decree would permit TCI/Liberty to withdraw high appealing programming from distribution—and specifically from competing systems—upon expiration of the term of the Consent Decree. To remedy these flaws, GTE recommends: (1) That the term of the existing provisions of the Consent Decree be increased to seven years, and (2) that upon expiration of this seven year period, TCI/Liberty should be restrained from withdrawing any programming from distribution in a particular market unless that market is found to be subject to "effective competition" within the meaning of Section 623(l)(1) of the Act[1] or unless such programming is withdrawn from all markets, specifically including any and all systems in which TCI or Liberty has an interest.

II. Statement of Facts

Currently, the distribution of multichannel video programming is overwhelmingly dominated by the cable industry. Cable systems are accessible to ninety-six percent of television households in American and over sixty percent of those households subscribe. Annual cable revenues now exceed twenty-one billion dollars, and the industry has been increasingly controlled by large Multiple Systems Operators (MSOs), including TCI and Liberty.[2] From the customer's perspective, ninety-nine percent of all cable customers have only one cable operator to choose from.[3] As the industry exists today, the transport of video programming to consumers is a monopoly service.[4]

The most promising potential competition to entrenched cable interests comes from local exchange carriers (LECs), including GTE's domestic telephone operating companies. While LECs are presently prohibited from providing video programming to customers in their own

[1] 47 U.S.V. § 543(l)(1).

[2] See National Cable Television Association, Cable Television Developments (March, 1993). The merged TCI and Liberty entities will serve more than thirteen million customers—a quarter of the nation's cable subscribers—and have financial interests in a wide range of programming services including a number of the most popular and widely-carried services. See Competitive Impact Statement, ¶ II.A, at 3.

[3] Pub. L. No. 102–385, section 2(a)(2), 106 Stat. 1460; see also S. Rep. No. 92 102d Cong., 1st Sess. 8 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1141.

[4] *Chesapeake & Potomac Telephone Co.* v. *United States*, 830 F. Supp. 909, 927 (E.D. Va. 1993), appeal pending, No. 93–2340 (4th Cir).

service territories,[5] recent action by the Federal Communications Commission (FCC) allows LECs to provide common carrier transport of the video signals of unaffiliated programmers, know a video dialtone (VDT).[6] While LECs look forward to providing consumers with a competitive alternative to incumbent cable operators like TCI and Liberty, these operators have fought vigorously to stave off competition at every turn.[7]

III. The Consent Decree Must be Modified

To its credit, the Consent Decree seeks to discourage TCI/Liberty's anti-competitive conduct with respect to multichannel subscription television distributors (MSTDs) and video programming providers (VPVs).[8] However, TCI/Liberty's existing monopoly position, the cable industry's long history of anti-competitive conduct, coupled with their current attempts to derail all potential competition, present a clear and present danger that the provisions of the Consent Decree will be woefully inadequate. In particular, the restraints imposed by the Consent Decree appear to be lifted at the very point in time when competition will likely be becoming a reality.

A consent decree is not merely a private contract between the parties; it is a judicial decree backed by the contempt power of the Court. Thus, in approving the decree, "the Court performs a judicial function and is called upon to decide whether it is equitable to enter the decree as proposed by [the parties]." *United States* v. *Carter Products, Inc.*, 211 F.Supp. 144, 147–48 (S.D.N.Y. 1962). The decree "must be scrutinized carefully and approved, both as to form and content, by the court entering it, prior to such entry." *Esso Corp.* v. *United States*, 340 F.2d 1000, 1005 (9th Cir. 1965). Indeed, the Court is required "to make an independent determination of the propriety and equity of the decree proposed." *United States* v. *F.&M. Schaefer Brewing Co.*, 1968 Trade Cas. (CCH) ¶72,345 (E.D.N.Y. 1967).

As presently proposed,the Consent Decree fails this standard. Because the Consent Decree does not adequately serve the public interest, it must be modified or rejected by the Court. *See, e.g., United States* v. *AT&T*, 552 F. Supp. 131,216 (D.D.C. 1982); *State of New York* v. *Dairylea Cooperative*, 547 F.Supp. 306, 308 (S.D.N.Y. 1982). It is therefore incumbent upon the Department of Justice, consistent with its responsibilities under the Tunney Act,[9] to seek modification of the Consent Decree before any request for entry of judgment is made to the Court.

The development of viable competition to entrenched monopoly cable interests is wholly contingent upon two requirements: competitors' access to appealing programming, and use of existing and proposed distribution networks. To be viable, a competitor must be able to assemble an attratctive package of programs to offer to consumers and have the ability to distribute its offerings. Because of these requirements, the merged TCI-Liberty entitles constitute a bottleneck—if not a stranglehold—upon the development of viable competition in the video marketplace. Only the closest scrutiny of the merged entity's conduct will ensure that the public interest is served in the development of effective alternatives to cable.

The primary flaw in the Consent Decree is its term. The five-year period proposed is simply inadequate. The video dialtone facilities proposed by LECs—the principal potential competition to cable—will not reach a payback point for least seven years.[10] During this period, as nascent competition to cable more fully develops, LECs' video dialtone networks may be particularly vulnerable to anti-competitive conduct by TCI/Liberty. Indeed, as actual competition develops toward the end of this period, TCI/Liberty will have even greater incentives to engage in anti-competitive conduct to stem the loss of market share. In order to cure this deficiency, the term of the Consent Decree must be not less than seven years.

A transition period is also necessary as the Consent Decree period comes to an end. In particular, at that point, it would be in TCI/Liberty's interest to withdraw appealing programming from competitive systems and packages. To prevent this from happening, the Consent Decree must be modified to prohibit TCI/Liberty from withdrawing any programming from a particular market unless the market in question is found to be subject to "effective competition," as defined by Section 623(l)(1) of the Act. Of course, TCI/Liberty might have legitimate reasons for the withdrawal of some programming. Therefore, this prohibition would not apply to the extent that TCI/Liberty also withdrew the same programming from all systems in which it has an interest. Once withdrawn, this programming could not be made subsequently available to any TCI/Liberty system unless made generally available to all MSTDs under similar terms and conditions.

In addition to these serious deficiencies, the Consent Decreee allows TCI/Liberty broad latitude for *de facto* discrimination. For example, TCI/Liberty could construct a price per volume table so that most local packagers could not afford appealing programming. TCI/Liberty could also set the volume price for programming high, charge this high price to its own systems and utilize the greater profit to reward those systems meeting market retention and growth incentive objectives. In essence, TCI/Liberty could provide its own systems with both incentives and a discount. Careful scrutiny on a going-forward basis is therefore required if TCI/Liberty is to be restrained from crushing developing competition.

Without rectification of these inadequacies, the court will not be able to affirmatively find "the propriety and equity of the decree proposed." Since the Consent Decree, as presently proposed, does not serve the public interest, it must be modified or rejected by the Court.

IV. Conclusion

For the reasons stated hereinabove, GTE beleives that the Department must withdraw its stipulation to the Consent

[5] 47 U.S.C. 533(b); 47 CFR 63.54(c). GTE has challenged this ban on video programming. *GTE California Incorporated* v. *Federal Communications Commission*, No. 93–70924 (9th Cir.). Two district courts have already struck down the ban as unconstitutional. *Chesapeake & Potomac, supra; US East, Inc.* v. *United States*, No C 93–1523 R, Order Granting Plaintiffs' Motion for Summary Judgment (W.D. Wash., June 15, 1994). Numerous other district court actions are also pending. See, e.g., *Pacific Telesis Group* v. *United States*, No. C 93–20915 JW EAI (N.D. Cal.). Additionally, Congress is considering lifting the ban. See H.R. 3636 (103d Cong., 2d Sess.), S. 1822 (103d Cong., 2d Sess.).

[6] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54–65.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, CC Dkt. 87–266, FCC 92–327, 7 FCC Rcd 5781 (1992) (Video Dialtone Order), pets, for recon. pending, appeal pending sub nom. *Mankato Citizens Telephone Co.* v. *Federal Communications Commission*, No. 92–1404 et al. (D.C. Cir.). See Competitive Impact Statement, ¶II.C, at 7.

[7] See, e.g., the National Cable Television Association's July 5, 1994 Petition to Deny the Applications of Contel of Virginia, Inc. d/b/a GTE Virginia, GTE Florida Incorporated, GTE California Incorporated and GTE Hawaiian Telephone Company, Inc. for authority under Section 214 of the Communications Act to construct, own, operate and maintain video dialtone facilities, Nos. W–P–C 6955, 6956, 6957, 6958.

[8] *See* Proposed Final Judgment ¶II.D and E, at 2. Sections 616 and 628 of the Act, 47 U.S.C. 536 and 548, refer to these entities as multichannel video programming distributors and video programming vendors.

[9] Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h).

[10] For example, Bell Atlantic has projected a seven year payback period. Ameritech has projected seven to nine years. Pacific Bell has projected nine years. US West has projected seven to eight years.

Decree *unless* (1) the term of the existing provisions of the Consent Decree be increased to at least seven years, and (2) upon expiration of this seven year period, TCI/Liberty is further restrained from withdrawing any programming from distribution unless such programming is similarly withdrawn from all markets, specifically including all systems in which TCI or Liberty has an interest, or the specific market from which it is withdrawn has been found to be subject to "effective competition" within the meaning of Section 621(l)(1) of the Act.

Respectfully submitted,

Gail L. Polivy,

D.C. Bar No. 941963, An Attorney for GTE Corporation, 1850 M Street, N.W., Suite 1200, Washington, D.C. 20036, (202) 453–5214.

Of Counsel:

C. Daniel Ward, An Attorney for GTE Corporation, One Stamford Forum, Stamford, CT 06904, (203) 965–3071.

John F. Raposa, an Attorney for GTE Service Corporation, P.O. Box 152092, Irving TX 75015–2092, (214) 718–6969.

Dated: July 1994.

[FR Doc. 94–19050 File 8–3–94; 8:45 am]

BILLING CODE 4410–01–M

Drug Enforcement Administration

Controlled Substances: Proposed Aggregate Production Quotas for 1995

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of proposed aggregate production goals for 1995.

SUMMARY: This notice proposes initial 1995 aggregate production quotas for controlled substances in Schedules I and II of the Controlled Substances Act.

DATES: Comments or objections should be received on or before September 6, 1994.

ADDRESSES: Send comments or objections to the Administrator, Drug Enforcement Administration, Washington, DC 20537, Attn: DEA Federal Register Representative (CCR).

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

SUPPLEMENTARY INFORMATION: Section 306 of the Controlled Substances Act (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in Schedules I and II. This responsibility has been delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations. The Administrator, in turn, has redelegated this function to the Deputy Administrator pursuant to 59 FR 23637 (May 6, 1994).

The quotas are to provide adequate supplies of each substance for: (1) The estimated medical, scientific, research, and industrial needs of the United States; (2) lawful export requirements; and (3) the establishment and maintenance of reserve stocks.

In determining the below listed proposed 1995 aggregate production quotas, the Deputy Administrator considered the following factors: (1) Total actual 1993 and estimated 1994 and 1995 net disposals of each substance by all manufacturers; (2) estimates of 1994 year end inventories of each substance and of any substance manufactured from it and trends in accumulation of such inventories; and (3) projected demand as indicated by procurement quota applications filed pursuant to § 1303.12 of Title 21 of the Code of Federal Regulations.

Pursuant to § 1303.23(c) of Title 21 of the Code of Federal Regulations, the Deputy Administrator of the DEA will, in early 1995, adjust aggregate production quotas and individual manufacturing quotas allocated for the year based upon 1994 year-end inventory and actual 1994 disposition data supplied by quota recipients for each basic class of Schedule I or II controlled substance.

Therefore, under the authority vested in the Attorney General by Section 306 of the Controlled Substances Act of 1970 (21 U.S.C. 826), delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations, and redelegated to the Deputy Administrator pursuant to 59 FR 23637 (May 6, 1994), the Deputy Administrator hereby proposes that the aggregate production quotas for 1995 for the following controlled substances, expressed in grams of anhydrous acid or base, be established as follows:

Basic class	Proposed 1995 quotas
Schedule I	
Acetylmethadol	2
Aminorex	2
Bufotenine	10
Cathinone	4
Difenoxin	14,000
2, 5-Dimethoxyamphetamine	15,650,000
Dimethylamphetamine	2
N-Ethylamphetamine	4
Lysergic acid diethylamide	41
Mescaline	2
4-Methoxyamphetamine	12
4-Methylaminorex	2
3-Methylfentanyl	12
Methaqualone	2
Methcathinone	9
3, 4-Methylenedioxyamphetamine	12
3, 4-Methylenedioxy-N-ethylamphetamine	2
3, 4-Methylènedioxymethamphetamine	12
Normorphine	2
Tetrahydrocannibinols	35,000
Thiophene Analog of Phencyclidine	10
Schedule II	
Alfentanil	7,000
Amobarbital	5
Amphetamine	635,000
Cocaine	550,000
Codeine (for sale)	67,312,000
Codeine (for conversion)	16,181,000
Desoxyephedrine 900,000 grams of levodesoxyephedrine for use in a non-controlled, nonprescription product and 20 grams for methamphetamine	900,020
Dextropropoxyphene	124,012,000
Dihydrocodeine	202,000
Diphenoxylate	688,000
Ecgonine (for conversion)	650,000
Fentanyl	76,000
Hydrocodone	8,474,000
Hydromorphone	393,000
Levo-alpha-acetylmethadol	200,000
Levorphanol	8,000
Meperidine	8,637,000
Methadone	3,779,000
Methadone (for conversion)	364,000
Methadone Intermediate (for sale)	300,000
Methadone Intermediate (for conversion)	4,393,000
Methylphenidate	7,935,000
Morphine (for sale)	7,612,000
Morphine (for conversion)	78,105,000
Noroxymorphone (for sale)	21,000
Noroxymorphone (for conversion)	3,500,000
Opium	1,118,000
Oxycodone (for sale)	3,613,000
Oxycodone (for conversion)	6,200
Oxymorphone	2,500
Pentobarbital	15,706,000
Phencyclidine	52
Phenylacetone (for conversion)	3,528,000
Secobarbital	480,000
Sufentanil	700
Thebaine	9,383,000

Aggregate production quotas for all other Schedules I and II controlled substances included in §§ 1308.11 and 1308.12 of Title 21 of the Code of Federal Regulations are established at zero.

All interested persons are invited to submit their comments and objections in writing regarding this proposal. A person may object to or comment on the

proposal relating to any of the above-mentioned substances without filing comments or objections regarding the others. If a person believes that one or more of these issues warrant a hearing, the individual should so state and summarize the reasons for this belief.

In the event that comments or objections to this proposal raise one or more issues which the Deputy Administrator finds warrant a hearing, the Deputy Administrator shall order a public hearing by notice in the **Federal Register**, summarizing the issues to be heard and setting the time for the hearing.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this matter does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Deputy Administrator hereby certifies that this action will have no significant impact upon small entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C., 601, *et seq.* The establishment of annual aggregate production quotas for Schedules I and II controlled substances is mandated by law and by international treaty obligations. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

Dated: July 28, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–19054 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 92–48]

Avner Kauffman, M.D.; Denial of Application for Registration

On April 7, 1992, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Avner Kauffman, M.D., (Respondent), 12620 S. Harlem Avenue, Palos Heights, Illinois 60463. The Order to Show Cause sought to deny Respondent's application for a DEA Certificate of Registration, alleging that Respondent's registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f).

The Order to Show Cause asserted in part that Respondent's registration would be inconsistent with the public interest in light of his 1985 felony conviction for delivery of a controlled substance. Respondent's previous DEA Certificate of Registration was revoked by the DEA in September 1985. The Order to Show Cause further alleged that following the revocation of Respondent's DEA Certificate of Registration, he continued to prescribe controlled substances in violation of the Controlled Substances Act.

Respondent, through counsel, requested a hearing on the allegations raised in the Order to Show Cause and the matter was placed on the docket of Administrative Law Judge Mary Ellen Bittner. On September 29 and 30, 1992, a hearing was held in Chicago, Illinois. On September 22, 1993, the administrative law judge issued her opinion, recommended ruling, findings of fact, conclusions of law, and decision. Neither the Government nor Respondent filed exceptions to the recommended ruling. On October 22, 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 Deputy Administrator hereby issues his final order in this matter based upon the findings of fact and conclusions of law set forth below.

At the hearing, a lieutenant from the Illinois State Police testified that on January 27, 1984, he purchased 2.2 grams of cocaine from Respondent during an undercover investigation. The next contact between the two occurred on January 31, 1984, when the lieutenant spoke to Respondent on the telephone. During the conversation, Respondent informed the lieutenant that he would sell the lieutenant half an ounce of cocaine for $1,100. Respondent and the lieutenant met later that day, but Respondent was unable to deliver the cocaine as discussed. Respondent, however, gave the lieutenant six tablets of Seconal, a Schedule II controlled substance. Respondent did not conduct a physical examination of the lieutenant and the Seconal was not provided for any medical purpose. Additionally, Respondent offered to provide the lieutenant with Quaaludes, then a Schedule II controlled substance. During their meeting, Respondent also informed the lieutenant that he had once smuggled a kilogram of cocaine from Florida; had previously lost about $30,000 worth of cocaine in bad drug deals; and could obtain another kilogram of cocaine for $50,000 if the lieutenant were interested.

The lieutenant and Respondent next spoke on February 1, 1984, to discuss another cocaine purchase. At a meeting later that night at Respondent's office, the lieutenant bought 14 grams of cocaine from Respondent for $1,100. During the meeting, Respondent commented on the quality of the cocaine and promised that it was better than the cocaine previously sold to the lieutenant. The lieutenant testified that this was the last time he purchased cocaine from Respondent, although he attempted additional undercover buys on several occasions.

Respondent was arrested on February 9, 1984. Following his arrest, Respondent stated that he had purchased cocaine "10–15" times and had smoked cocaine. Respondent was indicted on March 2, 1984, on three counts of delivery of a controlled substance. Respondent pled guilty to one count and was sentenced on February 1, 1985, to three years probation and a $3,000 fine.

As a result of his conviction, on March 23, 1984, the Illinois Department of Registration and Education summarily suspended Respondent's controlled substance license. In June 1985, Respondent entered into a Consent Agreement suspending Respondent's medical license but staying the suspension, placing him on probation and suspending his controlled substance license for five years. Respondent was further ordered to perform 120 hours of volunteer medical service for each year of probation, to continue psychiatric treatment, and to file biennial reports certifying compliance with these conditions. Based on his lack of state authorization to handle controlled substances, the then-Administrator of the Drug Enforcement Administration revoked Respondent's previous DEA Certificate of Registration, effective September 23, 1985.

Respondent's Illinois Physician and Surgeon License expired on July 31, 1987. He continued to practice medicine but did not renew his license until December 1988. In April 1990, the Illinois Department of Professional Regulation (IDPR) issued an order finding that Respondent had practiced medicine without a license, reprimanded him, and imposed a $1,000 fine. At the hearing in this matter, Respondent admitted that he had a made a mistake by not renewing his license immediately.

Respondent filed an application for registration with the DEA on June 8, 1990. At that time, a DEA investigator

conducted a pharmacy survey for the period 1988–1990. The investigator found that five prescriptions for controlled substances had been called in to local pharmacies, allegedly by Respondent, after his DEA Certificate of Registration was revoked. Some prescriptions contained the names and DEA registration numbers of other doctors and had Respondent's name crossed out on the prescription. One prescription contained Respondent's retired DEA registration number and another contained Respondent's revoked DEA registration number. Respondent testified during the hearing in this matter that he may have authorized the prescriptions and explained that he mistakenly thought that he was permitted to prescribe controlled substances. Respondent added that in late 1990, after consulting his attorney, he "completely stopped" authorizing prescriptions for controlled substances.

An investigator with IDPR testified that in 1991 he began an investigation of Respondent after receiving a complaint from a local pharmacist. The pharmacist was concerned about Respondent's use of the non-controlled substance Stadol. The pharmacist found Respondent's purchases of Stadol unusual for a pediatrician. Testimony was presented at the hearing regarding Respondent's alleged misuse of Stadol. However, as the administrative law judge correctly noted, Stadol is not a controlled substance. Therefore, these allegations were not granted great weight by either the administrative law judge or the Deputy Administrator.

Pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy 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 Deputy 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 were relevant to a determination of whether Respondent's registration would be in the public interest.

The Deputy Administrator finds that the Illinois licensing board, IDPR, has taken action against Respondent on more than one occasion. IDPR summarily suspended Respondent's controlled substance license based on his felony conviction and later reprimanded him for practicing without a license. The Deputy Administrator also finds that Respondent's past conduct indicates a cavalier attitude towards the dispensing and prescribing of controlled substances. Providing the undercover officer with Seconal for no legitimate medical purpose reveals a serious lack of judgment, as does Respondent's explanation for his continued prescribing of controlled substances following the revocation of his DEA Certificate of Registration. Respondent's felony conviction for distribution of cocaine again evidences a dangerous indifference for the law. This conviction, along with Respondent's failure to abide by DEA regulations, proves that Respondent cannot be trusted to comply with laws relating to controlled substances.

The Deputy 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 Deputy 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) and 0.104 (59 FR 23637), hereby orders that Avner Kauffman's application for registration be, and it hereby is, denied. This order is effective August 4, 1994.

Dated: July 28, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–19055 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 93–4]

Timothy H. Reese, M.D. Denial of Application

On September 29, 1992, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Timothy H. Reese, M.D. (Respondent), of Pittsburgh, Pennsylvania, proposing to deny his application for registration as a practitioner. The Order to Show Cause alleged that Respondent's registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f).

Respondent, through counsel, requested a hearing on the issues raised by the Order to Show Cause, and the matter was placed on the docket of Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held in Arlington, Virginia, on May 18, 1993. On March 8, 1994, in her findings of fact, conclusions of law, and recommended ruling, the administrative law judge recommended that Respondent's application for DEA registration be denied. No exceptions were filed by either party.

On April 8, 1994, the administrative law judge transmitted the record to the Administrator. The Deputy Administrator has carefully considered the entire record in this matter and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter based upon findings of fact and conclusions of law as hereinafter set forth.

The administrative law judge found that the Respondent is an emergency room physician who completed a three-year residency in family practice in 1977, and then became affiliated with medical groups that provided emergency room coverage for various hospitals. Respondent also maintained a small, private practice until April 1989.

In 1984, an investigator for the Ohio State Medical Board (Board) obtained from a pharmacy various prescriptions for controlled substances written by Respondent. Most of the prescriptions bore the address of Respondent's residence, and were written for members of Respondent's family. The investigator interviewed some of Respondent's family members that were purportedly issued prescriptions by the Respondent, and they denied ever receiving prescriptions for him.

Thereafter, the Board subpoenaed Respondent's patient records, however, Respondent indicated that they had been destroyed. Respondent was then requested to appear before the Board to explain why he wrote the prescriptions at issue. In his deposition before the Board, Respondent states that he did not know what controlled substances were, what schedules certain controlled substances were in, and that he wrote these prescriptions mainly for weight loss. In 1986, the Board's investigation of Respondent concluded with no charges being filed.

In 1989, a sergeant with the Columbus (Ohio) Police Department, Narcotics Bureau (Narcotics Bureau), was informed by local pharmacists of their suspicions regarding prescriptions issued by the Respondent. The prescriptions were for large quantities of controlled substances, typically Dilaudid. The pharmacists were unfamiliar with the patients bringing in the prescriptions, and the patients named on the prescriptions did not have local addresses.

The pharmacists further informed the Narcotics Bureau sergeant that the physician's telephone number listed on some of the prescriptions was disconnected, and that other prescriptions bore telephone numbers either at emergency rooms in Pennsylvania, or a residence in Westerville, Ohio. A confidential informant later advised the Narcotics Bureau that Respondent wrote prescriptions to members of his family and friends, and they in turn returned the prescribed drugs to Respondent, who used them to treat his wife's heroin addiction. As a result of this information, the Narcotics Bureau seized a number of Dilaudid prescriptions issued by Respondent from local pharmacies.

The investigation by the Narcotics Bureau also revealed that: One of the individuals that attempted to fill a controlled substance prescription was seen by the pharmacist driving a car registered to Respondent's address; several of the individuals did not reside at the address listed on their prescriptions; an individual stated that she used cocaine while in Respondent's home, sold cocaine to Respondent, and was offered cocaine by the Respondent to fill a prescription, which she refused; Respondent asked the same individual to fill a prescription for Dilaudid, and the individual later prepared syringes of Dilaudid and water that Respondent's wife injected; all of the telephone numbers for Respondent on the prescriptions corresponded to emergency rooms in Pennsylvania. Respondent testified at the hearing, that someone falsified his signature on the prescriptions found by the Narcotics Bureau.

Respondent testified that after he and his wife separated in April 1989, and he moved from their Westerville, Ohio residence, he believed that his wife continued to live in the residence until her eviction for non-payment of rent. Respondent further testified that he left behind all of his belongings, including prescription pads printed with the address of his residence.

In August 1989, a DEA diversion investigator observed the wife's eviction from Respondent's home. Among the items removed from the home and subsequently recovered by DEA, were drug paraphernalia items, including a white powder substance in a plastic container and pipes containing residue. The items later tested positive for sodium bicarbonate, oxycodone, and cocaine. The Narcotics Bureaus sergeant testified at the hearing that despite the information disclosed by the investigation, the Respondent was not criminally charged because he moved out of the State of Ohio.

Following Respondent's relocation to the Commonwealth of Pennsylvania, on October 26, 1989, DEA informed him that he was under investigation for diverting Dilaudid. In response to this information, Respondent surrendered his DEA registration.

On March 31, 1991, Respondent executed an application for DEA registration, and answered affirmatively, the question regarding whether he had ever surrendered a previous registration. DEA then initiated a pre-registration investigation of the Respondent. The investigation revealed that, in 1990, when Respondent began working for a physicians' group that provided medical services, he informed his employer that he was registered with DEA, and provided his surrendered registration number. DEA later obtained Respondent's application for employment at a health care facility in Mount Pleasant, Pennsylvania, where Respondent was associated as an emergency room physician. In response to a question on the application for employment regarding his registration status, Respondent again stated that he held a current DEA registration, and listed his surrendered registration number. DEA also discovered numerous prescriptions issued by Respondent in 1990 and 1991, in which he repeatedly used his surrendered DEA registration number.

Respondent testified that his wife used heroin and cocaine, that she was taking methadone, and that she had access to his DEA number. Respondent also testified that he has never abused drugs, been charged with using drugs, or kept drug paraphernalia in his home. Respondent acknowledged however that he never informed his employers of the surrender of his DEA registration, because his lack of registration would preclude his employment. Respondent further acknowledged that he wrote prescriptions for controlled substances after the surrender of his DEA registration because his work required him to do so, and that he needed his DEA registration to continue his career as an emergency room physician.

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny any application for such registration, if he determines that the continued registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

It is well established that these factors are to be considered in the disjunctive, i.e., the Deputy Administrator may properly rely on any one or a combination of the factors and give each factor the weight he deems appropriate. See *Henry J. Schwarz, Jr., M.D.*, Docket No. 88–42, 54 FR 16422 (1989).

In considering whether grounds exist to deny Respondent's application for DEA registration, the administrative law judge found factors two, four and five relevant in light of evidence regarding Respondent's falsification of employment applications, representing that he held a DEA registration after he had surrendered the registration; and, Respondent's issuing of prescriptions for controlled substances using his surrendered DEA registration number.

The administrative law judge found, that despite Respondent's explanations regarding his falsifying employment applications and writing prescriptions with a surrendered DEA registration number, Respondent showed no remorse, and appeared to consider his actions justified by exigent circumstances. The administrative law judge also found with respect to the prescriptions for Dilaudid, that Respondent's testimony was not responsive nor particularly credible. The administrative law judge further found that Respondent's admission that other persons, including his wife whom Respondent knew to be a drug abuser, had access to his prescription pads, showed that Respondent had little respect for the responsibilities of being a DEA registrant.

Judge Bittner concluded that the preponderance of the credible evidence established that it is unlikely that Respondent would competently or

reliably discharge the obligations inherent in a DEA registration, and further concluded that it would not be in the public interest to grant his application. Therefore, the administrative law judge recommended that Respondent's application for DEA registration be denied.

The Deputy Administrator having considered the entire record adopts the administrative law judge's findings of fact, conclusions of law, and recommended ruling in its entirety. Accordingly, the Deputy 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) and 0.104 (59 FR 23637), hereby orders that the application for registration, executed by Timothy H. Reese, M.D., be, and it hereby is, denied. This order is effective August 4, 1994.

Dated: July 28, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–19056 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 94–8]

James H. Sanders, M.D.; Revocation of Registration

On October 12, 1993, the Deputy Assistant Administrator, (then-Director), Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to James H. Sanders, M.D. (Respondent), of Barbourville, Kentucky. The Order to Show Cause proposed to revoke Dr. Sanders' DEA Certificate of Registration, AS6935918, and deny any pending applications for renewal of such registration. The Order to Show Cause alleged that Respondent was not currently authorized to handle controlled substances in the Commonwealth of Kentucky and that Respondent's continued registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4).

The Order to Show Cause alleged that: Since 1986, DEA received complaints regarding Respondent's excessive prescribing of controlled substances to individuals for no legitimate medical reason; between December 1991 and September 1992, DEA conducted an undercover investigation during which Respondent prescribed controlled substances to undercover agents upon request without performing any physical examination or taking a medical history; during the investigation, Respondent was observed prescribing controlled substances to other individuals in the same manner as he issued prescriptions to the undercover agents; in October 1992, DEA conducted a prescription survey of five pharmacies in Barbourville, Kentucky, which revealed that between April 1, 1992 and October 29, 1992, Respondent prescribed 229,090 dosage units of controlled substances; and on December 9, 1992, the Commonwealth of Kentucky, State Board of Medical Licensure (Board) seized 43 patient records from Respondent's office.

The Order to Show Cause further alleged that on January 21, 1993, the Board issued an Order of Temporary Suspension suspending Respondent's license to practice medicine in the Commonwealth of Kentucky. On March 2, 1993, the Board lifted the suspension of Respondent's medical license, however, his controlled substances privileges remained suspended. As a result, Respondent is no longer authorized by state law to handle controlled substances.

Respondent, through counsel, filed a request for a hearing on the issues raised by the order to Show Cause, and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. On November 19, 1993, the Government filed a motion for summary disposition, which was accompanied by a letter from the General Counsel to the Board, dated October 20, 1993, as to the status of Respondent's controlled substance privileges in Kentucky. The Government argued that since Respondent is not currently authorized in the Commonwealth of Kentucky to handle controlled substances, DEA could not continue to maintain his registration.

On December 14, 1993, Respondent filed a response to the Government's motion, asserting, in substance, that Respondent's state license had been temporarily restricted to limit his ability to prescribe controlled substances and that on February 22, 1994, the Board would reach a final decision regarding Respondent's privileges to practice medicine in Kentucky.

On December 20, 1993, the administrative law judge issued a Memorandum to Counsel affording Respondent until March 15, 1994, to file a statement as to the status of his authority to handle controlled substances in Kentucky. No such statement has been filed.

On April 7, 1994, in her opinion and recommended decision, the administrative law judge found that the Respondent did not deny that his state license to practice medicine has been restricted. The administrative law judge therefore, granted the Government's motion for summary disposition and recommended that Respondent's DEA Certificate of Registration be revoked.

On May 10, 1994, the administrative law judge transmitted the record to the Deputy Administrator. The Deputy Administrator has carefully considered the entire record in this matter and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter based upon findings of fact and conclusions of law as hereinafter set forth.

The Deputy Administrator adopts the opinion and recommended decision of the administrative law judge in its entirety. The Drug Enforcement Administration cannot register or maintain the registration of a practitioner who is not duly authorized to handle controlled substances in the state in which he conducts his business. 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. See *James H. Nickens, M.D.*, 57 FR 59847 (1992); *Elliott Monroe, M.D.*, 57 FR 23246 (1992); *Bobby Watts, M.D.*, 53 FR 11919 (1988).

The administrative law judge properly granted the Government's motion for summary disposition. It is well-settled that when no question of fact is involved, or when the facts are agreed upon, a plenary, adversary administrative proceeding involving evidence and cross-examination of witnesses is not obligatory. The rationale is that Congress does not intend administrative agencies to perform meaningless tasks. *Phillip E. Kirk, M.D.*, 48 FR 32887 (1983), *aff'd sub nom Kirk* v. *Mullen*, 749 F. 2d 297 (6th Cir. 1984); *Alfred Tennyson Smurthwaite, N.D.*, 43 FR 11873 (1978); see also, *NLRB* v. *International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO*, 549 F. 2d 634 (9th Cir. 1977); *United States* v. *Consolidated Mines and Smelting Co., Ltd.*, 455 F. 2d 432, 453 (9th Cir. 1971).

Since Respondent is not currently authorized to handle controlled substances in the Commonwealth of Kentucky, it is not necessary to reach a conclusion regarding whether his continued registration is inconsistent with the public interest.

Accordingly, the Deputy 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) and 0.104 (59 FR 23637), hereby orders that DEA Certificate of Registration, AS6935918, previously issued to James H. Sanders, M.D., be, and it hereby is, revoked and that any pending applications for renewal of such registration be, and they

hereby are, denied, This order is effective September 6, 1994.

Dated: July 28, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–19057 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Employment and Training Administration

Advisory Council on Unemployment Compensation; Hearings

SUMMARY: The Advisory Council on Unemployment Compensation (ACUC) was established in accordance with the provisions of the Federal Advisory Committee Act on January 24, 1992, (57 FR 4007, Feb. 3, 1992). Public Law 102–164, the Emergency Unemployment Compensation Act of 1991, mandated the establishment of the Council to evaluate the overall unemployment insurance program, including the purpose, goals, counter-cyclical effectiveness, coverage, benefit adequacy, trust fund solvency, funding of State administrative costs, administrative efficiency, and other aspects of the program, and to make recommendations for improvement.

TIME AND PLACE: The hearings will be held from 1:00 p.m. to 3:00 p.m. on September 8, and from 1:00 p.m. to 5:00 p.m. on September 9 at the Southgate Tower Hotel, Peyton Room, 371 Seventh Avenue, New York, New York.

PUBLIC PARTICIPATION: The hearings will be open to the public. Seating will be available to the public on a first-come, first-served basis. Seats will be reserved for the media. Individuals with disabilities in need of special accommodations should contact the Designated Federal Official (DFO), listed below, at least 7 days prior to the hearing.

SUBMITTING WRITTEN STATEMENTS: Individuals or organizations wishing to submit written statements should send fifteen (15) copies to Ester R. Johnson, DFO, Advisory Council on Unemployment Compensation, U.S. Department of Labor, 200 Constitution Avenue, NW. Room S–4231, Washington, DC 20210. Statements must be received not later than August 22, 1994.

PRESENTING ORAL STATEMENTS: Individuals or organizations wishing to present oral statement should send a written request to Ellen S. Calhoun, Advisory Council on Unemployment Compensation, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4206, Washington, DC 20210. Requests for presenting oral statements should indicate a daytime phone number. Time slots will be assigned on a first-come, first-served basis. All such requests must be received not later than August 22, 1994.

FOR ADDITIONAL INFORMATION CONTRACT: Ester R. Johnson, DFO, Advisory Council on Unemployment Compensation, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210, (202) 219–7831. (This is not a toll-free number.)

Signed at Washington, DC., this 28th day of July 1994.

Doug Ross,

Assistant Secretary of Labor.

[FR Doc. 94–18987 Filed 8–3–94; 8:45 am]

BILLING CODE 4510–30–M

Advisory Council on Unemployment Compensation; Meeting

SUMMARY: The Advisory Council on Unemployment Compensation (ACUC) was established in accordance with the provisions of the Federal Advisory Committee Act on January 24, 1992 (57 FR 4007, Feb. 3, 1992). Public Law 102-164, the Emergency Unemployment Compensation Act of 1991, mandated the establishment of the Council to evaluate the overall unemployment insurance program, including the purpose, goals, counter-cyclical effectiveness, coverage, benefit adequacy, trust fund solvency, funding of State administrative costs, administrative efficiency, and other aspects of the program, and to make recommendations for improvement.

TIME AND PLACE: The meeting will be held from 9:00 a.m. to 12:00 noon on September 8 and 9 at the Southgate Tower Hotel, Peyton Room, 371 Seventh Avenue, New York, New York.

AGENDA: The agenda for the meeting is as follows:

1. Discussion of UI coverage of agricultural workers:
2. Discussion of options for ensuring the forward funding of the UI system;
3. Discussion of variations in eligibility for UI among the States; and,
4. Discussion of variations in UI benefit levels and duration among the States.

PUBLIC PARTICIPATION: The meeting will be open to the public. Seating will be available to the public on a first-come, first-served basis. Seats will be reserved for the media. Individuals with disabilities in need of special accommodations should contact the Designated Federal Offical (DFO), listed below, at least 7 days prior to the meeting.

FOR ADDITIONAL INFORMATION CONTACT: Esther R. Johnson, DFO, Advisory Council on Unemployment Compensation, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-4231, Washington, DC 20210. (202) 219-7831. (This is not a toll-free number.)

Signed at Washington, DC, this 28th day of July 1994.

Doug Ross,

Assistant Secretary of Labor.

[FR Doc. 94–18988 Filed 8–3–94; 8:45 am]

BILLING CODE 4510–30–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Notice of Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), as amended, notice is hereby given that a meeting of the Challenge and Advancement Advisory Panel (Music Challenge Section) to the National Council on the Arts will be held on August 25–26, 1994. The panel will meet from 9:30 a.m. to 5:30 p.m. on August 25 and from 9:30 a.m. to 5:00 p.m. on August 26 in Room 714, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506.

A portion of this meeting will be open to the public from 4:00 p.m. to 5:00 p.m. on August 26 for a policy discussion.

The remaining portions of this meeting from 9:30 a.m. to 5:30 p.m. on August 25 and from 9:30 a.m. to 4:00 p.m. on August 26 are for the purpose of panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of February 8, 1994, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the Panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, N.W., Washington, D.C., 20506, 202/682–5532,

TYY 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Committee Management Officer, National Endowment for the Arts, Washington, D.C., 20506, or call 202/682–5439.

Dated: July 27, 1994.

Yvonne M. Sabine,

Director, Office of Panel Operations, National Endowment for the Arts.

[FR Doc. 94–19051 Filed 8–3–94; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Nuclear Waste; Meeting

The Advisory Committee on Nuclear Waste (ACNW) will hold its 66th meeting on Tuesday and Wednesday, August 16 and 17, 1994, in Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed to discuss information the release of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552b(c)(6).

The agenda for the subject meeting shall be as follows:

Tuesday, August 16, 1994—8:30 A.M. until 6:00 P.M.

Wednesday, August 17, 1994—8:30 A.M. until 6:00 P.M.

During this meeting the Committee plans to consider the following:

A. Waste Confidence Decision

Discuss the history and legal background behind this decision with representatives of the NRC Office of the General Counsel.

B. DOE Proposed Program Approach (Scenario A)

Discuss with NRC staff its views on DOE's new funding proposal and potential impacts on NRC future planning.

C. DOE Topical Report on Extreme Erosion

Discuss with the NRC staff its review of the topical report, and discuss with DOE and NRC staff regarding the use of topical reports of issue resolution.

D. Meeting With Commissioner Rogers

Meet with Commissioner Rogers to discuss items of mutual interest, Agreement State Compatibility, proposals relating to development of high-level waste site by DOE (Scenario A), and related items of mutual interest, as time permits.

E. Government Land Ownership

Discuss with NRC staff a proposed amendment to 10 CFR Part 61 which seeks to explore whether government land ownership for low level waste facilities post closure should continue to be required (tentative).

F. Preparation of ACNW Reports

Prepare ACNW reports on issues considered during this and previous meetings.

G. Committee Activities/Future Agenda

Discuss topics proposed for consideration by the full Committee and working groups. Discuss organizational and personnel matters related to ACNW members and ACNW staff. A portion of this session may be closed to public attendance to discuss information the release of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552b(c)(6).

H. Miscellaneous

Discuss miscellaneous matters related to the conduct of Committee activities and organizational activities and complete discussion of matters and specific issues that were not completed during previous meetings, as time and availability of information permit.

Procedures for the conduct of and participation in ACNW meetings were published in the **Federal Register** on June 6, 1988 (53 FR 20699). In accordance with these procedures, oral or written statements may be presented by members of the public, electronic recordings will be permitted only during those portions of the meeting that are open to the public, and questions may be asked only by members of the Committee, its consultants, and staff. Persons desiring to make oral statements should notify the ACNW Executive Director, Dr. John T. Larkins, as far in advance as practicable so that appropriate arrangements can be made to allow the necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during this meeting may be limited to selected portions of the meeting as determined by the ACNW Chairman. Information regarding the time to be set aside for this purpose may be obtained by contacting the ACNW Executive Director prior to the meeting. In view of the possibility that the schedule for ACNW meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the ACNW Executive Director if such rescheduling would result in major inconvenience.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by contacting the ACNW Executive Director, Dr. John T. Larkins (telephone 301/415–7360), between 7:30 A.M. and 4:15 P.M. EST.

Dated: July 29, 1994.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 94–19001 Filed 8–3–94; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34462; File No. SR–CHX–94–18]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by Chicago Stock Exchange, Inc. Relating to Changes in the Chicago Basket

July 28, 1994.

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 July 22, 1994, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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 Exchange submits the following proposed rule change to amend the first paragraph of Interpretation and Policy .01 of Rule 3 of Article XXXVI. The remainder of Interpretation and Policy .01 would remain unchanged. Specifically, the changed language is as follows:

Additions are *italicized*; deletions [bracketed]

.01 The Chicago Basket (CXM)

The Exchange will trade a basket of stocks based upon the Chicago Mercantile Exchange's stock index XMI futures contract (the "Merc Futures Contract"). The CXM will consist of the stocks included in the Merc Futures

Contract in a fixed quantity of [25] 5 shares of each of the stocks included in the futures contract.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed change is to reduce the size of the Chicago Basket ("CXM") from 25 shares of each component stock to 5 shares of each component stock, in order to permit more entities and persons to be able to trade the CXM basket. The rules that permit the CXM basket to be traded on the Exchange were submitted for Commission approval and were approved on October 15, 1993.[1]

The CXM basket would not be comprised of a new fixed quantity of shares (5 instead of 25) of each of the stocks included in a futures contract traded on the Chicago Mercantile Exchange. This XMI futures contract is based on the American Stock Exchange's Major Market Index ("MMI"). The MMI is a broad-based, price-weighted index currently based on 20 stocks listed on the New York Stock Exchange.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

[1] See Securities Exchange Act Release No. 33053 (October 15, 1993), 58 FR 54610 (October 22, 1993) (File No. SR–CHX–93–18).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CHX. All submissions should refer to File No. SR–CHX–94–18 and should be submitted by August 25, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18961 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34457; File No. SR–NASD–94–28]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Clearance and Settlement Requirements for NASD Member Firms That Are Market Makers in the Nasdaq Stock Market or the OTC Bulletin Board® Service

July 28, 1994.

On May 23, 1994, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder.[2] The rule change amends Section 7 of Part V to Schedule D of the NASD By-Laws[3] and Section 4 of the OTC Bulletin Board® Service ("OTCBB") Rules[4] relating to clearance and settlement requirements of NASD member firms functioning as market makers in the Nasdaq Stock Market ("Nasdaq") or the OTCBB.

Under the rule as amended, market makers will either be required to utilize the facilities of a registered clearing agency that uses a continuous net settlement system or, if both parties to a transaction agree, to settle the transaction "ex-clearing." The rule change applies to market makers in Nasdaq securities as well as to OTCBB market makers whose transactions in OTCBB securities are clearing eligible.

Notice of the proposed rule change, together with its terms of substance was provided by issuance of a Commission release[5] and by publication in the **Federal Register**.[6] No comments were received in response to the Notice. This order approves the proposed rule change.

As the NASD indicated in its rule filing, the Automated Confirmation Transaction Service ("ACT") is the primary facility for collecting, processing, and disseminating transaction reports on Nasdaq securities as well as equity issues quoted in the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4 (1993).

[3] NASD Manual, Schedules to the By-Laws, Schedule D, Part V, Sec. 7, (CCH) ¶ 1823.

[4] NASD Manual, OTCBB Rules, Sec. 4, (CCH) ¶ 2574.

[5] Securities Exchange Act Rel. No. 34238 (June 20, 1994).

[6] 59 FR 33031 (June 27, 1994).

OTCBB.[7] ACT also facilitates the clearance and settlement of inter-member transactions by locking-in trade details for transmission to the National Securities Clearing Corporation ("NSCC").[8] The generation of locked-in trades by ACT enhances the overall efficiency of the clearance and settlement process and virtually eliminates a member's risk exposure respecting uncompared trades. These benefits cannot be realized, however, unless the broker-dealers on both sides of the trade have some form of participation in a registered clearing agency.[9]

The rule change will increase participation in registered clearing agencies due to the elimination of the "25 mile exception" from Section 7(a) in Part V of Schedule D to the NASD By-Laws.[10] Prior to the amendment, the "25 mile exception" allowed market makers in SmallCap℠ securities, that did not participate in the Small Order Execution System" SOES") and were located more than 25 miles from a clearing facility, to bypass the requirement of clearing and settling transactions through a registered clearing agency. The rule, as amended, eliminates this exception and requires market makers in Nasdaq securities to utilize the facilities of a registered clearing agency that uses a continuous net settlement system, unless both parties to a transaction agree to settle the transaction "exclearing."

Participation in registered clearing agencies will also increase due to the imposition of clearance and settlement requirements on market makers in OTCBB securities.[11] Market makers in these securities will be required to clear and settle transactions that are clearing eligible[12] through the facilities of a registered clearing agency that uses a continuous net settlement system, unless both parties to a transaction agree to settle the transaction "exclearing."

The Commission has determined to approve the NASD's proposal. As a result of the amendment, parallel requirements will exist for the two largest equity market segments in which NASD members function as market makers and utilize ACT for trade reporting and comparison purposes.[13] The Commission finds that the rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD, including the requirements of Sections 11A(a)(1), 15A(b)(6), and 17A(a)(1) of the Act. Section 11A(a)(1) contains the Congressional findings that have guided development of the National Market System. These findings include a directive to apply state-of-art data processing and communications techniques to achieve more efficient and effective market operations and to ensure the economical execution of securities orders. Similarly, Section 15A(b)(6) requires, among other things, that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitation transactions in securities. Finally, Section 17A(a)(1) reflects the statutory goals of a national system for clearance and settlement of securities transactions. These goals include the application of new data processing and communications techniques to create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

The Commission finds that the new clearance and settlement requirements are consistent with the foregoing statutory provisions. In sum, the rule change will further the objectives of minimizing risk exposure from uncompared trades and fostering optimal usage of ACT to lock-in the details of individual trades prior to their submission to a registered clearing agency.[14]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change, SR–NASD–94–28 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18959 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34463; File No. SR–Phlx–92–12]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to Restrictions on Orders in Multiply Traded Options Entered by Specialists and Registered Options Traders for Execution on Other Exchanges

July 29, 1994.

On December 14, 1992, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act;"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to restrictions on entering orders in multiply traded options. Notice of the proposal appeared in the **Federal Register** on March 12, 1993.[3] One comment letter was received opposing the proposed rule change,[4] to which the Phlx responded.[5] This order approves the Exchange's proposal.

Description of Proposal

The Phlx proposes to adopt Advice B–12, which would extend the prohibitions contained in Phlx Rule 1014 and Phlx Advice B–4, regarding off-floor opening orders for options traded on multiple exchanges. Currently, Commentary .14 to Phlx Rule 1014 and Phlx Advice B–4 prohibit a Registered Options Trader ("ROT") from placing an opening order for their market functions account from off-floor. The Phlx now seeks to restrict Phlx ROTs and specialists from sending orders which would establish or increase a position in registered options to other exchanges from off of the Phlx options trading floor. Before an opening order initiated from the Phlx equity

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[7] See NASD Manual, Schedules to the By-Laws, Schedule D, Parts X, XI and XII, (CCH) ¶¶ 1865–1867G.

[8] See NASD Manual, ACT Rules, Secs, (d)–(e), (CCH) ¶¶ 2554–2555.

[9] See NASD Manual, ACT Rules, Sec. (b)(2)(B), (CCH) ¶ 2552 (market makers may not participate in ACT unless the market maker satisfies, among other things, the requirement of "membership in, or maintenance of, an effective clearing arrangement with a member of a clearing agency registered pursuant to the Securities Exchange Act of 1934 * * *").

[10] NASD Manual, Schedules to the By-Laws, Schedule D, Part V, Sec. 7(a), (CCH) ¶ 1823.

[11] NASD Manual, OTCBB Rules, Sec. 4, (CCH) ¶ 2574.

[12] Clearing eligible status is noted in the OTCBB symbol director and in the electronic directory accessible via Nasdaq Workstation PCs.

[13] The NASD estimates that fewer than 10 member firms that function as market makers will be required to establish clearing arrangements as a result of this amendment.

[14] See NASD Manual, ACT Rules, Sec. (b)(1), (CCH) ¶ 2552 (participation in ACT is mandatory for all brokers that are members of a registered clearing agency and all brokers that have clearing arrangements with such members).

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1992).

[3] See Securities Exchange Act Release No. 31961 (March 8, 1993), 58 FR 13662 (March 12, 1993).

[4] See Letter from Alger Chapman, Chairman and Chief Executive Officer, CBOE, to Jonathan Katz, Secretary, Commission, dated April 13, 1993 ("CBOE Comment Letter").

[5] See Letter from Gerald O'Connell, Vice President, Market Regulation, Phlx, to Jonathan Katz, Secretary, Commission, dated June 25, 1993 ("Phlx Response Letter").

options floor may be sent to another market for execution, it must first clear the crowd at the Phlx when the bid or offer of the order is on or between the Phlx disseminated market.[6] Pursuant to the proposal, ROTs and specialists would be required to place their off-floor opening positions in their customer accounts, regardless of whether the execution of such orders occurs on the Phlx or on another exchange.[7] The fine schedule for proposed Advice B–12 would run on a three year cycle, such that repeat violations within a three-year period would result in escalating fines.[8]

Comment Letter

The CBOE believes that the Phlx proposal raises implications regarding the multiple listing of options which should be dealt with on a uniform basis by the options exchanges.[9] Specifically, the CBOE believes that the proposal would allow Phlx specialists and ROTs, who enter transactions from the Phlx options floor, to obtain "good faith" margin treatment for options transactions executed on other exchanges even if there is little or no activity in those options on the Phlx and the transactions have no relationship to the specialists' and ROTs' performance at the Phlx. As a result, the CBOE believes that multiple listing could be used as a means of giving the floor members of options exchanges preferred access to options traded on other exchanges without regard to whether there is any meaningful competition in those options between the exchanges.[10] The CBOE suggests that specialists and ROTs should be required to effect a certain percentage (*e.g.*, 75%) of their contract volume in a class of options on the exchange on which they act as a specialist or ROT before being entitled to effect transactions on other exchanges in that options class through their market functions accounts.[11]

Phlx Response

The Phlx refutes the arguments raised by the CBOE.[12] The Phlx states that by seeking to ensure that Phlx floor traders conduct their market making functions from the Phlx equity options floor where they can best meet their affirmative and negative market making obligations, the proposal merely brings the Phlx's rules into line with the existing rules of the other options exchanges, including the CBOE's. As a result, the Phlx contends that the proposal does not raise the implications contemplated by the CBOE of "disparate, competitive treatment by the different options exchanges."[13]

Additionally, the Phlx argues that it has rules in place addressing the competitive concerns raised by the CBOE. Pursuant to Phlx Advice B–3, ROTs are required to trade in person, and not through the use of orders, the greater of 1,000 contracts or 50% of their contract volume on the Exchange in each quarter.[14] Additionally, at least 50% of a ROT's trading activity in each quarter must be in assigned options classes. Proposed Advice B–12 does not alter the application of Advice B–3. As a result, the Phlx argues that specialists and ROTs would not be able to obtain good faith margin treatment for a significant number of transactions executed on other markets relative to the number of trades that they must execute on the Phlx equity options floor, regardless of the level of trading activity in their assigned options classes at the Phlx.[15]

Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5)[16] in that the proposal is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and to protect investors and the public interest. Specifically, the Commission finds that the proposal is a reasonable extension of the Phlx's existing rules by according the same treatment to all transactions initiated from off the Phlx floor, without regard to whether the transactions are executed on the Phlx or another exchange. The Commission agrees with the Exchange that this restriction should serve to ensure that Phlx floor traders are conducting their market making activities from on the floor where they can best meet their affirmative and negative market making obligations.

The Commission appreciates the concerns raised by the CBOE; however the Commission believes that the Phlx has adequate rules and procedures to ensure that Exchange ROTs and specialists can obtain market-maker treatment for options trades executed on other exchanges only where they perform a real market-making function for such options on the Phlx floor. First, under Section 11(b) of the Act,[17] Rule 11b–1 thereunder[18] and Phlx Rule 1014, specialists and ROTs are required to engage in a course of dealings in a manner reasonably calculated to contribute to the maintenance of a fair and orderly market. This ensures that trades by such persons are for the purposes of fulfilling market-making obligations under the Act. Secondly, Exchange Advice B–3 minimizes the opportunity for ROTs to obtain good faith margin for a significant number of trades executed on other exchanges. By requiring that the greater of 1,000 contracts or 50% of their contract volume be executed on the Exchange in each quarter[19] and that at least 50% of their contract volume be in assigned classes in each quarter. Advice B–3 effectively ensures that market-makers will not be able to use the Phlx floor simply to send orders to other markets but instead will have substantive obligations that ensure they are acting as a bona fide market-maker.[20]

In summary, the Commission notes that only market makers who are

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[6] Clearing the crowd on the Phlx would require that the order be loudly and audibly voiced in the crowd and, if not then executed, the order may be sent away.

[7] Proposed Advice B–12 would only be applicable to transactions in equity option.

[8] The fine schedule for Advice B–12 provides that a fine of $500 will be imposed for the first violation and a fine of $1,000 will be imposed for the second violation. The sanction for the third violation is discretionary with the Phlx Business Conduct Committee. In addition, under a rolling three-year cycle, if three years elapse between the first and second violation, the second violation would be treated as a first violation. If there is a violation within the three years after the most recent violation, the next highest fine will be issued. Thus, a third violation less than three years after a fine was issued for a second violation would be treated as a "third violation," even though more than three years may have elapsed after the first violation.

[9] The CBOE acknowledges, however, that the proposal is a logical extension of the Phlx's existing rules because it accords the same treatment to all transactions initiated from off the Phlx floor without regard to whether the transactions are executed on the Phlx or another exchange. See CBOE Comment Letter, *supra* note 4.

[10] *Id.*

[11] *Id.*

[12] See Phlx Response Letter, *supra* note 5.

[13] *Id.*

[14] These trades must actually be executed on the Exchange. Trades that are announced on the Exchange floor, clear the crowd, and are subsequently executed on another market, are not counted as Exchange trades for purposes of this requirement. Telephone conversation between Gerald O'Connell, Vice President, Market Regulation, Phlx, and Sharon Lawson, Assistant Director, Office of Market Supervision, Division of Market Regulation, Commission, on July 18, 1994.

[15] *Id.*

[16] 15 U.S.C. 78f(b)(5) (1988).

[17] 15 U.S.C. 78k(b) (1988).

[18] 17 CFR 240.11b–1 (1981).

[19] See *supra* note 14.

[20] CBOE Rule 8.7, Interpretation and Policy .03, is quite similar to Phlx Advice B–3. This CBOE rule requires that (1) "at least 75 percent of a Market-Maker's total contract volume must be in option classes to which he has been appointed pursuant to [CBOE] Rule 8.3;" and (2) "a Market-Maker must execute in person, and not through the use of orders, at least 25 percent of his total transactions.

conducting bona fide market making activity on the Phlx floor are entitled to good faith margin treatment for their options transactions. As a result of the above, the Commission does not believe that the current proposal would result in disparate, competitive treatment by the options exchange, as envisioned by the CBOE.[21]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR–PHlx–92–12) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18960 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34455; File No. SR–Phlx–94–14]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to its Order and Decorum Regulations

July 28, 1994.

I. Introduction

On March 10, 1994, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Regulation 4 ("Order") of the Exchange's Rule 60 order and decorum regulations. On March 31, 1994, the Exchange submitted to the Commission Amendment No. 1 to the proposed rule change.[3] On June 22, 1994, the Exchange submitted to the Commission Amendment No. 2 to the proposed rule change.[4]

The proposed rule change was published for comment in the Securities Exchange Act Release No. 34244 (June 22, 1994), 59 FR 33314 (June 28, 1994). No comments were received on the proposal. This order approves the proposed rule change as amended.

II. Description of the Proposal

The Phlx is amending Regulation 4 of the Exchange's order and decorum regulations,[5] which were adopted pursuant to Phlx Rule 60 ("Assessments for Breach of Regulations").[6] Regulation 4, Paragraph (i) (redesignated Paragraph (a)) currently prohibits members/participants or employees of a member/participant from engaging in disorderly conduct on the trading floor, and imposes fines for violations thereof. In addition to a general prohibition against disorderly conduct in Paragraph (a), Subparagraphs (ii) through (iv) currently impose specific fines for abuse of the paging system, possession of firearms, and various degrees of fighting, including inciting physical abuse, minor acts of physical abuse and major acts of physical abuse.

The Phlx is amending Regulation 4, Paragraph (a) to prohibit indecorous conduct on the trading floor which is disruptive to the conduct of business on the floor. The Exchange is also adopting Sub-Paragraph (iv) to Regulation 4 to impose a fine ranging from $500 to $1,000 for abusive, derisive or harassing treatment directed at any person while on the floor, which, in the view of two floor officials, could constitute a public embarrassment to the Exchange.

Finally, the Exchange is adopting Paragraph (b) to Regulation 4 stating that any acts described in paragraph (a) which are deemed particularly egregious, or where an individual has established a pattern of order violations, may be referred by two floor officials to the Business Conduct Committee where additional fines and other sanctions may be imposed pursuant to Phlx Rule 960. As a result of this adopted language, similar language which currently follows the paragraph addressing physical abuse in Regulation 4 is being deleted to apply the new paragraph to all violations of Regulation 4.

The Exchange believes that the amendment is consistent with Section 6 of the Act in general, and in particular, with Section 6(b)(5), in that it is designed to promote just and equitable principles of trade, and protect investors and the public interested by ensuring an orderly and decorous environment on the trading floor for Exchange business to be conducted. The proposal is also consistent with Section 5(b)(6), in that Regulation 4, as amended, would continue to provide that members of the Exchange be appropriately disciplined for violations of the rules of the Exchange.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with the requirements of Sections 6(b)(5), (6) and (7) of the Act.[7]

The Commission believes that the Phlx's amendments are a reasonable measure which should help to ensure the orderly operation of the Exchange floor. The proposal addresses the operational concerns by explicitly prohibiting indecorous conduct that is disruptive to business on the Exchange's trading floor. The Commission believes that the amendment to Regulation 4 should contribute to the Phlx's efforts to ensure the efficient, undisrupted conduct of business on the Exchange and provide a trading floor environment free from conduct that could distract or interfere with market activity. As a result, the rule change should enhance the members' ability to engage in transactions in securities and, thereby, protect investors and the public interest.

The Commission believes that the proposed amendments provide appropriate penalties for violations of Regulation 4. Specifically, the adopted range of fines ($500 to $1,000) that can be imposed for abusive, derisive or harassing conduct on the floor which is determined by two floor officials to

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[21] Indeed, the Commission believes that approval of the proposed rule change makes the situation envisioned by the CBOE less likely by removing the ambiguity that currently exists in the Phlx's rules and clarifying that off-floor orders, whether executed on the Phlx floor or at another exchange, are not entitled to good faith margin treatment.

[22] 15 U.S.C. 78s(b)(2) (1988).

[23] 17 CFR 200.30–3(a)(12) (1993).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1994).

[3] See letter from Gerald D. O'Connell, Vice President, Market Surveillance, Phlx, to Sharon Lawson, Assistant Director, SEC, dated March 30, 1994. Amendment No. 1 clarified that in any instance where an act described in Regulation 4(a) is deemed particularly egregious, or where an individual has established a pattern of order violations, two floor officials may refer the matter to the Business Conduct Committee where additional fines and other sanctions may be imposed pursuant to Phlx Rule 960.

[4] See letter from Gerald D. O'Connell, First Vice President, Phlx, to Sharon Lawson, Assistant Director, SEC, dated June 22, 1994. Amendment No. 2 added a range of fines for violations that constitute a public embarrassment to the Exchange.

[5] In addition to Regulation 4, the Exchange's Rule 60 Regulations govern smoking; food, liquids, and beverages; identification badges and access cards; visitors and applicants; dress; and proper utilization of the security system. See Phlx Rule 60 Regulations.

[6] Rule 60 permits Exchange officials and floor officials to assess fines, not exceeding $1,000, for violations of regulations pertaining to order, decorum, health, safety and welfare ("order and decorum") on the Exchange, or to refer such violations to the Exchange's Business Conduct Committee where higher fines or other sanctions may be imposed, in accordance with Phlx Rule 960. Rule 60 also enumerates the procedural aspects of order and decorum fines, including the ability to contest a fine and request a hearing. The Exchange has adopted seven regulations of order and decorum pursuant to Rule 60, including Regulation 4.

[7] 15 U.S.C. 78f (1988).

constitute a public embarrassment to the Exchange is reasonable in relation to the infractions in question because of the Phlx's interest in ensuring the safety of its floor personnel and the undisrupted conduct of business on the Exchange. Moreover, because the rule change defines the scope of prohibited conduct, provides notice to members, provides a right of appeal, and is tailored to serve a legitimate Exchange regulatory interest to ensure that trading can continue undisrupted on the Phlx floor, the proposal provides fair and reasonable procedures for the regulation of trading floor conduct.

The Commission also believes that it is appropriate for the Exchange to retain discretion to pursue formal disciplinary proceedings in accordance with Phlx Rule 960 for egregious violations or where an individual has established a pattern of order violations. This will enable the Exchange to seek stiffer sanctions where warranted by the scope and nature of the violative conduct. The Commission, however, emphasizes that when an Exchange investigation results in a full disciplinary proceeding pursuant to Rule 960, all procedural rights provided in the Rule would apply.[8]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–Phlx–94–14) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18966 Filed 8–3–94; 8:45 am]

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[8] The Exchange stated that two floor officials could not impose a fine or sanction pursuant to both Rules 60 and 960 for the same conduct. The Exchange also stated that if a disciplinary proceeding pursuant to Rule 960 is initiated by the Exchange, all procedural rights contained in Rule 960 would apply. Conversation between Gerald D. O'Connell, Vice President, Market Surveillance, Phlx, and Louis A. Randazzo, Attorney, SEC, on March 25, 1994.

[9] 15 U.S.C. 78s(b)(2) (1988).

[10] 17 CFR 200.30–3(a)(12) (1994).

[Release No. 34–34446; File Nos. SR-Philadep-94–01, and SR–SCCP–94–03]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Changes to Amend the Philadelphia Depository Trust Company's and the Stock Clearing Corporation of Philadelphia's By-Laws Regarding the Composition of the Respective Boards of Directors and Nominating Committees

July 27, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on July 14, 1994, the Philadelphia Depository Trust Company ("Philadep") and the Stock Clearing Corporation of Philadelphia ("SCCP") filed with the Securities and Exchange Commission ("Commission") the proposed rule changes (File Nos. SR-Philadep-94–01 and SR–SCCP–94–03) as described in Items I, II, and III below, which Items have been prepared primarily by Philadep and SCCP. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested parties.

I. Self-Regulatory Organizations' Statement of the Terms of Substance of the Proposed Rule Changes

The proposed rule changes respectively amend Philadep By-Laws Article IV, Section 2 and Article III, Section 4 and SCCP By-Laws Article IV, Section 2 and Article III, Section 4. These sections set forth the requirements for the composition of the Boards of Directors and Nominating Committees.

II. Self-Regulatory Organizations' Statements Regarding the Proposed Rule Changes

In their filings with the Commission, Philadep and SCCP included statements concerning the purpose of and the basis for the proposed rule changes and discussed any comments received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. Philadep and SCCP have prepared summaries, as set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

A. Self-Regulatory Organizations' Statement of the Purpose of and the Statutory Basis for the Proposed Rule Changes

In order to ease the administrative burden, Philadep and SCCP propose to amend their By-Laws to remove the requirement that the two Vice Chairmen of the Board of Governors of the Philadelphia Stock Exchange, Inc. ("PHLX") serve as ex-officio members of the Philadep and SCCP Boards of Directors. The proposed amendments will install the Chief Operating Officer of the PHLX both as an ex-officio member of the Philadep and SCCP Boards of Directors and as the Vice Chairman of the Philadep and SCCP Boards. The proposed amendments will reduce the requisite number of PHLX Governors who must serve on the Philadep and SCCP Boards of Directors from a majority of the fifteen to seventeen Directors to six of the Directors. The proposed amendments will change the term of office for the Boards of Directors for the purpose of qualifying PHLX Governors as Philadep and SCCP Directors.[2]

Presently, under Article III Section 4(a) of the Philadep and SCCP By-Laws, the Nominating Committee must consist of five ex-officio members of the Board of Directors and two other persons appointed by the Chairman of the Board. Under the proposed rule change, the number of members on the Nominating Committee will consist of four ex-officio members of the Board of Directors and three other persons appointed by the Chairman of the Board.

As composed under the proposed rule changes, the Philadep and SCCP Boards of Directors will continue to provide the PHLX, as the sole shareholder of both Philadep and SCCP, with adequate representation. The PHLX will be represented by both senior exchange staff personnel and members of the PHLX Board of Governors, who typically also represent Philadep and SCCP participant firms. In accordance with Philadep's and SCCP's amendment processes delineated in By-Law Article XI, the Chairman of the PHLX Board of Governors, as agent for the sole shareholder and parent corporation, has signed a unanimous consent in lieu of a special meeting to effectuate the foregoing changes.

The proposed rule changes comply with Section 17A of the Act insofar as they will aid Philadep and SCCP in assuring the fair representation of shareholders and participants in the selection of directors and in the administration of affairs.[3]

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] The intent of this provision is to synchronize the term of office for the Chairman of the Exchange's Board of Governors with his terms of office on the Philadep and SCCP Boards.

[3] 15 U.S.C. 78q–1(b)(3)(C) (1988).

B. Self-Regulatory Organizations' Statement on Burden on Competition

Philadep and SCCP do not believe that the proposed rule changes will impose any burden on competition.

C. Self-Regulatory Organizations' Statement on Comments on the Proposed Rule Changes Received From Members, Participants or Others

Written comments were neither solicited nor received with respect to the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which Philadep or SCCP consents, the Commission will:

(A) By order approve such proposed rule changes or

(B) Institute proceeding to determine whether the proposed rule changes should be disapproved.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing Persons making such 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 respecting the proposed rule changes that are filed with the Commission, and all written communications concerning the proposed rule changes between the Commission and any person, other than those that may be withheld from the public pursuant to the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filings will also be available for inspection and copying at the principal offices of Philadep and SCCP. All submissions should refer to File Numbers SR–Philadep–94–01 and SR–SCCP–94–03 and should be submitted by August 25, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[4]

[4] 17 CFR 200.30–3(a)(12) (1993).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18967 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34456; International Series Release No. 693; File No. SR–BSE–94–01]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by Boston Stock Exchange, Inc. To Establish a Northbound Trading Linkage With the Montreal Stock Exchange

July 28, 1994.

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 February 7, 1994, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization.[1] 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 BSE seeks to commence northbound trading pursuant to its linkage with the Montreal Stock Exchange ("ME").

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] On June 20, 1994, the Exchange submitted to the Commission a draft of the proposed Linkage Plan for the northbound linkage ("Draft Linkage Plan"). The Linkage Plan is an agreement between the BSE and Montreal Stock Exchange which contains arrangements for the management of the northbound linkage, settlement of trade disputes, comparison and settlement of trades, and surveillance of trading activity.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Securities markets are becoming increasingly international, reacting to many of the same economic and political events that affect the rest of the world. The globalization of these markets is driven by several factors, but advances in automation and telecommunications have propelled its rapid growth. Factors driving this globalization include investors' desire to enter foreign markets, the growth of large institutional funds needing to decrease risk by diversifying investments in other countries, and regulatory changes that opened markets to foreign broker-dealer firms and their customers.

Effective international securities markets require efficient and valuable systems for order routing and execution, information dissemination, and clearance and settlement. Most major and emerging markets have automated or plan to automate all or some of these functions to take advantage of efficiency, competition and market expansion opportunities.

The Commission in Securities Exchange Act Release No. 25284 stated that the international securities market should feature efficient structures for quotation, price and volume dissemination concerning securities and derivatives markets traded worldwide.[2] A critical step in achieving a worldwide securities market information system would be the creation and maintenance of international linkages between the automated information systems of the various national securities markets. Such a link was established between the BSE and the ME in 1984 for orders in U.S. stocks transmitted southbound from Montreal to Boston. This rule proposal is designed to complete the "loop" with orders in Canadian stocks being routed northbound from Boston to Montreal.[3]

The proposed rule change seeks to commence northbound trading pursuant to the trading linkage previously

[2] See Securities Exchange Act Release No. 26284 (November 14, 1988), 53 FR 46963 (November 21, 1988). The Commission issued its Policy Statement on Regulation of International Securities Markets in 1988 to identify areas of regulatory concern presented by the continued internationalization of the securities markets.

[3] Under the Draft Linkage Plan, see note 1 *supra*, all securities listed on the ME, except for options and futures, would be eligible to be traded through the proposed northbound linkage.

established with the ME.[4] This would provide an additional means for U.S. customers to place orders in Canadian stocks with U.S. brokers for execution on the ME. These orders would be entered into the broker/dealers' order-match systems which are linked to the BSE's BEACON system. BEACON would receive and log the details of the order and pass it on to the ME's automated order-routing and execution system. The order would contain the terms for the price, if any, stated in Canadian dollars, and an identifier indicating that its transmission is for the ME. The ME system would also log the order and direct it to the specialist's electronic book for action. These orders will be treated as would any other order sent to the ME floor.

Upon execution, the customer report would be sent from the specialist's book through the ME system to the BEACON system, with both systems logging in the details of the report, then to the broker/dealer's order-match system. BEACON will essentially function as a conduit for the benefit of member firms who today conduct this business through correspondents. While BEACON will keep detailed records of all traffic, it will not function as an execution system for Canadian stocks, nor show quotes in Canadian stocks, and it will not be advertised as such.

The trades would be cleared pursuant to the BSE member's agreement with a Canadian correspondent to clear and settle trades at the Canadian Depository for Securities ("CDS") on their behalf. BSE members would give up a valid CDS account at execution and would be treated like a customer of the Canadian correspondent. This is the clearing arrangement that U.S. broker/dealers currently utilize in clearing trades in Canadian stocks.

The ME is an affiliate member of the Intermarket Surveillance Group ("ISG") and as such has elected to participate in the ISG investigative procedures.[5] This structure will enhance the level of cooperation between the BSE and ME surveillance departments with regard to transactions executed through the link, as is currently done today with southbound orders. Essentially, each northbound trade will be entered into the ME's electronic book and will therefore be subject to the ME's on-line stock trading monitoring system ("SECMA"). The ME currently focuses its trading reviews on insider trading, trading on non-public market information ("front running"), price manipulation (Market fraud of various types), short squeeze, short sales down ticking, normal course issue of bid up ticking, and restrictions on trading by members involved in a distribution.

In conducting these types of trading reviews, the ME utilizes price alerts, volume alerts, exception reports based on high-lows and closing prices, as well as other technical information analysis and graphics that are available.

2. Statutory Basis

The basis under the Act for the proposed rule change is Section 6(b)(5) in that the rule is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market, and in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file 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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR–BSE–94–01 and should be submitted by August 25, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18968 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34458; File No. SR–MSRB–94–9]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Reports of Sales or Purchases, and Procedures for Reporting Inter-dealer Transactions Pursuant to Rule G–14

July 28, 1994.

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 June 20, 1994, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change (File No. SR–MSRB–94–9). The proposed rule change is described in Items I, II, and III below, which Items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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[4] The Exchange's southbound foreign linkage rule and the linkage plan with the ME was approved by the Commission in 1989. *See* Securities Exchange Act Release No. 27080 (July 31, 1989) (File No. SR–BSE–89–01).

[5] As an affiliate member of ISG, the ME has agreed to abide by the requirements of the ISG Affiliate Agreement.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Board is filing a proposal to amend Board rule G–14, concerning reports of sales or purchases, and procedures for reporting inter-dealer transactions (hereafter collectively referred to as "the proposed rule change").[1] The proposed rule change states that it is the duty of brokers, dealers and municipal securities dealers to report transactions in municipal securities to the Board or its designee, and describes procedures for reporting.

II. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

In its filing with the Commission, the Board included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The texts of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in Section (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

(a) Purpose

The purpose of the proposed rule change is to achieve a certain degree of transparency in the municipal securities market in a cost-effective manner by collecting and disseminating information on inter-dealer transactions. Under the proposed rule change, aggregate data about market activity and certain volume and price information about frequently traded securities would be disseminated to promote investor confidence in the market and its pricing mechanisms. In addition, all transaction information collected would be made available to regulatory agencies responsible for enforcement of Board rules as a means to assist in the inspection for compliance with, and the enforcement of, Board rules.

The proposed rule change is a first step to increase transparency in the municipal securities market. After gaining experience with the collection and dissemination of inter-dealer transactions, the Board's future steps would include adding institutional and retail customer information, and moving toward the ultimate goal of making available transaction information that is both comprehensive and contemporaneous.

Background. The municipal securities market has grown dramatically in recent years. At the same time, retail investors have entered the market in increasing numbers. These factors have increased the need for access to information on municipal securities trading in the market, including information which may help to establish more accurate valuation of individual municipal securities.[2] Recognizing this need, the Board has adopted long-term goals and priorities for action, among which is the goal of providing market participants with more information about the value of securities.[3]

Similarly, the staff of the Division of Market Regulation of the Commission has stated:

> The Staff believes that the degree of transparency in the municipal securities market is not adequate, and should be increased to better inform investors in their dealings with broker-dealers and to make the market more efficient.[4]

In the equities markets, quotations, trade prices and volumes are reported publicly for all securities listed on the exchanges and in the National Association of Securities Dealers Automated Quotation ("Nasdaq") System. The Commission has noted at least three benefits to the equities markets from transparency: enhanced investor protection, market liquidity, and market efficiency.[5] The Board believes that these same benefits would be desirable in the municipal securities market.

The Pilot Program for Transaction Reporting. In 1993, the Board announced its plan to undertake a pilot program to collect and publish information on transactions occurring in the inter-dealer market for municipal securities (the "pilot program"). The Board has designed the pilot program to take into account the distinctive aspects of the municipal securities market that distinguish it from the exchange-listed and Nasdaq markets. A primary distinguishing characteristic of the municipal securities market is the large number of outstanding issues. There are approximately 1.2 million municipal securities that are distinct, non-fungible entities for purposes of trading and reporting. In addition, the municipal securities market lacks any core group of issues that trade frequently and consistently over sustained periods of time. While, on any given day, a certain number of municipal securities are traded frequently, the identity of these frequently traded issues is continually changing over time. A third distinguishing characteristic is that, in the municipal securities market, most issues are purchased by "buy and hold" investors relatively quickly after initial issuance. When frequent trading does occur in an issue, it generally occurs immediately after issuance and then subsides within a week to 10 days.[6]

In the markets covered by Nasdaq and the National Association of Securities Dealer's ("NASD's") recently inaugurated Fixed Income Pricing System ("FIPS") for high-yield fixed-income corporate securities,[7] displays of data about a security are organized based on firm quotations. The Board believes that a different concept is needed for municipal securities, since firm two-sided quotations exist only for very few municipal securities at any given time. There are several reasons for this. For most municipal securities, there is only a small "float" of securities available to be the subject of trading. This small "float" is a primary disincentive to market making. In addition, the tax treatment of borrowing tax-exempt securities (along with the small floats) effectively prevents short-sales of an issue. This denies potential market makers a technique that otherwise could be used to manage risks. Finally, the traditional "buy and hold" philosophy of most tax-exempt purchasers simply does to provide the incentive or create the need for continuous, two-sided quotations

[1] The Commission notes that the MSRB intends to enact the proposed rule change, in its entirely, as a temporary pilot program to be in place for a minimum of one year. Telephone conversation between Larry M. Lawrence, Policy and Technology Advisor, MSRB, and Betsy Prout, Staff Attorney, Commission, on July 27, 1994.

[2] For a more general discussion of the evolution of the municipal securities market, *see* MSRB, Report of the Municipal Securities Rulemaking Board on Regulation of the Municipal Securities Market (September 1993), at 19–27.

[3] See, *e.g.*, "From the Chairman," MSRB Reports, Vol. 8, No. 5 (December 1988), at 2.

[4] SEC, Division of Market Regulation, Staff Report on the Municipal Securities Market (September 1993) ("Staff Report"), at 36.

[5] SEC, Division of Market Regulation, Market 2000: An Examination of Current Equity Market Developments (January 1994), at IV–2.

[6] The Board has examined inter-dealer trading data provided by the National Securities Clearing Corporation ("NSCC") for a six-month period during 1991. During this six-month period, only 40 issues traded three or more times per day for a minimum of 10 consecutive business days. It is important to note that these 40 issues did not trade frequently for the entire six-month period and that, on any given day, only a few of the 40 would be trading frequently. In most cases, frequent trading in these issues—primarily new issues—tended to trail off shortly after a 10-day run. Altogether, approximately 75 percent of all issues trading during the six-month period were traded only once or twice in a given week.

[7] *See* Securities Exchange Act Release No. 32019 (March 19, 1993), 58 FR 12428.

traditionally offered by market makers in equity securities.

The Board has designed the transaction reporting pilot program to provide the public with price and volume information in a way that reflects the unique aspects of the municipal securities market. The pilot program will make information available in the form of a daily, public report containing volume and pricing information for the inter-dealer market ("daily report"). The issues that will be reported individually each day will be those that traded at or above a threshold number of times on the previous business day. Initially the threshold will be four trades per day. As trading in an issue increases, it will be reported; as an issue's trading frequency decreases, it will be replaced by others that are trading frequently. In this way, the daily report will reflect the ever-changing pattern of trading activity in the universe of some 1.2 million municipal securities. The pilot program will make information on all inter-dealer trades in municipal securities available to the Commission and other regulatory agencies to assist in the inspection for compliance with and the enforcement of Board rules.

Requirement to Report. There is currently no affirmative requirement for public reporting of transactions in municipal securities. In its present form, the Board's rule G–14 does not require the reporting of transactions in municipal securities, but does require that any such report represent a legitimate trade. The rule requires a dealer that distributes or publishes a report of a transaction in a municipal security to know or have reason to believe that the transaction was actually effected and to have no reason to believe that the transaction was fictitious or in furtherance of any fraudulent, misleading or deceptive purpose.

The proposed rule change would impose a duty upon dealers to report inter-dealer transaction information to the Board or its designee. It states that such information would be used to make public reports and would be provided to the Commission, the NASD, and bank regulatory organizations charged with enforcing Board rules, *i.e.*, the Comptroller of the Currency in the case of national banks, the Board of Governors of the Federal Reserve System in the case of state member banks of the Federal Reserve System, and the Federal Deposit Insurance Corporation ("FDIC") in the case of other banks insured by the FDIC.

Reporting Procedures. Brokers, dealers and municipal securities dealers would report transactions under Rule G–14 Transaction Reporting Procedures, which are also part of the proposed rule change. The transaction reporting procedures designate the NSCC as the Board's agent to receive transaction information. NSCC is a clearing agency registered with the Commission under Section 17A of the Act and is the central facility for automated comparison processing for inter-dealer municipal securities transactions. Automated comparison is the process by which each party to an inter-dealer trade ensures that its contra-party knows the terms of the trade and will be ready to settle, on those terms, on settlement date. In general, the automated comparison process requires each dealer in a transaction to submit information on a trade (*e.g.*, price, quantity, contra-party) to a comparison system operated by a clearing agency registered with the Commission. This information is then matched ("compared") by computer in the comparison system and the results reported back to each dealer.

Currently, pursuant to the Board's rule G–12(f)(i), dealers must use the facilities of a registered clearing agency to compare all inter-dealer transactions in securities with CUSIP numbers. Since NSCC and all other registered clearing agencies offering municipal securities comparison services are linked by automated interfaces, it will be possible for transactions to be submitted to NSCC by submitting them to any such clearing agency. Accordingly, the proposed procedures state that dealers may provide transaction information to NSCC or any other registered clearing agency linked with NSCC for the purpose of automated comparison. Dealers may submit transaction information directly or through an agent that is a member of the registered clearing agency.[8] Thus, under the proposed rule change, dealers would not be required to submit transaction data to a separate reporting system and should not incur additional operational costs to fulfill their reporting obligations.

With one exception, NSCC automated comparison procedures require both the purchasing and selling dealers to submit information about the trade. Thus, the proposed reporting procedures require transaction information to be submitted by both parties. For transactions involving the distribution of new issue securities from a syndicate manager to syndicate members, however, NSCC comparison procedures require only a submission from the syndicate manager. The proposed procedures allow for the same "one-sided" submission of information for public reporting.

The comparison process requires various data elements to be submitted with regard to each transaction. The proposed transaction reporting program makes an identical requirement for these data items. The following transaction information will be collected by the Board through NSCC:

Identification of seller
Identification of buyer
Trade date
CUSIP number of security traded
Trade type (*e.g.*, syndicate takedown, new issue or regular way)
Par value (quantity) traded
Price, in one of the following formats:
  Dollar price of security
  "Final money" (total dollar amount of the transaction)
  Yield or basis of concession, if any
Settlement date, if not "regular way"

As noted above, dealers already are required to provide this information to a registered clearing agency as part of the automated comparison process required under rule G–12(f)(i). Currently, the accrued interest is an optional data element for the purpose of the automated comparison process, *ie.*, it can be submitted, but is not required to match or compare a transaction. However, accrued interest will be a mandatory submission for the purpose of transaction reporting pursuant to the Rule G–14 Transaction Reporting Procedures. This requirement is necessary for accurate computation of dollar price in certain circumstances (see "Price Computation," *infra*).

Timing. In the current comparison cycle, dealers submit required information to a registered clearing agency by the evening of trade date ("T"). NSCC, as the central facilities provider for the comparison system, accepts this submitted data, compares the submissions of the parties on the night of T and reports the results back to the dealers on T+1. Trades that are successfully compared on T will be the basis of the daily report produced by the Board's proposed program. Accordingly, trades that are not successfully compared on the night of the trade will not be subject to reporting on T+1.[9] As an indication of the reliability of the

[8] These are the same procedures currently used to submit information for automated comparison.

[9] It was determined to use data for compared trades rather than data for both compared and uncompared trades because the compared data is more reliable than uncompared data. If uncompared data were reported, this might cause the daily report to include erroneous prices or to include duplicate trades. Uncompared submissions eventually are resolved as trades or as mistakes. Those that are resolved as trades will be entered in the transaction reporting database after T+1 and thus will be made available to the enforcement agencies.

data in the daily report, the percentage of submissions that were successfully compared ("comparison rate") will be shown in each day's report.[10]

The Daily Report. The daily report will be provided to subscribers for public use by approximately 6:00 a.m. on T+1. This will make the data available prior to the beginning of trading activity. The daily report will be available both as a computer-readable file and as a printed report. The computer-readable file will be electronically disseminated by an automated interface between Board computers and those of subscribers or by magnetic tape delivered by a courier service.

The Daily Report. The daily report will include aggregate information for each day of trade, as follows:

(i) Total par value traded;

(ii) Total number of compared transactions; and

(iii) Total number of issues traded (*i.e.*, the number of different CUSIP numbers that were involved in compared transactions on that day).

In addition to the aggregate data, the daily report will contain price and volume information about certain municipal securities that were "frequently traded" on that day. The Board believes that it would be appropriate to report issue-specific information only if four or more transactions in the issue are reported as compared on a given day. Using this threshold and based on recent levels of market activity, the Board anticipates that the daily list of frequently traded issues normally will range between 80 to 350 issues, with an average of about 180 issues each day. The size and composition of the list obviously would vary from day to day, depending upon market activity in specific cases.

The information in the daily report about each "frequently traded" security will include:

(i) The CUSIP number and security's description;

(ii) The total number of transactions in the security and total volume traded;

(iii) The highest and lowest prices of transactions in the security; and

(iv) "Average price" information, *i.e.*, the number of transactions in the security involving par values between $100,000 and $1,000,000 inclusive, and the average price of those transactions.

The Board will provide a statement to be included in the report pointing out that (a) the daily report represents only those inter-dealer transactions that have been submitted for comparison and that actually were compared on the previous day and (b) reported prices are affected by various factors such as transaction size. This statement is intended to ensure that readers unfamiliar with the municipal securities market do not misinterpret the daily report.

Price Computation. Municipal securities transactions are sometimes executed on a dollar price basis and sometimes executed on a yield basis. The Board has chosen to use dollar price as the uniform expression of "price" in the daily report to simplify reporting procedures. In cases where dollar price is submitted for comparison, that dollar price, as compared by the comparison system, will be used in the daily report. In certain cases the security "price" for the daily report will need to be computed from other submitted data. For example, current procedures required for automated comparison allow the submission of par value and "final money" (total dollar amount of the transaction) to achieve comparison. The proposed Rule G–14 Transaction Reporting Procedures provide that the dealers will submit the amount of accrued interest in the trade to allow for computation of dollar price in these cases. The following formula will be used:

Dollar price = (Final money—Accrued interest) / Par value

For "when, as if issued" trades submitted for comparison on a yield basis, final money will be computed and a dollar price similarly derived if a settlement date is known. For yield transactions whose settlement date is not known, an assumed settlement date will be used. The assumed settlement date will be 20 business days from the first trade date on which that issue is submitted for comparison. On the daily report, a note will be added to the trade information stating that an assumed settlement date was used to compute the dollar price in the trade and showing the date used. Once the actual settlement date is known to NSCC, it will be used and noted as such when the issue is next included on a daily report.

Fees and Costs. Subscription fees, estimated production costs for the daily report, and further technical details of the pilot program will be provided in a subsequent filing prior to beginning operation of the facility.

Surveillance and Enforcement Uses of Pilot Program Information. In addition to public reporting, the proposed rule change would make transaction data available to the regulatory organizations charged with enforcing Board rules. Commenting on the need for better information in this area, the Commission's staff stated:

> In the Staff's view, a central flaw in the present regulatory system is the lack of an integrated audit trail in the municipal securities market of the type that exists in the stock and options markets. Because of the limited pricing information available in the secondary market for many thinly traded municipal securities, it is extremely difficult for the NASD to assess the fairness of the prices being charged retail customers by municipal securities broker-dealers. The Staff believes that the MSRB, the NASD, and the banking agencies should work to create a cost-effective trade reporting system that will provide the regulators with an integrated audit trail of municipal securities and result in improved surveillance for all segments of the market. The development of such an audit trail would increase the NASD's ability to examine and enforce the existing customer protection rules of the Commission and the NASD.[11]

The transaction reporting pilot program will result in a centralized data base of trade information that is expected to improve the efficiency and effectiveness of inspection for compliance with and the enforcement of Board rules. All compared trades will be made available to these regulatory organizations, including those that compare after trade date and those not frequently traded. Comprehensive information will be made available, including identification of parties to each trade and the prices of all securities traded.

The information to be made available through the pilot program will enable enforcement agencies to identify transaction patterns to detect market manipulation and other anomalies. It will also assist regulators in determining the market value of securities as they assess compliance with the Board's rule G–30 on fair and reasonable prices and commissions. The Board is working with the NASD and the bank regulatory organizations to ensure that the pilot system's outputs will meet their requirements for surveillance of the municipal securities market and enforcement of the Board's rules.

The Board plans to evaluate expansion of the pilot program as experience is gained and comments on program operations are received from information users and the industry. The Board's first consideration will be how the daily report and surveillance mechanisms could be improved by including institutional customer transaction data and information on the

[10] The Board has previously stated its concern about the need to increase the comparison rate to obtain improvements as a prerequisite to implementing T+3 settlement for municipal securities.

[11] Staff Report, *supra* note 4, and 37.

time of trade. During this evaluation, the Board's goal will be not only to enhance the information contained in the daily report, but also to find cost-effective methods for providing even greater levels of transparency to the market, particularly with respect to customer transactions and the dissemination of transaction price information on a more contemporaneous basis.

Effect of Proposed Rule Change upon Dealers. Dealers should experience minimal operational impact from the proposed rule change, since, as mentioned above, they are now required, pursuant to the Board's rule G–12(f)(i), to use the facilities of a registered clearing agency for the automated comparison of transactions. The transaction data submitted by dealers for comparison will be used by the transaction reporting pilot program. Thus, under the proposed program, dealers would not have to submit transaction data to a separate reporting system and should not incur additional operational costs.

(b) Statutory Basis

The Board believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which requires, in pertinent part, that the Board's rules be designed:

* * * to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest * * *.

The transaction reporting pilot program will make it possible to provide pricing reports to all market participants and to the public. The availability of this information is expected to support market integrity, increase investor confidence, improve pricing efficiency and increase liquidity in the market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Board does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act, since it would apply equally to all brokers, dealers and municipal securities dealers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In May 1993 the Board published a notice explaining its plan to collect inter-dealer transaction data by using information required for automated comparison, clearance and settlement. The notice set forth the proposed method of collection inter-dealer transaction data and of publishing it. The Board received four comments of which two supported the proposed pilot program and made suggestions for expansion. The remaining two commenters suggested certain modifications of the daily report format and the selection criteria for reported issues without expressing general support or opposition.

Sample Format for Daily Report. One commenter noted that the reporting of transaction data by the Board should include a statement stating that prices change with market conditions and that prices for individual transactions may depend upon factors such as size of transaction, interest rate, maturity date, and call features. Another commenter stated that the daily report should note that the data represents transactions that have been submitted for comparison. The Board agrees that statements similar to those requested by the commenters should be included on or with the daily reports to help clarify the meaning of the data to the general public and has decided to include such statements on the daily report. The Board also plans to ask recipients of the daily report who intend to publish it for a general audience also to include such statements in their publications.

Average Price Calculation. One commenter suggested widening the band used for average price calculation to include more price information. In contrast, another commenter suggested narrowing the band to exclude some trades that might be considered "odd lots" (certain zero-coupon bond trades reported by NSCC on the basis of maturity value).

The Board believes that it is appropriate to use the band from $100,000 to $1 million for average price calculations for initial production of the daily report. Once the program goes into operation and feedback is received from data users, it will be possible to judge how well the "average price" concept actually works in practice. As experience is gained, the price band concept will be reviewed to determine whether it is serving its intended purpose of indicating a "typical" inter-dealer market price. The pilot program's computer system will be designed to enable the parameters of the price band to be changed easily and quickly.

Compilations of Data. One commenter urged the Board to provide compilations of transaction data (*e.g.*, a month of data on a computer disk) to facilitate study of the data by academics. The Board has decided not to make such compilations available at the beginning of the pilot program, but may do so in the future.

Information on Daily Reports. One commenter suggested that the Board publish individual transaction data (CUSIP number, description, par value, price) for each transaction, without regard to whether a security is being frequently traded on a specific day. This commenter believes that, by limiting reporting to individual maturities of an issue that are trading frequently, the program would withhold information that, in the aggregate, would be useful. For example, the commenter believes that the general price levels for prerefunded securities could be extracted from aggregate transaction data on prerefunded securities, even when no one prerefunded security is trading frequently.

The Board believes that reporting an isolated transaction in a security does not necessarily provide a reliable indicator of "market price" and might be misleading to an observer not familiar with the market. Nevertheless, after the pilot program begins operation and experience is obtained, the Board will review the use of the daily report and consider expanding the information included to accommodate requests from information users and the industry.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the MSRB consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested people are invited to submit written data, views, and arguments concerning the foregoing. People making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR–MSRB–94–9 and should be submitted by August 25, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–19008 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34453; File No. SR–NASD–94–13, Amendment No. 2]

Self-Regulatory Organizations; Notice of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the NASD's Proposed N•PROVE System for Price Improvement and Execution of Small Orders

July 28, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on July 25, 1994,[2] the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC") Amendment No. 2 to the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD and The Nasdaq Stock Market, Inc. ("Nasdaq") propose to amend the proposed rules governing the operation of The Nasdaq Primary Retail Order View and Execution System ("N•PROVE"), a new Nasdaq system for execution and price improvement of small-sized customer orders. Specifically, the NASD proposes to amend Sections 6.b and 6.c. of the Rules of Operation and Procedures for the N•PROVE service to provide that a limit order entered at a price between the best bid or offer displayed on Nasdaq will be immediately executed against a limit order subsequently entered into N•PROVE on the opposite side of the market priced at or superior to the limit price of the first limit order. Following is the text of the proposed rule change. (Additions are in italics; deletions are bracketed.)

RULES OF OPERATION AND PROCEDURES FOR THE N•PROVE SYSTEM

(6) EXECUTIONS OF N•PROVE ORDERS

* * * * *

a. No change.

b. Limit orders may be entered into N•PROVE. A limit order priced at the Nasdaq inside market when the order is delivered to an N•PROVE market maker will be handled as a market order. Limit orders priced outside the Nasdaq inside market will be stored in the N•PROVE limit order file, and when the inside market equals or betters the limit price, the order will be handled as a market order. Limit orders priced better than the inside market upon entry will establish the price at which subsequent incoming market orders on the other side of market may be priced and executed (e.g., a sell order priced between the best bid and offer would improve the price of an incoming buy order). Market makers will receive notification of the existence of a limit order priced better than the inside market on their quote retrieval screens; provided however, notification of the existence of a preferenced limit order will only be delivered to the designated market maker. [A limit order priced better than the inside market in Nasdaq may also be matched and executed against an incoming market or limit order, on the other side of the market, without the participation of a market maker.] *A limit order priced better than the inside market on Nasdaq shall be automatically executed against a subsequent limit order on the opposite side of the market at a price equal or superior to the limit price of the initial limit order (a sell (buy) limit order priced at or below (above) a limit order to buy (sell)), up to the size of the initial limit order or the subsequent limit order, whichever is smaller, and without the participation of a market maker.*

c. Market orders may be entered into N•PROVE. A market order will be delivered to a market maker for execution at the current inside market (buy orders will be executed at the best offer and sell orders at the best bid). If a limit order has previously been entered into N•PROVE at a price superior to the best bid or offer, the incoming market order will be repriced to match the price of the limit order and will be displayed for 15 seconds to *all* market makers [at] *whose current quotation equals* the *applicable* inside quote, *in the case of an unpreferenced order, and to the preferenced market maker in the case of a preferenced order.* [That order will either be executed by a market maker or will be matched and executed against the limit order.] *If no market maker accepts the incoming market order within the 15-second period, the market order will be automatically executed against the limit order.* All market orders entered into N•PROVE will be executed in compliance with market maker obligations as established in subsection (4).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this amendment is to amend N•PROVE's execution algorithm for limit orders to provide that, upon receipt of limit orders that match between the inside spread, the system will automatically execute the matching limit orders against each other without any delay or separate display to market makers. The NASD believes this amendment will further enhance the price improvement and limit order protection benefits afforded retail investors through N•PROVE.

As currently proposed, if a limit order is entered into N•PROVE between the inside spread on Nasdaq, a subsequent limit order on the opposite side of the market priced at the same or a superior price to the limit price of the pending limit order (*e.g.*, a sell limit order priced at or below a limit order to buy) will be matched against that pending limit order. If the incoming limit order is unpreferenced, all market makers at the inside quotation will have a 15-second

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] The NASD initially filed the proposed rule change on March 4, 1994. On March 28, 1994, the NASD filed Amendment No. 1, which expands and clarifies the description of the system. Notice of the original filing and Amendment No. 1 was provided by publication in the **Federal Register**. Securities Exchange Act Release No. 34145 (June 1, 1994), 59 FR 29649 (June 8, 1994).

opportunity to execute the incoming limit order. If the incoming limit order is preferenced, only the preferenced market maker will have a 15-second opportunity to execute the incoming limit order. If no market maker elects to execute the incoming limit order, the system would automatically execute the pending limit order against the incoming limit order.[3]

This amendment will change the execution methodology for matched limit orders by eliminating the 15 second window for the display of the incoming limit order prior to execution and permitting an immediate match of offsetting limit orders received by N•PROVE. By providing retail customers a greater opportunity to receive immediate and automatic executions of their limit orders priced between the spread, the NASD believes the proposal will enhance N•PROVE's price improvement capabilities and limit order protection features. Moreover, to the extent the N•PROVE has received two priced orders from retail customers that match or cross each other inside the spread, the NASD believes no market benefit would be served by delaying the execution of this transaction. Indeed, the NASD believes the amendment is in furtherance of Section 11A(a)(1)(C)(v) of the Act, which provides that investors' orders should be executed without the intervention of a dealer to the maximum extent possible consistent with the achievement of other critical market structure objectives, such as the economically efficient execution of securities transactions.

The proposed execution algorithm for matching incoming market orders against limit orders priced better than the inside market will remain the same. Specifically, as proposed, if a limit order is entered into N•PROVE at a price between the spread, the next incoming market order on the opposite side of the market (e.g., the limit order is to sell stock and the market order is to buy stock) would automatically "pass over" or read the limit order file to see if there are any orders residing in the limit order file at prices superior to the best bid or offer in the Nasdaq marketplace. If a limit order resides on the file at a superior price, then the market order will be flashed on the screen at that superior price for acceptance within a brief 15-second period, instead of at the inside bid or offer, as the case may be. In that event, all market makers at the inside quotation would have the opportunity for 15 seconds to execute the market order at the superior limit price. If no market maker elected to execute the order at that improved price, the system would execute the orders against each other at the limit price.

The NASD notes that both the limit order and the market order are better off with this execution process—customers placing market orders receive price improvement and customers placing limit orders will be assured that N•PROVE executions will not occur at prices inferior to their limit order prices. Accordingly, the NASD believes this execution process for a market orders is wholly consistent with the protection of investors and the maintenance of fair and orderly markets.

A key consideration for retaining N•PROVE's flash display and automated execution feature for market orders is the need to maintain the liquidity and depth of The Nasdaq Stock Market. One of the cornerstones of the success of Nasdaq's competing dealer system has been the availability of market maker capital to satisfy investors' liquidity demands. The extent to which market maker capital is available, in turn, is critically dependent on the ability of market makers to interact with customer order flow. Without the ability of market makers to trade with their customers' orders, orders presented to them by other members, or orders entered into Nasdaq execution systems, market-maker profitability will suffer and, as a result, market liquidity will diminish and investors will receive inferior executions of their orders. Accordingly, if market makers are denied any opportunity, however brief, to interact with incoming market orders entered into N•PROVE, the NASD believes that liquidity on Nasdaq will inevitably be affected in an adverse manner to the detriment of investors.

The NASD notes that an objective for a National Market System contained in Section 11A of the Act regarding the execution of investors' orders without the intervention of a dealer is premised upon, and necessarily incorporates the corresponding assurance that, such executions will be fully consistent with the economically efficient execution of such securities transactions. The NASD maintains that affording market makers an extremely narrow 15-second window of exposure within which they may view, evaluate, and respond to incoming market orders prior to the automated match of two investors' orders is appropriate in a competing dealer market environment. The ability of market makers to interact with customer order flow is essential to the long-term well-being of Nasdaq and the efficient execution of customer orders that results from vigorous competition among viable, aggressive Nasdaq market makers.

In sum, the NASD believes the proposal significantly enhances the price improvement and limit order protection features of N•PROVE and eliminates the possibility that a pending limit order will remain unexecuted while other public customer orders receive executions at the order's limit price, while preserving the liquidity and orderliness of Nasdaq by allowing a minimal, yet essential, opportunity for market makers to interact with retail order flow.

The NASD also believes the proposed N•PROVE system is consistent with Sections 15A(b)(6), 15A(b)(9), 15A(b)(11), and 11A(a)(1)(C) of the Act. Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest. Section 15A(b)(9) requires that rules of an Association not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Section 15A(b)(11) requires the NASD to formulate rules governing the quality of fair and informative quotations. Section 11A(a)(1)(C) finds that it is in the public interest to, among other things, assure economically efficient execution of securities transactions. The fundamental purpose of N•PROVE is to assist investors in achieving prompt, efficient executions of their small orders and to provide an opportunity for price improvement within an automated execution environment. The integrity and efficiency of Nasdaq for public investors and market-making participants is critical and the NASD believes that N•PROVE will provide benefits to both constituencies. The design of N•PROVE is not anti-competitive as it affords all market and limit orders an equal opportunity for price improvement regardless of whether the orders are preferenced or

[3] For example, if the inside bid and offer were 20—20¼, and two limit orders were entered to buy and sell at 20¼, the system would allow the orders to match against each other within 15 seconds. In addition, if two limit orders crossed each other in between the inside spread (*i.e.*, a buy order priced at 20⅜ and a sell order priced at 20⅛), the orders would be matched after 15 seconds and the price averaged between the orders (each would receive 20¼).

unpreferenced. In addition, to the extent that preferenced orders may be handled differently than unpreferenced orders, because market makers have entered into preferencing arrangements with known customers, market maker's effectively will have waived the protections offered them by the system. N•PROVE may also enhance the quality of quotations in the Nasdaq marketplace as market makers participating in the service may be encouraged to narrow the spread and improve the best inter-dealer quotations in Nasdaq in order to be first in priority and continue to receive unpreferenced order flow through N•PROVE.

Lastly, the NASD believes the N•PROVE is fully consistent with the significant national market system objectives contained in Section 11A of the Act. The facilities of N•PROVE would advance these objectives by offering efficient execution of investors' small orders, by maintaining market maker participation through the automated delivery of orders with the ability to reject those orders if trades have already occurred, and by offering the opportunity for price improvement to N•PROVE orders. The system's functionality will more accurately reflect market makers' affirmative obligations to provide liquidity to the market, without depriving market makers of legitimate exceptions from the firmness requirements contained in SEC Rule 11Ac1–1.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD believes that the proposed rule change will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–94–13 and should be submitted by August 25, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18965 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Rel. No. 20435; 812–8960]

FGIC Capital Market Services, Inc.; Notice of Application

July 29, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("Act").

APPLICANT: FGIC Capital Market Services, Inc.

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from paragraphs (a)(5), (a)(6), and (b) of rule 3a–5.

SUMMARY OF APPLICATION: Applicant seeks an order that would permit it to rely on rule 3a–5.

FILING DATE: The application was filed on April 29, 1994 and amended on July 22, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 23, 1994, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicant, 115 Broadway, New York, New York 10006.

FOR FURTHER INFORMATION CONTACT: James E. Anderson, Staff Attorney, at (202) 942–0573, or Robert A. Robertson, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a recently-formed Delaware corporation and a wholly-owned subsidiary of FGIC Holdings, Inc. ("FGIC Holdings"). FGIC Holdings is a wholly-owned subsidiary of GE Capital Corporation ("GE Capital"), an indirect wholly-owned subsidiary of General Electric Company. FGIC Holdings is a holding company engaged primarily in the insurance business through its subsidiary, Financial Guaranty Insurance Company. GE Capital is a diversified financial services company. GE Capital's activities consist of several distinct businesses that fall into five industry segments: specialized financing, mid-market financing, consumer services, equipment management, and specialty insurance.

2. Applicant was formed for the primary purpose of issuing and selling in private placement transactions municipal reinvestment contracts ("MRCs") and similar investment agreements primarily to state or local government entities or agencies. Applicant also sells put options where the holder acquires securities permitted under rule 3a–5(a)(6) directly for its own account and applicant agrees, at the option of the holder, to purchase

[4] 17 CFR 200.30–3(a)(12) (1994).

such investments at a later date.[1] Within six months of applicant's receipt of the proceeds of the MRC offerings and put fees, applicant lends at least 85% of such proceeds to GE Capital or certain companies controlled by GE Capital (the "Subsidiaries") for their use in financing their respective operations.[2] GE Capital fully guarantees applicant's obligations under each MRC it issues.

3. Section 3(a)(1) defines an investment company to include any issuer that is engaged primarily, or that proposes to engage primarily, in the business of investing, reinvesting, or trading in securities. Section 3(a)(3) defines an investment company to include any issuer engaged in the business of investing, reinvesting, owning, holding, or trading in securities, and that owns or proposes to acquire investment securities having a value exceeding 40% of the issuer's total assets, exclusive of Government securities and cash items, on an unconsolidated basis. Because applicant's loans to GE Capital and the Subsidiaries may be considered investments in the debt securities of GE Capital and the Subsidiaries, applicant falls within the definition of investment company.

4. To date, applicant has relied on the exception provided under section 3(c)(1) to avoid having to register as an investment company.[3] The number of holders of MRCs is anticipated eventually to exceed 100. At that time, applicant will be unable to continue to rely on section 3(c)(1). Accordingly, applicant requests an exemption from paragraphs (a)(5), (a)(6), and (b) of rule 3a–5 so that it can issue debt securities in the manner described above without registering as an investment company under the Act.

Applicant's Legal Conclusions

1. Rule 3a–5 excepts from the definition of investment company any finance subsidiary of an operating company. Paragraph (a)(5) of rule 3a–5 requires that a finance subsidiary relying on the rule loan to its parent company or a company controlled by its parent company at least 85% of amounts raised by the subsidiary. Paragraph (a)(6) limits the investments of the finance subsidiary to Government securities, securities of its parent company or a company controlled by its parent company, and certain other debt instruments. Rule 3a–5(b) defines a parent company and companies controlled by the parent company as companies that are not investment companies under section 3(a) or that are excepted or exempted by order from the definition of investment company by section 3(b) or by the rules and regulations under section 3(a).

2. Assuming that GE Capital otherwise may be deemed to be an investment company under the Act, the diversity of GE Capital's financial activities requires it to rely on the exception from the definition of investment company under section 3(c)(6).[4] Because GE Capital is excepted from the definition of investment company under section 3(c)(6), rather than under section 3(b) or the rules and regulations under section 3(a), GE Capital is not an eligible parent within the meaning of rule 3a–5(b). Consequently, applicant cannot comply with the requirements in paragraphs (a)(5) and (a)(6) that it invest its assets in the securities of an eligible parent company and companies controlled by the parent company.

3. Section 6(c) provides that the Commission may exempt any person or transaction from any provision of the Act or any rule thereunder to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant asserts that none of the investor protection concerns addressed by the Act are raised by its activities since it is engaged primarily in the business of financing the operations of GE Capital, and GE Capital is not an investment company. Consequently, applicant believes that the standards for relief under section 6(c) are satisfied.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–19009 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[1] Applicant considers the sale of put options to constitute the sale of debt securities and proceeds of the put options to consist of the put fees.

[2] All references herein to the Subsidiaries are intended to include solely companies that are controlled by GE Capital under the definition of a "company controlled by a parent company" under rule 3a–5(b)(3).

[3] Section 3(c)(1) excepts from the definition of investment company any issuer whose securities are owned by less than 100 persons and which is not making a public offering of its securities.

[4] Section 3(c)(6) excepts from the definition of investment company any company primarily engaged in one or more of the businesses described in paragraphs (3), (4), and (5) of section 3(c), or in one or more of such businesses (from which not less than 25% of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading securities. Section 3(c)(3) excepts from the definition of investment company banks and similar institutions. Section 3(c)(4) excepts from the definition of investment company person engaged in the business of making small loans, industrial banking, or similar businesses. Section 3(c)(5) excepts from the definition of investment company persons who are engaged in the business of: "purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesales, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate."

[File No. 500–1]

Latin American Resources, Inc.; Order of Suspension of Trading

August 1, 1994.

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate information concerning the securities of Latin American Resources, Inc. ("LARI"), of Huntington Station, New York, and that questions have been raised about the accuracy and adequacy of LARI's financial statements and other disclosures. The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company, over-the-counter or otherwise, is suspended for the period from 9:15 a.m. (EDT), August 1, 1994 through 11:59 p.m. (EDT), on August 10, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–19010 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–20434; 812–8814]

Notice of Application for Exemption

July 28, 1994.

AGENCY: Securities and Exchange Commission ("SEC" or the "Commission").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "1940 Act").

APPLICANTS: MFS Variable Insurance Trust (the "Trust") and Massachusetts Financial Services Company ("MFS").

RELEVANT 1940 ACT SECTIONS: Order requested under Section 6(c) of the 1940 Act for exemptions from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder.

SUMMARY OF APPLICATION: Applicants seek an order to the extent necessary to permit shares of the Trust and shares of any other investment company that is designed to fund insurance products and for which MFS, or any of its affiliates, may serve as investment advisor, administrator, manager, principal underwriter or sponsor (collectively, with the Trust, the "Funds") to be sold to and held by: (a) Variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated life insurance companies (the "Participating Insurance Companies"); and (b) qualified pension and retirement plans outside of the separate account context (the "Plans").

FILING DATES: The application was filed on February 5, 1994. Amendment number one to the application was filed on June 14, 1994, and amendment number two to the application was filed on June 22, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing on this application by writing to the Secretary of the SEC and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on August 22, 1994 and accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the interest, the reason for the request and the issues contested. Persons may request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, DC 20549. Applicants: Robert J. Zutz, Kirkpatrick & Lockhart, 1800 M Street, NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Barbara J. Whisler, Senior Attorney, or Michael V. Wible, Special Counsel, both at (202) 942–0670, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: Following is a summary of the application, the complete application is available for a fee from the Public Reference Branch of the SEC.

Applicants' Representations

1. The Trust, a Massachusetts business trust, is registered under the 1940 Act as an open-end, diversified management investment company of the series type. The Trust commenced operations on or about June 2, 1994.

2. The Trust will offer the following twelve separately managed portfolios: the MFS OTC Series; MFS Growth Series; MFS Research Series; MFS Growth With Income Series; MFS Total Return Series; MFS Utilities Series; MFS High Income Series; MFS World Governments Series; MFS Strategic Fixed Income Series; MFS Bond Series; MFS Limited Maturity Series; and MFS Money Market Series. The application states that, except for the MFS OTC Series, the MFS Utilities Series, the MFS World Governments Series and the MFS Strategic Fixed Income Series, each of the portfolios of the Trust will be diversified. Applicants incorporate by reference into the application the registration statement (File No. 33–74668) on Form N–1A of the Trust.

3. MFS serves as the investment advisor to the portfolios of the Trust. MFS is a subsidiary of Sun Life Assurance Company of Canada (U.S.), which is a subsidiary of Sun Life Assurance Company of Canada.

4. Applicants state that once the order requested in the application is granted, the Trust intends to offer shares of each of its existing and future portfolios to separate accounts of insurance companies in addition to the separate accounts established by Century Life of America ("Century Life") or its affiliates (the "Accounts") to serve as investment vehicles for variable annuity and/or variable life insurance contracts (the "Contracts"). The Trust may also offer shares of its portfolios directly to the Plans outside of the separate account context.

5. The application states that each Participating Insurance Company will have the legal obligation of satisfying all applicable requirements under both state and federal law. Applicants state that it is anticipated that Participating Insurance Companies will rely on Rule 6e–2 or Rule 6e–3(T) under the 1940 Act, although some may rely on individual exemptive orders as well, in connection with variable life insurance contracts. Applicants further state that the role of the Funds, in so far as the federal securities laws are applicable, will be limited to that of offering shares to the Accounts and meeting any conditions that the Commission may impose upon granting the order requested in the application.

6. The application states that, due to changes in the tax law, the Funds have the opportunity to increase their asset base through sale of shares of the Funds to the Plans. The Plans may choose any of the Funds as the sole investment option, or, as one of several investment options. Shares of any of the Funds sold to a Plan would be held by the trustee of that Plan as required by Section 403(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"). MFS will not serve as investment advisor to any of the Plans that purchase shares of the Funds. There will be no pass-through voting to participants in the Plans.

Applicants' Legal Analysis

1. In connection with the funding a scheduled premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust ("UIT"), Rule 6e–2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The relief provided by Rule 6e–2 is available to a separate account's investment advisor, principal underwriter, and sponsor or depositor. The exemptions granted by rule 6e–2(b)(15) are available only where the management investment company underlying the UIT offers its shares "exclusively to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company." The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of a single insurance company (or of two or more affiliated insurance companies) is referred to as "mixed funding." The use of a common management investment company as the underlying investment medium for variable annuity and variable life insurance separate accounts of unaffiliated insurance companies is referred to as "shared funding." "Mixed and shared funding" denotes the use of a common management investment company to fund the variable annuity and variable life insurance separate accounts of other affiliated and unaffiliated insurance companies. The relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that offers its shares to a variable annuity separate account of the same company or of any other affiliated or unaffiliated life insurance company. Therefore, Rule 6e–2(b)(15) precludes mixed and shared funding.

2. Applicants state that the relief granted by Rule 6e–2(b)(15) is not affected by the purchase of shares of the Funds by the Plans. Applicants note, however, that because the relief under Rule 6e–2(b)(15) is available only where shares are offered exclusively to separate accounts, additional exemptive relief is necessary if shares of the Funds also are to be sold to Plans.

3. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a UIT, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted to a separate account by Rule 6e–3(T)(b)(15) are available only where all of the assets of the separate account consist of the shares of one or more registered management investment companies which offer their shares "exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company." Rule 6e–3(T) permits mixed funding. Rule 6e–3(T), however, does not permit shared funding.

4. Applicants state that the relief granted by Rule 6e–3(T) is not affected by the purchase of shares of the Funds by the Plans. Applicants note, however, that because the relief under Rule 6e–3(T) is available only where shares are offered exclusively to separate accounts, additional exemptive relief is necessary if shares of the Funds are also to be sold to Plans.

5. As noted, Applicants state that changes in the tax law have created the opportunity for the Funds to increase their asset base through the sale of Fund shares to the Plans. Applicants state that Section 817(h) of the Internal Revenue Code of 1986, as amended (the "Code"), imposes certain diversification standards on the underlying assets of the Contracts held in the Funds. The Code provides that such Contracts shall not be treated as an annuity contract or life insurance contract for any period in which the investments are not, in accordance with regulations prescribed by the Treasury Department, adequately diversified. On March 2, 1989, the Treasury Department issued regulations which established diversification requirements for the investment portfolios underlying variable contracts. Treas. Reg. § 1.817–5 (1989). The regulations provide that, to meet the diversification requirements, all of the beneficial interests in the investment company must be held by the segregated asset accounts of one or more insurance companies. The regulations do, however, contain certain exceptions to this requirement, one of which allows shares in an investment company to be held by the trustee of a qualified pension or retirement plan without adversely affecting the ability of shares in the same investment company to also be held by the separate accounts of insurance companies in connection with their variable contracts. Treas. Reg. § 1.817–5(f)(3)(iii).

6. Applicants state that the promulgation of Rules 6e–2 and 6e–3(T) under the 1940 Act preceded the issuance of these Treasury regulations. Applicants assert that, given the then current tax law, the sale of shares of the same investment company to both separate accounts and Plans could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15).

7. Applicants therefore request relief from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder to the extent necessary to permit shares of the Funds to be offered and sold in connection with both mixed and shared funding.

8. Section 9(a) of the 1940 Act provides that it is unlawful for any company to serve as investment advisor or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in Sections 9(a) (1) or (2). Rules 6e–2(b)(15) and 6e–3(T)(b)(15) provide exemptions from Section 9(a) under certain circumstances, subject to limitations on mixed and shared funding. The relief provided by Rules 6e–2(b)(15)(i) and 6e–3(T)(b)(15)(i) permits a person disqualified under Section 9(a) to serve as an officer, director, or employee or the life insurer, or of any of its affiliates, so long as that person does not participate directly in the management or administration of the underlying fund. The relief provided by Rules 6e–2(b)(15)(ii) and 6e–3(T)(b)(15)(ii) permits the life insurer to serve as the underlying fund's investment advisor or principal underwriter, provided that none of the insurer's personnel who are ineligible pursuant to Section 9(a) are participating in the management or administration of the fund.

9. Applicants state that the partial relief from Section 9(a) found in Rules 6e–2(b)(15) and 6e–3(T)(b)(15), in effect, limits the amount of monitoring necessary to ensure compliance with Section 9 to that which is appropriate in light of the policy and purposes of the Section. Applicant state that those 1940 Act rules recognize that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to the many individuals in a large insurance company complex, most of whom will have no involvement in matters pertaining to investment companies within that organization. Applicants note that the Participating Insurance Companies are not expected to play any role in the management or administration of the Funds. Therefore, Applicants assert, applying the restrictions of Section 9(a) serves no regulatory purpose. The application states that the relief requested will not be affected by the proposed sale of shares of the Funds to the Plans. The insulation of the Trust from individuals disqualified under the 1940 Act remains in place. Applicants assert that, since the Plans are not investment companies and will not be deemed affiliated by virtue of their share holdings, no additional relief is necessary.

10. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) under the 1940 Act assume the existence of a pass-through voting requirement with respect to management investment company shares held by a separate account. The application states that the Participating Insurance Companies will provide pass-through voting privileges to all Contract owners so long as the Commission interprets the 1940 Act to require such privileges.

11. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) under the 1940 Act provide exemptions from the pass-through voting requirement with respect to several significant matters, assuming observance of the limitations on mixed and shared funding imposed by the 1940 Act and the rules thereunder.

Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) provide that the insurance company may disregard voting instructions of its contract owners with respect to the investments of an underlying fund, or any contract between a fund and its investment advisor, when required to do so by an insurance regulatory authority.

Rules 6e–2(b)(15)(iii)(b) and 6e–3(T)(b)(15)(iii)(B) provide that the insurance company may disregard voting instructions of its contract owners if the contract owners initiate any change in the company's investment policies, principal underwriter, or any investment advisor, provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraphs (b)(15)(ii) and (b)(7)(ii) (B) and (C) of each rule.

12. Applicants represent that the right of the Participating Insurance Companies to disregard voting instructions of Contract owners provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15) does not raise any issues different from those raised by the authority of state insurance

administrators over separate accounts. Under the rules, an insurer can disregard voting instructions only with respect to certain specified items. Affiliation does not eliminate the potential, if any exists, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment advisor initiated by contract owners. The potential for disagreement is limited by the requirements in Rules 6e–2 and 6e–3(T) that the insurance company's disregard of voting instructions be both reasonable and based on specific good faith determinations.

13. Applicants further represent that the Funds' sale of shares to the Plans does not impact the relief requested in this regard. As noted previously by Applicants, shares of the Funds sold to Plans would be held by the trustees of such Plans as required by Section 403(a) of ERISA. Section 403(a) also provides that the trustee(s) must have exclusive authority and discretion to manage and control the Plan with two exceptions: (a) when the Plan expressly provides that the trustee(s) is (are) subject to the direction of a named fiduciary who is not a trustee, in which case the trustee(s) is (are) subject to proper directions made in accordance with the terms of the Plan and not contrary to ERISA; and (b) when the authority to manage, acquire or dispose of assets of the Plan is delegated to one or more investment mangers pursuant to Section 402(c)(3) of ERISA. Unless one of the two exceptions stated in Section 403(a) applies, Plan trustees have the exclusive authority and responsibility for voting proxies. Where a named fiduciary appoints an investment manger, the investment manager has the responsibility to vote the shares held unless the right to vote such shares is reserved to the trustees or to the named fiduciary. In any event, there is no pass-through voting to the participants in such Plans. According, Applicants note that, unlike the case with insurance company separate accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with Plans because such Plans are not entitled to pass-through voting privileges.

14. Applicants state that no increased conflicts of interest would be present by the granting of the requested relief. Applicants assert that shared funding does not present any issues that do not already exist where a single insurance company is licensed to do business in several states. Applicants note that where Participating Insurance Companies are domiciled in different states, it is possible that the state insurance regulatory body in a state in which one Participating Insurance Company is domiciled could require action that is inconsistent with the requirements of insurance regulators in one or more other states in which other Participating Insurance Companies are domiciled. Applicants state that the possibility, however, is no different and no greater than exists where, as is currently permitted, a single insurer and its affiliates offer their insurance products in several states.

15. Applicants argue that affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions (adapted from the conditions included in Rule 6e–3(T)(b)(15)) discussed below are designed to safeguard against any adverse effects that different state insurance regulatory requirements may produce. If a particular state insurance regulator's decision conflicts with the majority of other state regulators, the affected insurer may be required to withdraw its separate account's investment in the relevant Fund.

16. Applicants also argue that affiliation does not eliminate the potential, if any exists, for divergent judgments as to when a Participating Insurance Company properly may disregard voting instructions of Contract owners. Potential disagreement is limited by the requirement that a disregard of voting instructions be both reasonable and based on specified good faith determinations. However, if a Participating Insurance Company's decision to disregard Contract owner instructions represents a minority position or would preclude a majority vote approving a particular change, such Participating Insurance Company may be required, at the election of the relevant Fund, to withdraw its investment in that Fund. No charge or penalty will be imposed as a result of such withdrawal.

17. Applicants state that there is no reason why the investment policies of a Fund with mixed funding would or should be materially different from what those policies would or should be if such investment company or series thereof funded only variable annuity or only variable life insurance contracts. Applicants therefore argue that there is no reason to believe that conflicts of interest would result from mixed funding. Moreover, Applicants represent that the Funds will not be managed to favor or disfavor any particular insurer or type of Contact.

18. Applicants note that no single investment strategy can be identified as appropriate to a particular insurance product. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance and investment goals. Those diversities are of greater significance than any difference in insurance products. An investment company supporting even one type of insurance product must accommodate those diverse factors.

19. Applicants further note that Section 817(h) of the Code is the only section in the Code where separate accounts are discussed. Section 817(h) imposes certain diversification standards on the underlying assets of variable annuity contracts and variable life contracts held in the portfolios of management investment companies. Treasury Regulation 1.817–5(f)(3)(iii), which established diversification requirements for such portfolios, specifically permits, among other things, "qualified pension or retirement plans" and separate accounts to share the same underlying management investment company. Therefore, neither the Code, the Treasury regulations nor the revenue rulings thereunder present any inherent conflicts of interest if Plans, variable annuity separate accounts and variable life insurance separate accounts all invest in the same management investment company.

20. While there are differences in the manner in which distributions are taxed for variable annuity contracts, variable life insurance contracts and Plans, Applicants state that the tax consequences do not raise any conflicts of interest. When distributions are to be made, and the separate account or the Plan is unable to net purchase payments to make the distributions, that separate account or the Plan will redeem shares of the Trust at net asset value. The plan will then make distributions in accordance with the terms of the Plan. The life insurance company will surrender values from the separate account into the general account to make distributions in accordance with the terms of the variable contract.

21. With respect to voting rights, applicants state that it is possible to provide an equitable means of giving such voting rights to Contract owners and to Plans. Applicants represent that the transfer agent for the Trust will inform each Participating Insurance Company of each Account's share of ownership in the Trust, as well as inform the trustees of the Plans of their holdings. Each Participating Insurance Company will then solicit voting instructions in accordance with Rules 6e–2 and 6e–3(T).

22. Applicants argue that the ability of Funds to sell their respective shares directly to Plans does not create a "senior security", as such term is defined under Section 18(g) of the 1940 Act, with respect to any Contract owner vis-a-vis a participant under a Plan. Regardless of the rights and benefits of participants and Contract owners under the respective Plans and Contracts, the Plans and the Accounts have rights only with respect to their shares of the Trust. Such shares may be redeemed only at net asset value. No shareholder of any of the Funds has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

23. Finally, applicants state that there are no conflicts between Contract owners and participants under the Plans with respect to the state insurance commissioners' veto powers (direct with respect to variable life insurance and indirect with respect to variable annuities) over investment objectives. The basic premise of shareholder voting is that not all shareholders may agree that there are any inherent conflicts of interest between shareholders. The state insurance commissioners have been given the veto power in recognition of the fact that insurance companies cannot simply redeem their separate accounts out of one fund and invest those monies in another fund. To accomplish such redemption and transfers, complex time consuming transactions must be undertaken. Conversely, trustees of Plans can make the decision quickly and implement redemption of shares from a Fund and reinvest the monies in another funding vehicle without the same regulatory impediments or, as is the case with most Plans, hold cash pending suitable investment. Based on the foregoing, Applicants represent that even should there arise issues where the interests of Contract owners and the interests of Plans conflict, the issues can be almost immediately resolved because trustees of the Plans can, independently, redeem shares out of the Trust.

24. Applicants state that various factors have kept certain insurance companies from offering variable annuity and variable life insurance contracts. According to Applicants, these factors include: The cost of organizing and operating an investment funding medium; the lack of expertise with respect to investment management (particularly with respect to stock and money market investments); and the lack of public name recognition of certain insurers as investment professionals. Applicants argue that use of the Funds as common investment media for the Contracts would ameliorate these concerns. Participating Insurance Companies would benefit from the investment and administrative expertise of MFS as well as from the cost efficiencies and investment flexibility afforded by a large pool of funds. Applicants state that making the Funds available for mixed and shared funding will encourage more insurance companies to offer variable contracts such as the Contracts which will then increase competition with respect to both the design and the pricing of variable contracts. This can be expected to result in greater product variation and lower charges. Thus, Applicants argue that Contract owners would benefit because mixed and shared funding will eliminate a significant amount of the costs of establishing and administering separate funds. Moreover, Applicants assert that sales of shares of the Funds to Plans should increase the amount of assets available for investment by the Funds. This should, in turn, promote economies of scale, permit increased safety of investments through greater diversification, and make the addition of new portfolios to the Trust more feasible.

25. Applicants believe that there is no significant legal impediment to permitting mixed and shared funding. Additionally, Applicants note the previous issuance of an order permitting mixed and shared funding where shares of a trust were sold directly to qualified plans.

Applicants' Conditions

Applicants have consented to the following conditions if the requested order is granted:

1. A majority of the Board of Trustees or Board of Directors of each Fund (each, a "Board") shall consist of persons who are not "interested persons" of the Fund, as defined by Section 2(a)(19) of the 1940 Act and the rules thereunder and as modified by any applicable orders of the Commission, except that, if this condition is not met by reason of the death, disqualification, or bona fide resignation of any trustee or director, then the operation of this condition shall be suspended: (a) for a period of 45 days if the vacancy or vacancies may be filled by the Board; (b) for a period of 60 days if a vote of shareholders is required to fill the vacancy or vacancies; or (c) for such longer period as the Commission may prescribe by order upon application.

2. Each Board will monitor its Fund for the existence of any material irreconcilable conflict between the interests of the Contract owners of all of the Accounts investing in the Fund. A material irreconcilable conflict may arise for a variety of reasons, including: (a) an action by any state insurance regulatory authority; (b) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretative letter, or any similar action by insurance, tax, or securities regulatory authorities; (c) an administrative or judicial decision in any relevant proceeding; (d) the manner in which the investments of the Fund are managed; (e) a difference in voting instructions given by owners of variable annuity contracts and owners of variable life insurance contracts; or (f) a decision by an insurer to disregard the voting instructions of Contract owners.

3. The Participating Insurance Companies and MFS (or any other investment advisor of a Fund) will report any potential or existing conflicts to the Board. Participating Insurance Companies and MFS (or any other investment advisor of a Fund) will be responsible for assisting the appropriate Board in carrying out its responsibilities under these conditions by providing the Board with all information reasonably necessary for the Board to consider any issues raised, including information as to a decision by a Participating Insurance Company to disregard voting instructions of Contract owners. The responsibility to report such information and conflicts and to assist the Board will be a contractual obligation of the Participating Insurance Companies under the agreements governing participation in the Funds and these responsibilities will be carried out with a view only to the interests of Contract owners.

4. If it is determined by a majority of the Board, or by a majority of its disinterested trustees or directors, that an irreconcilable material conflict exists, the relevant Participating Insurance Companies shall, at their expense and to the extent reasonably practicable, take steps necessary to remedy or eliminate the irreconcilable material conflict, including: (a) withdrawing the assets allocable to some or all of the Accounts from the Fund and reinvesting such assets in a different investment medium including another portfolio of the Fund or another Fund, or submitting the question as to whether such segregation should be implemented to a vote of all affected contract owners; and, as appropriate, segregating the assets of any appropriate group (*i.e.*, variable annuity contract owners or variable life insurance contract owners) that votes in favor of such segregation, or offering to the affected variable contract owners the

option of making such a change; and (b) establishing a new registered management investment company or managed separate account.

The responsibility to take remedial action in the event of a Board determination of a material irreconcilable conflict and to bear the cost of such remedial action shall be a contractual obligation of all Participating Insurance Companies under the agreements governing their participation in the Funds. The responsibility to take such remedial action shall be carried out with a view only to the interests of Contract owners. For purposes of this Condition Four, a majority of the disinterested members of the applicable Board shall determine whether any proposed action adequately remedies any material irreconcilable conflict, but, in no event will the Fund or MFS be required to establish a new funding medium for any Contract. Further, no Participating Insurance Company shall be required by this Condition Four to establish a new funding medium for any Contract if any offer to do so has been declined by a vote of a majority of the affected Contract owners.

5. The Board's determination of the existence of an irreconcilable material conflict and its implications shall be made known promptly and in writing to all Participating Insurance Companies.

6. Participating Insurance Companies will provide pass-through voting privileges to all Contract owners so long as the Commission interprets the 1940 Act to require pass-through voting privileges for Contract owners. Accordingly, the Participating Insurance Companies will vote shares of the Fund held in their Accounts in a manner consistent with voting instructions timely received from Contract owners. Participating Insurance Companies will be responsible for assuring that each of their Accounts calculates voting privileges in a manner consistent with other Participating Insurance Companies. The obligation to calculate voting privileges in a manner consistent with all other Accounts will be a contractual obligation of all Participating Insurance Companies under the agreements governing their participation in the Funds. Each Participating Insurance Company will vote shares for which it has not received voting instructions as well as shares attributable to it in the same proportion as it votes shares for which it has received instructions.

7. All reports received by the Board of potential or existing conflicts, and all Board action with regard to: (a) determining the existence of a conflict; (b) notifying Participating Insurance Companies of a conflict; and (c) determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records. Such minutes or other records shall be made available to the Commission upon request.

8. Each Fund will notify all Participating Insurance Companies that separate account prospectus disclosure regarding potential risks of mixed and shared funding may be appropriate. Each Fund shall disclose in its prospectus that: (a) shares of the Fund are offered in connection with mixed and shared funding; (b) material conflicts may arise from mixed and shared funding arrangements; and (c) the Board will monitor for the existence of any material conflicts and determine what action, if any, should be taken in response to such conflicts.

9. Each Fund will comply with all provisions of the 1940 Act requiring voting by shareholders, and, in particular, each Fund will either provide for annual meetings (except to the extent that the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with Section 16(c) of the 1940 Act, (although the Funds are not within the trusts described in Section 16(c) of the 1940 Act) as well as with Section 16(a), and, if applicable, Section 16(b) of the 1940 Act. Further, each Fund will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of trustees and with whatever rules the Commission may promulgate with respect thereto.

10. If and to the extent that Rules 6e–2 and 6e–3(T) are amended (or if Rule 6e–3 under the 1940 Act is adopted) to provide exemptive relief from any provision of the 1940 Act or the rules thereunder with respect to mixed and shared funding on terms and conditions materially different from any exemptions granted in the order requested by Applicants, then the Funds and the Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rules 6e–2 and 6e–3(T), as amended, and Rule 6e–3, as adopted, to the extent applicable.

11. No less than annually, the Participating Insurance Companies and/or MFS (or any other investment advisor of a Fund) shall submit to the Boards such reports, materials, or data as the Board may reasonably request so that the Boards may carry out fully the obligations imposed by the conditions contained in the application. Such reports, materials, and data shall be submitted more frequently if deemed appropriate by the Boards. The obligations of the Participating Insurance Companies to provide these reports, materials, and data to the Boards shall be a contractual obligation of all Participating Insurance Companies under the agreements governing participation in the Funds.

12. If a Plan should become an owner of 10% or more of the assets of a Fund, such Plan will execute a fund participation agreement with the applicable Fund. A Plan will execute an application containing an acknowledgment of this condition upon such Plan's initial purchase of shares of any Fund.

Conclusion

For the reasons stated above, Applicants believe that the requested exemptions, in accordance with the standards of Section 6(c), are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18964 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–20433; International Series Release No. 694; 812–8944]

Ontario Financing Authority; Notice of Application

July 28, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANT: Ontario Financing Authority ("OFA").

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from all provisions of the Act.

SUMMARY OF APPLICATION: OFA, a public authority established by the Province of Ontario, Canada, seeks an order exempting it from all provisions of the Act in connection with the offer and sale of its debt securities in the United States.

FILING DATE: The application was filed on April 20, 1994 and amended on July 20, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be

issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 22, 1994, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street N.W., Washington, D.C. 20549. Applicant, c/o Pamela M. Gibson, Shearman & Sterling, Commerce Court West, 199 Bay Street, Suite 4405, Toronto, Canada, M5L 1E8.

FOR FURTHER INFORMATION CONTACT: Marc Duffy, Senior Attorney, (202) 942–0565, or C. David Messman, Branch Chief, (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. OFA is a statutory authority of the Province of Ontario ("Ontario" or the "Province") established on November 15, 1993 by the Province under the Capital Investment Plan Act, 1993 (the "Capital Investment Act"). The Province established OFA to assist the Province, and municipalities, school boards, post-secondary institutions, hospitals and other public bodies (the "Public Sector Clients") to borrow and invest money, and provide other financial services. Through OFA, money will be raised to finance capital investment in the areas of, among others, education, health-care, transportation, and water and sewage infrastructure. OFA is expected to become a major financing vehicle for borrowing by Public Sector Clients.

2. OFA proposes to issue and sell in the United States debt securities unconditionally guaranteed by the Province ("Guaranteed Debt Securities"). The proceeds of the Guaranteed Debt Securities will be lent to various Public Sector Clients. Substantially all of the moneys borrowed by OFA will be re-lent to the Public Sector Clients. Funds not immediately lent to the Province or Public Sector Clients will be invested by OFA. In order to assure favorable terms to the Public Sector Clients, and in anticipation of their borrowing needs, OFA may borrow and then invest the proceeds of such borrowings temporarily in debt instruments, such as banker's acceptances, Treasury bills, and commercial paper until the Public Sector Clients require such funds.

3. Guaranteed Debt Securities will be direct, unsecured obligations of OFA, with the payment of principal, and any interest or premium, irrevocably and unconditionally guaranteed by the Province (the "Provincial Guarantee") pursuant to an order of the Lieutenant Governor in Council under the Financial Administration Act (the "FAA"). Section 22 of the FAA provides, in part, that the Lieutenant Governor in Council may by order authorize the Minister of Finance, on behalf of Ontario, "to agree to guarantee or indemnify the debts, obligations, securities or undertakings of any person * * * [and] may fix such terms and conditions as are considered advisable * * *." Pursuant to this authority, Guaranteed Debt Securities will bear the irrevocable unconditional guarantee of the Province so that, in the event of a default, holders of Guaranteed Debt Securities may proceed directly against the Province under such guarantee without first proceeding against OFA, and such amount will then be payable out of the Consolidated Revenue Fund of the Province.

4. The Capital Investment Act is the primary legislation governing OFA and sets out OFA's constitution, functions, and powers. The Minister of Finance of the Province is responsible for the administration of the Capital Investment Act in respect of OFA. Pursuant to the Capital Investment Act, OFA is required to submit an annual report on its affairs, including audited financial statements, to the Minister of Finance within 90 days of the end of its fiscal year. The financial statements are audited by the Provincial Auditor.

5. The Lieutenant Governor in Council is empowered to make regulations respecting the management, control, and administration of the affairs of OFA. OFA's board of directors may pass by-laws regulating OFA's proceedings, specifying the powers and duties of the officers and employees and generally for the management of OFA. In particular, the power of OFA to borrow, issue securities, make short-term investments, manage risk associated with financing and investment, or incur liabilities in order to facilitate financings by others only may be exercised under the authority of a by-law that has been approved by the Minister of Finance.

6. Substantially all of OFA's assets are expected to include: (i) Obligations of Public Sector Clients to repay loans made to them by OFA; (ii) the assets, consisting primarily of deposit obligations, of The Province of Ontario Savings Office; (iii) obligations of certain Public Sector Clients to repay loans made to them by the Province and transferred to OFA; (iv) investments to facilitate OFA's cash flow management and maximize the return on its surplus funds and those of Public Sector Clients; and (v) such other assets, which may consist of obligations or investments, as permitted by the Capital Investment Act.

Applicant's Legal Analysis

1. Section 3(a)(3) of the Act defines an investment company as an issuer engaged in the business of investing, reinvesting, owning, holding, or trading in securities, and owning "investment securities" having a value exceeding 40% of the value of such issuer's total assets. Because substantially all of the moneys borrowed by OFA will be lent to Public Sector Clients, a substantial portion of OFA's assets will consist of obligations of the Public Sector Clients to repay such loans. In addition, OFA will invest its own surplus funds and those of other Public Sector Clients, as well as make temporary investments. Such obligations and investments could be deemed to be "investment securities" within the meaning of section 3(a)(3). As a result, OFA could be deemed to be an "investment company" under the Act.

2. Section 6(c) permits the SEC to grant an exemption from the provisions of the Act if and to the extent that such exemption is necessary and appropriate in the public interest, consistent with the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of the Act.

3. OFA believes that granting the exemption would be appropriate in the public interest. It would benefit United States investors by making the Guaranteed Debt Securities more readily available to such investors. It also would expand the United States' market for OFA's Guaranteed Debt Securities and thus encourage the free flow of capital among nations.

4. OFA further believes that granting the exemption requested would be consistent with the protection of investors. The payment of the principal of, and any premium or interest on, the Guaranteed Debt Securities will be irrevocably and unconditionally guaranteed by the Province. As a result, the Guaranteed Debt Securities will be

backed by the sovereign credit of the Province and not merely the credit and assets of OFA.

5. Finally, OFA believes an exemption would be consistent with the purposes fairly intended by the policy and provisions of the Act. OFA is a governmental central financing and investing authority that was organized to obtain and arrange efficient financing and investments for the requirements of public authorities of the Province. OFA is thus a statutory body with characteristics different from the types of investment companies at which the Act generally is directed and for which its substantive provisions are necessary or suitable.

Applicant's Conditions

OFA agrees that any order of the SEC granting the requested relief shall be subject to the following conditions:

1. No Guaranteed Debt Securities will be offered or sold within the United States unless: (a) They are registered under the Securities Act of 1933 (the "Securities Act"); (b) in the opinion of United States counsel for OFA, an exemption from registration under the Securities Act is available with respect to such offer and sale; or (c) the staff of the SEC states in writing that they will not recommend that the SEC take any enforcement action under the Securities Act if such securities are offered and sold in the United States without registration.

2. All borrowings by OFA, including the issuance by OFA of the Guaranteed Debt Securities, will be effected in accordance with the provisions of the Capital Investment Act and any applicable regulations and by-laws promulgated thereunder. All investments of funds of OFA and any Pubic Sector Client will be made by OFA in accordance with the requirements of the Capital Investment Act and any applicable regulations and by-laws promulgated thereunder. All temporary investments by OFA will be made in accordance with the requirements of the Capital Investment Act and any applicable regulations and by-laws promulgated thereunder.

3. The payment of principal of, and any interest or premium on, all Guaranteed Debt Securities issued by OFA will be irrevocably and unconditionally guaranteed by the Province pursuant to an order of the Lieutenant Governor in Council under the FAA.

4. Applicant and the Province will expressly submit to the jurisdiction of any state or federal court in the City or State of New York in any action or proceeding arising out of or relating to the Guaranteed Debt Securities and the Provincial Guarantee, and Applicant and the Province will agree that all claims in respect of such action or proceeding may be heard and determined in such New York State court or in any such federal court. Applicant and the Province also will waive the defense of an inconvenient forum to the maintenance of any such action or proceeding. Applicant and the Province will appoint an agent for service of process with an office in New York, New York, as agent to receive on behalf of Applicant and the Province service of copies of the summons and complaint and any other process which may be served in any such action or proceeding. Such consent to jurisdiction and appointment of an agent for service of process will be irrevocable until all amounts due and payable in respect of any such Guaranteed Debt Securities have been paid. Applicant will agree to explicitly waive any immunity it may have from jurisdiction and from execution or attachment or any process in the nature thereof in respect of any suit, action, or proceeding arising out of or relating to the Guaranteed Debt Securities. The Province will agree to explicitly waive any immunity the Province may have from jurisdiction in respect of any such action.

5. In respect of any action or proceeding brought with respect to such Guaranteed Debt Securities or Provincial Guarantee instituted in any state or federal court in the United States (other than any action or proceeding in any New York State or federal court in New York City referred to in the preceding paragraph), each of OFA and the Province will agree to accept service of process by any form of mail requiring a signed receipt effected in accordance with Sections 1608(b)(3)(B) and 1608(a)(3), respectively, of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. 1608). In agreeing to accept such service of process in any such action or proceeding, neither OFA nor the Province will waive any claim of sovereign immunity it may have with respect to itself or its property in any such action or proceeding, consent to the subject matter jurisdiction or jurisdiction *in personam* of any such court, agree that any such court is a proper forum for any such action or proceeding, or waive any rights it may have to remove any such action or proceeding from state court to federal court.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18962 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20432; File No. 811–5492]

TCW Investment Funds, Inc.; Application for Deregistration

July 28, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: TCW Investment Funds, Inc.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application on Form N–8F was filed on July 25, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 22, 1994, and should be accompanied by proof of service on applicant, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, N.W., Washington, D.C. 20549. Applicant, 865 South Figueroa Street, Suite 1800, Los Angeles, California 90017.

FOR FURTHER INFORMATION CONTACT: James J. Dwyer, Staff Attorney, at (202) 942–0581, or C. David Messman, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end diversified management investment company organized as a Maryland

corporation. On March 4, 1988, applicant registered as an investment company under the Act, and filed a registration statement on Form N–1A under the Securities Act of 1933 and section 8(b) of the Act. The registration statement became effective on July 13, 1988, and applicant's initial public offering commenced immediately thereafter.

2. On February 16,1994, applicant's board of directors approved an agreement and plan of reorganization (the "Plan") between applicant and TCW Funds, Inc. ("TCW Funds"), a registered, open-end management company. The Plan provided for the transfer of all of the assets and liabilities of applicant's sole series, the Money Market Portfolio, in exchange for shares of TCW Galileo Money Market Fund ("Galileo"), a series of TCW Funds.

3. Definitive proxy materials relating to the Plan were filed with the SEC on March 23, 1994, and proxy materials were mailed to applicant's on or about March 25, 1994.

4. On April 6, 1994, the SEC issued an order [1] permitting applicant to exchange its assets and liabilities for shares of Galileo, provided that applicant's shareholders approved the exchange. In the application requesting that order, it was stated that the reason for the reorganization was to help reduce overall operating expenses because of economies of scale achieved by spreading certain management and administrative expenses over a larger asset base. Applicant's shareholders voted to approve the Plan at a special meeting of applicant's shareholders on April 20, 1994.

5. As of May 23, 1994, applicant had 87,893,619 shares outstanding, having an aggregate net asset value of $87,893,619, and a per share net asset value of $1.00. On May 23, 1994, pursuant to the Plan, applicant transferred all of its assets and liabilities to the TCW Funds, Inc. in exchange for shares of Galileo. The aggregate net asset value of the Galileo shares received was equal to the net asset value of applicant's shares held. Applicant then distributed the Galileo shares it received *pro rata* to its shareholders, in complete liquidation of applicant.

6. No brokerage commissions were paid in connection with the reorganization. The expenses applicable to the Plan, consisting of accounting, printing, administrative, and certain legal expenses, are estimated to be approximately $10,000. These expenses have been or will be paid by TCW Funds Management, Inc., applicant's investment adviser.

7. At the time of the application, applicant had no shareholders, assets, or liabilities. Applicant is not a party to any litigation or administrative proceeding. Applicant is not engaged in, nor does it propose to engage in, any business activities other than those necessary for the winding up of its affairs.

8. Applicant intends to file Articles of Dissolution with the Maryland Department of Assessments and Taxation.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18963 Filed 8–3–94; 8:45 am]

BILLING CODE 8010–01–M

[1] TCW Investment Funds, Investment Company Act Release Nos. 20130 (Mar. 11, 1994) (notice) and 20201 (Apr. 6, 1994) (order).

SMALL BUSINESS ADMINISTRATION

[Declaration of Economic Injury Disaster Loan Area #8298]

California; Declaration of Disaster Loan Area

Stanislaus County and the contiguous counties of Calaveras, Mariposa, Merced, San Joaquin, Santa Clara, and Tuolumne in the State of California constitute an economic injury disaster loan area due to damages caused by a fire which occurred on April 17, 1994 in the City of Modesto. Eligible small businesses without credit available elsewhere and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance until the close of business on April 26, 1995 at the address listed below: U.S. Small Business Administration, Disaster Area 4 Office, P.O. Box 13795, Sacramento, CA 95853–4795, or other locally announced locations. The interest rate for eligible small businesses and small agricultural cooperatives is 4 percent.

(Catalog of Federal Domestic Assistance Program No. 59002.)

Dated: July 26, 1994.

Erskine B. Bowles,

Administrator.

[FR Doc. 94–19076 Filed 8–3–94; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Henry, Johnson and Lafayette Counties, MO

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed project in Henry, Johnson and Lafayette Counties, Missouri.

FOR FURTHER INFORMATION CONTACT: Mr. Donald Neumann, Federal Highway Administration, P.O. Box 1787, Jefferson City, MO 65102, Telephone Number 314–636–7104; or Mr. Bob Sfreddo, Design Engineer, Missouri Highway and Transportation Department, P.O. Box 270, Jefferson City, MO 65102, Telephone Number 314–751–2876.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Missouri Highway and Transportation Department (MHTD) and the U.S. Army Corps of Engineers, will prepare an environmental impact statement (EIS) on a proposal to improve a portion of Missouri Route 13 in Henry, Johnson and Lafayette Counties, Missouri. Improvements would involve the reconstruction of existing Route 13 from Lexington to south of Clinton, a total distance of approximately 154.7 kilometers (70 miles).

1. The proposed improvement is considered necessary to meet anticipated traffic demand and to improve roadway safety. The project would serve as an alternative access to Whiteman Air Force Base.

2. In Missouri, alternatives under consideration include (1) a "no build" option, (2) improvement of the existing alignment, and (3) alternatives on new alignments. Authorization pursuant to Section 404 of the Clean Water Act will be required. Concurrent with preparation of the EIS, the Corps of Engineers will evaluate the alternatives and associated impacts that would result from the project. Comments received during the EIS process will be considered by the Corps of Engineers in the evaluation.

3. To date, preliminary information has been issued to local officials and other interested parties. The scoping process has been initiated with Federal, State, and local agencies. A formal scoping meeting is scheduled for August 10, 1994, in Warrensburg, Missouri. In

addition, public hearings will be held. Public notice will be given in advance of the date and time of each meeting. The draft EIS will be available prior to the public hearing for public review and comment. To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Any comments or questions concerning this proposed action and the EIS should be directed to the FHWA or the Missouri Highway and Transportation Department at the addresses provided above.

Issued on: July 28, 1994.

Gerald J. Reihsen, P.E.,

Division Administrator, Jefferson City.

[FR Doc. 94–19052 Filed 8–3–94; 8:45 am]

BILLING CODE 4910–22–M

Federal Railroad Administration

Petition for Waivers of Compliance

In accordance with 49 CFR 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received from the Burlington Northern Railroad a request for waiver of compliance with certain requirements of the Federal rail safety regulations. The petition is described below, including the regulatory provisions involved, the nature of the relief being requested and the petitioner's arguments in favor of relief.

Burlington Northern Railroad (BN)

(FRA Waiver Petition Docket Number SA–94–5)

The BN seeks a waiver of compliance from certain sections of the Railroad Safety Appliance Standards (49 CFR Part 231). BN states that it will be building one trainset of its "trough train" equipment. This train will be composed of 22 13-section cars. The parking brakes on these cars are of conventional design, but their location is not standard. The unique size and design of one 13-section car does not allow the conventional application of a handbrake.

BN requests a waiver from 49 CFR 231.1(a)(1), 231.1(a)(3)(i), and 231.1(a)(3)(ii). Section 231.1(a)(1) requires that there be one efficient handbrake which shall operate in harmony with the power brake installed on the car.

BN states that the 13-section trough train car has 14 truck assemblies; 2 single axle trucks and 12 two axle trucks. It is impossible to brake a minimum of half the total axles under the 13-section car from one parking brake location. A much more positive brake is provided by the proposed system that has each parking brake holding 2 two axle trucks. No active linkage cross any articulation under this system. The system uses a minimum of 4 parking brakes that brake 16 axles out of the 24 axle total. The 13-section trough train car requires more than one parking brake per car to safely hold the car when stopped. There are many cars that operate successfully with more than one handbrake, such as heavy duty flat cars, articulated intermodal cars and stand alone intermodal cars connected into groups with drawbars.

Section 231.1(a)(3)(i) requires that the handbrake be so located that it can be safely operated while the car is in motion. BN states that the long length of a trough train car (278 feet) necessitates multiple parking brakes to hold the car safely on grades and direct simple parking brake connections to the individual trucks and axles, requires that multiple parking brakes be applied along the length of the car. Four parking brakes per car is proposed. The location of the parking brakes does not lend itself to making provisions for the brake to be operated while the car is in motion. The design of the car will not allow the application of a standard handbrake to safely allow a man to ride the car while setting the brake. These cars are specifically designed for unit train operation and will be used in services where the train is loaded and unloaded in full trains or large blocks of cars, while coupled to and under the control of a locomotive. The parking brakes are designed to hold the car once stopped, on any practical grade for whatever reason. The safety of employees is enhanced by allowing them to apply the brake from the ground, without the need to climb onto the equipment.

The BN has had a policy in effect for several years that prohibits anyone from mounting or dismounting any freight car, caboose, or locomotive while it is moving. The application of parking brakes on this type of car will only be done while the car is stopped. A waiver is requested that allows the operation of the parking brake only when the car is stopped.

Section 231.1(a)(3)(ii) requires that the brake shaft be located on end of car, to the left of and not less than 17 nor more than 22 inches from center.

BN states that due to the design of the car and the need to operate the parking brake from the ground, it is imperative that the brake wheel and mechanism be mounted in such a way as to make its operation as safe as possible. The brake wheel and mechanism has been mounted as low as the car design will allow (approximately 3-foot 10 inches from the top of the rail to the bottom of the wheel rim) and as close to the side of the car as possible (52 inches to the center of the brake shaft from the center of the car.) This location allows the brake to be easily operated from the ground while the car is stopped.

The BN states the trough train provides the latest advancements in slackless technology, car geometry, aerodynamics and safety.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number SA–94–5 and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, FRA, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. Communications received before September 6, 1994 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) in Room 8201, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590.

Issued in Washington, D.C. on August 1, 1994.

Phil Olekszyk

Acting Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 94–19032 Filed 8–3–94; 8:45 am]

BILLING CODE 4910–06–P

Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of 49 CFR Part 236

Pursuant to 49 CFR Part 235 and 49 U.S.C. App. 26, the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

Block Signal Application (BS–AP)–No. 3300

Applicant: Southern Pacific Lines, Mr. J.A. Turner, Engineer—Signals, Southern Pacific Building, One Market Plaza, San Francisco, California 94105.

The Southern Pacific Lines seeks approval of the proposed conversion of the manual interlocking system to a traffic control system, at Grant Tower, milepost WA–745.4, near Salt Lake City, Utah, Rocky Mountain Region, Subdivision 7.

The reason given for the proposed changes is to enhance safety by having the dispatcher use only one set of operating rules for the territory under his control.

BS–AP–No. 3301

Applicant: Southern Pacific Lines, Mr. J.A. Turner, Engineer—Signals, Southern Pacific Building, One Market Plaza, San Francisco, California 94105.

The Southern Pacific Lines seeks approval of the proposed conversion of the manual interlocking system to a traffic control system, at Tower 112, milepost THE–211.0, near San Antonio, Texas, Gulf Coast Region, Del Rio District.

The reason given for the proposed changes is to enhance safety by having the dispatcher use only one set of operating rules for the territory under his control.

BS–AP–No. 3302

Applicant: Southern Pacific Lines, Mr. J.A. Turner, Engineer—Signals, Southern Pacific Building, One Market Plaza, San Francisco, California 94105.

The Southern Pacific Lines seeks approval of the proposed conversion of the manual interlocking system to a traffic control system, at Becks, milepost WA–748.7, near Salt Lake City, Utah, Rocky Mountain Region, Subdivision 7.

The reason given for the proposed changes is to enhance safety by having the dispatcher use only one set of operating rules for the territory under his control.

BS–AP–No. 3303

Applicant: Union Pacific Railroad Company, Mr. P.M. Abaray, Chief Engineer—Signals, 1416 Dodge Street, Room 1000, Omaha, Nebraska 68179.

The Union Pacific Railroad Company seeks approval of the proposed discontinuance and removal of the interlocking signals at M.P. Junction, milepost 145.9 and CCTA, milepost 145.9, near Corpus Christi, Texas, Corpus Christi Subdivision, San Antonio Division; including installation of stop signs at the CCTA rail crossing at grade, milepost 145.9.

The reason given for the proposed changes is to reduce maintenance.

BS–AP–No. 3304

Applicant: The Belt Railway Company of Chicago, Mr. T. F. Bell, Engineer-Signals and Communications, 6900 South Central Avenue, Bedford Park, Illinois 60638.

The Belt Railway Company of Chicago seeks approval of the proposed modification of the 55th Street Interlocking, in Chicago, Illinois; consisting of the discontinuance and removal of four controlled signals.

The reason given for the proposed changes is to eliminate redundant signals, replace aging cable, and maximize the efficiency and safety of train operations.

BS–AP–No. 3305

Applicant: Atchison, Topeka and Santa Fe Railway Company, Mr. W. S. Seery, Director Signal Systems, Communications and Signal, 4515 Kansas Avenue, Kansas City, Kansas 66106–1199.

The Atchison, Topeka and Santa Fe Railway Company seeks approval of the proposed modification of the automatic block signal system, on the single main track, between milepost 0.0 and milepost 10.0, near DeSoto, Kansas, Eastern Region, Topeka Subdivision; consisting of the relocation of four automatic block signals and the discontinuance and removal of two automatic block signals.

The reason given for the proposed changes is to permit the railroad to take advantage of electronic track circuitry and allow more efficient operations over the subdivision.

BS–AP–No. 3306

Applicant: Wisconsin Central Limited, Mr. Glenn J. Kerbs, Vice President Engineering, P.O. Box 5062, Rosemont, Illinois 60017–5062.

The Wisconsin Central Limited (WC) seeks approval of the proposed discontinuance and removal of the traffic control system, between milepost CM 166.7 and milepost CM 176.5, near Oshkoch, Wisconsin, on the Neenah Subdivision.

The reason given for the proposed changes is the WC is rerouting all traffic onto the Fox Valley Western Ltd. and abandoning the track between milepost CM 166.87 and CM 176. 5.

BS–AP–No. 3307

Applicant: CSX Transportation, Incorporated, Mr. D. G. Orr, Chief Engineer—Train Control, 500 Water Street (S/C J–350), Jacksonville, Florida 32202.

CSX Transportation, Incorporated seeks approval of the proposed modification of the traffic control system, on the single main track, between Wartrace, Tennessee, milepost J55.7 and Tullahoma, Tennessee, milepost J67.1, Mobile Division, Chattanooga Subdivision; consisting of the discontinuance and removal of automatic signals 58–6 and 58–7.

The reason given for the proposed changes is the installation of electronic coded track circuits associated with pole elimination for improved operations and efficiency.

BS–AP–No. 3308

Applicant: CSX Transportation, Incorporated, Mr. D. G. Orr, Chief Engineer—Train Control, 500 Water Street (S/C J–350), Jacksonville, Florida 32202.

CSX Transportation, Incorporated seeks approval of the proposed discontinuance and removal of the traffic control system, on the single main track, between Danley, milepost J7.0 and 738 feet north of Nolensville Road Bridge, near Nashville, Tennessee, Mobile Division, Nashville Terminal Subdivision; consisting of the discontinuance and removal of automatic signal D2–6 and controlled signal 232L, and the conversion of automatic signal D2–7 to an approach signal.

The reason given for the proposed changes is due to storm damage the pole line and the signal system is not needed for present day operation.

BS–AP–No. 3309

Applicant: CSX Transportation, Incorporated, Mr. D.G. Orr, Chief Engineer—Train Control, 500 Water Street (S/C J–350), Jacksonville, Florida 32202.

CSX Transportation, Incorporated seeks approval of the proposed discontinuance and removal of the traffic control and automatic block signal system, on the single main track, between milepost CA85.6, near Richmond, Virginia and milepost CA160.4, near Gordonsville, Virginia, Huntington Division, Piedmont Subdivision, and operate trains by Direct Traffic Control Rules.

The reason given for the proposed changes is due to storm damage and rusty rail conditions it is too costly to rebuild the signal system no longer needed for present day operation.

BS–AP–No. 3310

Applicants: Union Railroad Company, Mr. G.E. Steins, Assistant Vice President and General Manager, 135 Jamison Lane, P.O. Box 68, Monroeville, Pennsylvania 15146.

CSX Transportation, Incorporated, Mr. D.G. Orr, Chief Engineer—Train Control, 500 Water Street (S/C J–350), Jacksonville, Florida 32202.

The Union Railroad Company and CSX Transportation, Incorporated jointly seek approval of the proposed modification of "MO" Interlocking, Dexter Yard, North Versailles Township, Pennsylvania; consisting of the reduction of the interlocking limits, the discontinuance and removal of eight controlled signals, and the removal of nine electric locks.

The reason given for the proposed changes is the decline in train traffic and a change in operations.

BS–AP–No. 3011

Applicant: Soo Line Railroad Company, Mr. R.L. Nash, Director Signals and Communications, 105 South 5th Street, Box 530, Minneapolis, Minnesota 55440.

The Soo Line Railroad Company seeks approval of the relocation of absolute signal 22L, a distance of 684 feet west, on the No. 2 Main Track, near Moseby Junction, milepost 481.9, near Moseby, Missouri, Gateway Division, Kansas City Subdivision.

The reason given for the proposed changes is to reduce maintenance costs of rehabilitating the pole line on an unstable embankment slope caused by heavy rains during 1993.

BS–AP–No. 3312

Applicant: Conemaugh and Black Lick Railroad Company, Mr. Patrick R. Loughlin, Chief Engineer, 1170 Eighth Avenue, Bethlehem, Pennsylvania 18018.

The Conemaugh and Black Lick Railroad Company seeks approval of the proposed discontinuance and removal of Woodvale Crossing Interlocking, in Johnstown, Pennsylvania; consisting of the discontinuance and removal of six interlocked signals and conversions of the six power-operated switches to hand operation.

The reason given for the proposed changes is that the level of operations has decreased significantly, the interlocking is no longer economical to operate, and the interlocking is not necessary for the efficient and safe movement of trains.

BS–AP–No. 3313

Applicant: Atchison, Topeka and Santa Fe Railway Company, Mr. W.S. Seery, Director Signal Systems, Communications and Signal, 4515 Kansas Avenue, Kansas City, Kansas 66101–1199.

The Atchison, Topeka and Santa Fe Railway Company seeks approval of the proposed discontinuance and removal of the traffic control system, on the single main track, between milepost 0.0 and milepost 1.0, near Birds, Texas and between milepost 134.0 and milepost 134.5, near Rickers, Texas, Alliance Division, Dublin Subdivision.

The reason given for the proposed changes is that the signal system is no longer required due to the impending sale of all remaining portions of the Dublin Subdivision.

BS–AP–No. 3314

Applicant: CSX Transportation, Incorporated, Mr. D.G. Orr, Chief Engineer—Train Control, 500 Water Street (S/C J–350), Jacksonville, Florida 32202.

CSX Transportation, Incorporated seeks approval of the proposed modification of the traffic control system, on the single main track, between Graysville, Georgia, milepost WA120.1 and Tunnel Hill, Georgia, milepost WA108.0, Atlanta Division, W&A Subdivision; consisting of the discontinuance and removal of four automatic signals and the relocation of four automatic signals.

The reason given for the proposed changes is to improve operations and increase efficiency.

BS–AP–No. 3315

Applicant: CEN-TEX Rail Link LTD., Mr. J.R. Fitzgerald, Trustee, P.O. Box 50428, Amarillo, Texas 79159.

The CEN-TEX Rail Link LTD. seeks approval of the proposed temporary discontinuance of the traffic control system, on the single main track, between Belt Jct., Texas, milepost 1.5 and Rickers, Texas, milepost 134.5, on the former Atchison, Topeka and Santa Fe Railway Company's (ATSF) Alliance Division, Dublin Subdivision, for approximately six months and operate by track warrant control.

The reason given for the proposed changes is that CEN-TEX Rail Link LTD. has been purchased the trackage from the ATSF and control of the traffic control system will be removed from the ATSF dispatching center in Schaumburg, Illinois. A new dispatching center for this railroad is being planned and the temporary discontinuance is needed until the new dispatcher control facility is installed.

BS–AP–No. 3316

Applicant: Consolidated Rail Corporation, Mr. J.F. Noffsinger, Chief Engineer—C&S, 2001 Market Street, P.O. Box 41410, Philadelphia, Pennsylvania 19101–1410.

The Consolidated Rail Corporation seeks approval of the proposed modification of the signal systems, on the three main tracks, between "SO" Interlocking, milepost 266.1 and "C" Interlocking, milepost 273.2, near Conemaugh, Pennsylvania, on the Pittsburgh Line, Harrisburg Division; consisting of the following:

1. The discontinuance and removal of five controlled signals (2L, 2R, 4L, 4R, and 6L) at "AO" Interlocking, milepost 271.2, with no switches involved;

2. The discontinuance and removal of ten automatic signals at locations 2667, 2678, 2694, 2695, 2710, and 2722; and

3. The installation of four automatic signals at signal locations 2681, 2682, and 2683.

The reason given for the proposed changes is to retire facilities no longer required and improve train handling.

BS–AP–No. 3317

Applicant: Delaware and Hudson Railway Company, Incorporated, Mr. T. F. Waver, General Manager, 200 Clifton Corporate Park, P.O. Box 8002, Clifton Park, New York 12065.

The Delaware and Hudson Railway Company, Incorporated seeks approval of the proposed discontinuance and removal of CPF 752 Interlocking, milepost 751.75, near Sunbury, Pennsylvania, on the single main track, on the Freight Main Line, First Subdivision.

The reason given for the proposed changes is that there are only two trains daily on the line and the interlocking is no longer required for present operations.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the protestant in the proceeding. The original and two copies of the protest shall be filed with the Associate Administrator for Safety, FRA, 400 Seventh Street, S.W., Washington, D.C. 20590 within 45 calendar days of the date of issuance of this notice. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

FRA expects to be able to determine these matters without oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, D.C. on August 1, 1994.

Phil Olekszyk,

Acting Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 94–19033 Filed 8–3–94; 8:45 am]

BILLING CODE 4910–06–A

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

July 29, 1994.

The Department of Treasury has made revisions and resubmitted 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 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–0184.
Form Number: IRS Form 4797.
Type of Review: Resubmission.
Title: Sales of Business Property.
Description: Form 4797 is used by taxpayers to report sales, exchanges, or involuntary conversions of assets, other than capital assets, and involuntary conversions of capital assets held more than one year. It is also used to compute ordinary income from recapture and the recapture of prior year section 1231 losses.
Respondents: Individuals or households, farms, businesses or other for-profit.
Estimated Number of Respondents/ Recordkeepers: 1,396,388.

Estimated Burden Hours Per Respondent/Recordkeeper

Recordkeeping: 30 hr., 22 min.
Learning about the law or the form: 11 hr., 22 min.
Preparing the form: 17 hr., 1 min.
Copying, assembling and sending the form to the IRS: 1 hr., 20 min.

Frequency of Response: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 83,922,918 hours.
Clearance Officer: Garrick Shear (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, N.W., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 94–19026 Filed 8–3–94; 8:45 am]

BILLING CODE: 4830–01–P

Public Information Collection Requirements Submitted to OMB for Review

July 29, 1994.

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 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–1086.
Form Number: IRS Form 8725.
Type of Review: Revision.
Title: Excise Tax on Greenmail.
Description: Form 8725 is used by persons who receive "greenmail" to compute and pay the excise tax on greenmail imposed under section 5881 of the Internal Revenue Code. IRS uses the information to verify that the correct amount of tax has been reported.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents/ Recordkeepers: 12.

Estimated Burden Hours Per Respondent/Recordkeeper

Recordkeeping: 5 hr., 30 min.
Learning about the law or the form: 35 min.
Preparing and sending the form to the IRS: 43 min.

Frequency of Response: On occasion.
Estimated Total Reporting/ Recordkeeping Burden: 82 hours.
Clearance Officer: Garrick Shear (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 94–19027 Filed 8–3–94; 8:45 am]

BILLING CODE: 4830–01–P

Public Information Collection Requirements Submitted to OMB for Review

July 28, 1994.

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 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–0118.
Form Number: IRS Form 1099–PATR.
Type of Review: Revision.
Title: Taxable Distributions Received From Cooperatives.
Description: Form 1099–PATR is used to report patronage dividends paid by cooperatives (Internal Revenue Code section 6044). The information is used by IRS to verify reporting compliance on the part of the recipient.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents: 4,200.
Estimated Burden Hours Per Respondent: 11 minutes.
Frequency of Response: Annually.
Estimated Total Reporting Burden: 342,000 hours.

OMB Number: 1545–0193.
Form Number: IRS Form 4972.
Type of Review: Revision.
Title: Tax on Lump-Sum Distributions.
Description: Internal Revenue Code (IRC) section 402(e) allows taxpayers to compute a separate tax on a lump-sum distribution from a qualified retirement plan. Form 4972 is used to correctly figure that tax. The data is used to verify the correctness of the separate tax. Form 4972 is also used to make the special 20% capital gain election attributable to pre-1974 participation from the lump-sum distribution.
Respondents: Individuals or households.
Estimated Number of Respondents/ Recordkeepers: 140,000.

Estimated Burden Hours Per Respondent/Recordkeeper

Recordkeeping: 33 min.
Learning about the law or the form: 26 min.
Preparing the form: 1 hr., 28 min.
Copying, assembling, and sending the form to the IRS: 35 min.

Frequency of Response: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 424,200 hours.
OMB Number: 1545–1065.

Form Number: IRS Form 9003.
Type of Review: Extension.
Title: Additional Questions to be Completed by All Applicants for Permanent Residence in the United States.
Description: Form 9003 is used by the State Department and the Immigration and Naturalization Service to gather certain additional information from "green card" applicants for the IRS as required by Section 6039E of the Internal Revenue Code of 1986. The answers are transcribed into a database for IRS computer processing.
Respondents: Individuals or households.
Estimated Number of Respondents: 933,000.
Estimated Burden Hours Per Respondent: 5 minutes.
Frequency of Response: Other (when applying for green card).
Estimated Total Reporting Burden: 77,750 hours.
Clearance Officer: Garrick Shear (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–19028 Filed 8–3–94; 8:45 am]
BILLING CODE: 4830–01–P

Public Information Collection Requirements Submitted to OMB for Review

July 28, 1994.

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 2110, 1425 New York Avenue, NW., Washington, DC 20220.

U.S. Customs Service (CUS)

OMB Number: 1515–0183.
Form Number: None.
Type of Review: Extension.
Title: Application to Establish Centralized Examination Station.
Description: The district director decides when his/her district needs one or more Centralized Examinations Stations (CES). He/she announces this need and solicits applications to operate a CES.
Respondents: Businesses or other for-profit.
Estimated Number of Recordkeepers: 50.
Estimated Burden Hours Per Recordkeeper: 2 hours.
Frequency of Response: Other.
Estimated Total Recordkeeping Burden: 100 hours.
Clearance Officer: Laverne Williams (202) 927–1555, U.S. Customs Service, Paperwork Management Branch, Room 6316, 1301 Constitution Avenue, N.W., Washington, DC 20229.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–19029 Filed 8–3–94; 8:45 am]
BILLING CODE: 4820–02–P

Public Information Collection Requirements Submitted to OMB for Review

July 28, 1994.

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 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms (BATF)

OMB Number: 1512–0021.
Form Number: ATF F 4587 (5330.4).
Type of Review: Extension.
Title: Application to Register as an Importer of U.S. Munitions Import List Articles.
Description: These records of items that are listed on the U.S. Munitions List are used to account for the items by the Registered Import and this Bureau in investigations to insure compliance with the Federal Law.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents: 300.
Estimated Burden Hours Per Respondent: 30 minutes.
Frequency of Response: Other (optionally, 1–5 years).
Estimated Total Reporting Burden: 150 hours.
OMB Number: 1512–0502.
Regulation ID Number: ATF REC 5210/12 and ATF REC 5210/1.
Type of Review: Extension.
Title: Tobacco Products Manufacturers—Notice for Tobacco Products (ATF REC 5210/12); and Records of Operation (ATF REC 5210/1).
Description: ATF requires tax identification on packages or cases. This is used to validate excise tax payments and verify claims. Manufacturers records system are needed to ensure product traceability and satisfaction of Tax Liabilities.
Respondents: Businesses or other for-profit.
Estimated Number of Recordkeepers: 108.
Estimated Burden Hours Per Recordkeeper: 1.
Frequency of Response: Other.
Estimated Total Recordkeeping Burden: 1 hour.
Clearance Officer: Robert N. Hogarth (202) 927–8930, Bureau of Alcohol, Tobacco and Firearms, Room 3200, 650 Massachusetts Avenue, N.W., Washington, DC 20226.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–19030 Filed 8–3–94; 8:45 am]
BILLING CODE: 4810–31–P

Customs Service

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: Customs Service, Treasury.
ACTION: Notice of calculation and interest.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning July 1, 1994, the rates will be 7 percent for overpayments and 8 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 1994.
FOR FURTHER INFORMATION CONTACT: John V. Accetturo, U.S. Customs Service,

National Finance Center, Revenue Accounting Branch, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1308.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates effective for a quarter are determined during the first-month period of the previous quarter. The rates of interest for the period of July 1, 1994–September 30, 1994, are 7 percent for overpayments and 8 percent for underpayments. These rates will remain in effect through September 30, 1994, and are subject to change on October 1, 1994.

Dated: July 27, 1994.

George J. Weise,

Commissioner of Customs.

[FR Doc. 94–18998 Filed 8–3–94; 8:45 am]

BILLING CODE 4820–02–P

Sunshine Act Meetings

Federal Register
Vol. 59, No. 149
Thursday, August 4, 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: 11:30 a.m., Friday, August 12, 1994.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION:

Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 94–19182 Filed 8–2–94; 2:55 pm]

BILLING CODE 6351–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:03 a.m. on Tuesday, August 2, 1994, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider the following:

Matters relating to the Corporation's corporate and supervisory activities.

Recommendations regarding administrative enforcement proceedings.

Application of Webster City Federal Savings Bank, Webster City, Iowa, a proposed new federally chartered stock savings bank, for Federal deposit insurance.

In calling the meeting, the Board determined, on motion 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: August 2, 1994.

Federal Deposit Insurance Corporation.

Leneta G. Gregorie,

Acting Assistant Executive Secretary.

[FR Doc. 94–19196 Filed 8–2–94; 3:30 pm]

BILLING CODE 6714–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10 a.m. on Tuesday, August 9, 1994, to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous meetings.

Reports of actions approved by the standing committees of the Corporation and by officers of the Corporation pursuant to authority delegated by the Board of Directors.

Memorandum re: Second Quarter 1994 Financial Management Report.

Discussion Agenda

Memorandum re: Guidelines within which the Division of Supervision will exercise the authority delegated to it as set forth in section 362.6 of the Corporation's rules and regulations with respect to applications by insured state banks involving retention of various types of life insurance products.

Memorandum with respect to a revised process for handling appeals of the supervisory subgroup component of the risk-based premium calculation.

Memorandum and resolution re: Proposed amendments to Part 337 of the Corporation's rules and regulations, entitled "Unsafe and Unsound Banking Practices," which would except loans which are fully secured by certain types of collateral from the general limit on "other purpose" loans to executive officers of insured nonmember banks.

Memorandum and resolution re: Final amendments to Part 303 of the Corporation's rules and regulations, entitled "Applications, Requests, Submittals, Delegations of Authority, and Notices Required to be Filed by Statute or Regulation," which revise application and publication requirements for the establishment and relocation of remove service facilities.

Memorandum and resolution re: Final amendments to Part 325 of the Corporation's rules and regulations, entitled "Capital Maintenance," which implement the portions of Section 305 of the Federal Deposit Insurance Corporation Improvement Act of 1991 that require the Federal banking agencies to revise their risk-based capital standards for insured depository institutions to ensure that those standards take adequate account of concentration of credit risk and the risks of nontraditional activities.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 942–3132 (Voice); (202) 942–3111 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Acting Executive Secretary of the Corporation, at (202) 898–6757.

Dated: August 2, 1994.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 94–19197 Filed 8–2–94; 3:30 pm]

BILLING CODE 6714–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:30 a.m. on Tuesday, August 9, 1994, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors, pursuant to sections 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of Title 5, United States Code, to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured depository institutions or officers, directors, employees, agents or other persons participating in the conduct of the affairs thereof:

Names of persons and names and locations of depository institutions authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii)).

Note: Some matters falling within this category may be placed on the discussion agenda without further public notice if it becomes likely that substantive discussion of those matters will occur at the meeting.

Discussion Agenda

Matters relating to the Corporation's corporate, supervisory, and resolution activities.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW, Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Acting Executive Secretary of the Corporation, at (202) 898–6757.

Dated: August 2, 1994.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 94–19198 Filed 8–2–94; 2:30 pm]

BILLING CODE 6714–01–M

FEDERAL ELECTION COMMISSION

"FEDERAL REGISTER" NUMBER: 94–18570.

PREVIOUSLY ANNOUNCED DATE AND TIME: Thursday, August 4, 1994, 10:00 a.m., Meeting Open to the Public.

The following item was deleted from the agenda:

Advisory Opinion 1994–17: Katherine S. Freichtner Ruffolo on behalf of Peter Barca for U.S. Congress.

The following item was added to the agenda:

Future Meeting Dates.

DATE AND TIME: Tuesday, August 9, 1994 at 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C.

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, August 11, 1994 at 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C. (Ninth Floor).

STATUS: This Meeting Will Be Open to the Public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Regulations:

Personal Use of Campaign Funds; Draft Request for Additional Comments (11 CFR Part 113).

Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Ron Harris, Press Officer, Telephone: (202) 219–4155.

Marjorie Emmons,

Secretary of the Commission.

[FR Doc. 94–19181 Filed 8–2–94; 2:56 pm]

BILLING CODE 6715–01–M

UNITED STATES INTERNATIONAL TRADE COMMISSION

[USITC SE–94–27]

TIME AND DATES: August 10, 1994 at 2:30 p.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS: Open to the public.

1. Agenda for future meeting.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–363–364 (Preliminary) (Oil Country Tubular Goods from Austria and Italy), and Inv. Nos. 731–TA–711–717 (Preliminary) (Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain).—briefing and vote.
5. Inv. No. 731–TA–718 (Preliminary) (Glycine from China).—briefing and vote.
6. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

CONTACT PERSON FOR MORE INFORMATION: Donna R. Koehnke, Secretary, (202) 205–2000.

Issued: August 2, 1994.

Donna R. Koehnke, Secretary

[FR Doc. 94–19213 Filed 8–2–94; 3:58 pm]

BILLING CODE 7020–02–P

LEGAL SERVICES CORPORATION

Audit and Appropriations Committee Meeting; Changes

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 58 FR 38234.

PREVIOUSLY ANNOUNCED TIME AND DATE: A meeting of the Legal Services Corporation Board of Directors Audit and Appropriations Committee will be held on August 5–6, 1994. The meeting will commence at 1:00 p.m. on August 5th, and 9:00 a.m. on August 6, 1994.

PREVIOUSLY ANNOUNCED LOCATION OF MEETING: The Fairmont Hotel, 123 Baronne, The Bayou III Room, New Orleans, LA 70140, (504) 529–7111.

CHANGES IN THE MEETING:

TIME: The meeting will commence at 2:00 p.m. on August 5th, and at 10:30 a.m. on August 6, 1994.

MATTERS TO BE CONSIDERED: The item pertaining to the revenue audit conducted by the Inspector General, numbered 7 on the original agenda, has been deleted. A new item number 7 is reflected on the following amended agenda.

OPEN SESSION:

1. Approval of Agenda
2. Approval of Minutes of July 15, 1994 Meeting
   a. Open Session
   b. Closed Session
3. Presentation of June 30, 1994 Expenses with Administrative Expenses Allocated to each Cost Center
4. Consideration and Review of Expense Projections for the period of July 1, 1994 through September 30, 1994
   a. Consideration of Recommended COB Modifications
   b. Consideration of Recommended COB Internal Budgetary Adjustments
5. Discussion of the Management and Administration Budget for Fiscal Year 1995.
6. Consideration of and Possible Action on the Fiscal Year 1996 Budget Mark.
7. Ratification of Independent Audit Firm's Contract for Conduct of the Corporation's Financial Audit for Fiscal Years 1994 Through 1996.

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: August 2, 1994.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 94–19148 Filed 8–2–94; 2:57 pm]

BILLING CODE 7050–01–M

Corrections

Federal Register
Vol. 59, No. 149
Thursday, August 4, 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.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 405 and 414

[BPD–770–CN]

RIN 0938–AG22

Medicare Program; Revisions to Payment Policies and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 1994

Correction

In rule document 94-17222 beginning on page 36069 in the issue of Friday, July 15, 1994, the tables appearing on pages 36069 through 36071 should have appeared as follows:

1. On page 63653, the following codes are corrected to read:

HCPCS+	MOD	Description	RUC recommended work RVUs	Specialty recommended work RVUs	HCFA decision
*15788		Chemical peel, face, epiderm	None	5.00	Decreased.
*15789		Chemical peel, face, dermal	None	6.59	Decreased.
*15792		Chemical peel, nonfacial	None	4.00	Decreased.
*15793		Chemical peel, nonfacial	None	5.34	Decreased.

2. On page 63662, the following codes are corrected to read:

HCPCS+	MOD	Description	RUC recommended work RVUs	Specialty recommended work RVUs	HCFA decision
97545		Work hardening	None	1.70	(b).
97546		Work hardening	None	.85	(b).

F. Pages 63722 through 63836, Addendum B

1. On page 63722, the following codes are corrected to read:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
33401		C	Valvuloplasty, open	0.00	0.00	0.00	0.00	090	S
33403		C	Valvuloplasty, w/cp bypass.	.00	.00	.00	.00	090	S
33406		C	Replacement, aortic valve.	.00	.00	.00	.00	090	S
33413		C	Replacement, aortic valve.	.00	.00	.00	.00	090	S

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
33414		C	Repair, aortic valve	.00	.00	.00	.00	090	S
33471		C	Valvotomy, pulmonary valve.	.00	.00	.00	.00	090	S
33475		C	Replacement, pulmonary valve. *	.00	.00	.00	.00	090	S
33505		C	Repair artery w/tunnel .	.00	.00	.00	.00	090	S
33506		C	Repair artery, translocation.	.00	.00	.00	.00	090	S
33600		C	Closure of valve	.00	.00	.00	.00	090	S
33602		C	Closure of valve	.00	.00	.00	.00	090	S
33606		C	Anastomosis/artery-aorta.	.00	.00	.00	.00	090	S
33608		C	Repair anomaly w/conduit.	.00	.00	.00	.00	090	S
33610		C	Repair by enlargement	.00	.00	.00	.00	090	S

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

2. On page 63723, the following codes are corrected to read:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
33611		C	Repair double ventricle	0.00	0.00	0.00	0.00	090	S
33612		C	Repair double ventricle	.00	.00	.00	.00	090	S
33615		C	Repair (simple fontan) .	.00	.00	.00	.00	090	S
33617		C	Repair by modified fontan.	.00	.00	.00	.00	090	S
33619		C	Repair single ventricle .	.00	.00	.00	.00	090	S
33692		C	Repair of heart defects	.00	.00	.00	.00	090	S
33697		C	Repair of heart defects	.00	.00	.00	.00	090	S
33698		C	Repair of heart defects	.00	.00	.00	.00	090	S
33722		C	Repair of heart defect ..	.00	.00	.00	.00	090	S
33732		C	Repair heart-vein defect.	.00	.00	.00	.00	090	S
33736		C	Revision of heart chamber.	.00	.00	.00	.00	090	S
33766		C	Major vessel shunt	.00	.00	.00	.00	090	S
33767		C	Atrial septectomy/septostomy.	.00	.00	.00	.00	090	S
33770		C	Repair great vessels defect.	.00	.00	.00	.00	090	S
33771		C	Repair great vessels defect.	.00	.00	.00	.00	090	S
33853		C	Repair septal defect	.00	.00	.00	.00	090	S

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

3. On page 63724, the following codes are corrected to read:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
33917		C	Repair pulmonary artery.	0.00	0.00	0.00	0.00	090	S
33918		C	Repair pulmonary atresia.	.00	.00	.00	.00	090	S
33919		C	Repair pulmonary atresia.	.00	.00	.00	.00	090	S
33920		C	Repair pulmonary atresia.	.00	.00	.00	.00	090	S
33922		C	Transect pulmonary artery.	.00	.00	.00	.00	090	S

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

4. On page 63733, HCPCS code 43248 is corrected to read as follows:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
43248		A	Upper GI endoscopy/ guidewire.	3.18	*4.14	0.34	7.66	000	N

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

5. On page 63749, the third appearance of HCPCS code 59020 is corrected to read as follows:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
59020	26	A	Fetal contract stress test.	0.67	*0.87	0.19	1.73	000	S

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

6. On page 63764, the following code is corrected to read:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
70551	26	A	Magnetic image, brain (MRI).	1.50	0.67	0.10	2.27	XXX	N

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

7. On page 63799, the following code is added to read:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
86423		D	Radioimmunosorbent test IGE.	0.00	0.00	0.00	0.00	XXX	O

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

8. On page 63836, the following codes are corrected to read:

HCPCS[1]	MOD	Status	Description	Work RVUs	Practice expense RVUs[2]	Malpractice RVUs	Total	Global period	Update
J7030		E	Infusion, normal saline solution.	0.00	0.00	0.00	0.00	XXX	O
J7040		E	Infusion, normal saline solution.	.00	.00	.00	0.00	XXX	O
J7042		E	5% dextrose/normal saline.	.00	.00	.00	0.00	XXX	O
J7050		E	Infusion, normal saline solution.	.00	.00	.00	0.00	XXX	O
J7051		E	Sterile saline or water ..	.00	.00	.00	0.00	XXX	O
J7060		E	5% dextrose/water	.00	.00	.00	0.00	XXX	O
J7070		E	Infusion, d5w	.00	.00	.00	0.00	XXX	O
J7120		E	Ringers lactate infusion	.00	.00	.00	0.00	XXX	O

[1] All numeric CPT HCPCS Copyright 1993 American Medical Association.
[2]* Indicates reduction of Practice Expense RVUs as a result of OBRA 1993.

BILLING CODE 1505-01-D

federal register

Thursday
August 4, 1994

Part II

Environmental Protection Agency

40 CFR Part 52
Clean Air Act Sanctions; Final Rule and Notice

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AD–FRL–5023–3]

Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is promulgating a rule governing the order in which the sanctions shall apply under the mandatory sanctions provision of the Clean Air Act (Act), as amended, after EPA makes a finding of failure specific to any State implementation plan (SIP) or plan revision required under the Act's nonattainment area provisions. This final rule provides that the offset sanction shall apply in an area 18 months after the date on which EPA makes such a finding with regard to that area and that the highway sanctions shall apply in that area 6 months following application of the offset sanction. Once this rule is effective, sanctions will apply automatically in the sequence prescribed in all instances in which sanctions are required following applicable findings that EPA has already made or that EPA will make in the future, except when EPA determines through a separate rulemaking to change the sanction sequence for one or more specific circumstances. The public will have an opportunity to comment on any such separate rulemaking.

EFFECTIVE DATES: This action will become effective on September 6, 1994.

ADDRESS(ES): The public docket for this action, A–93–28, is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at the Air and Radiation Docket and Information Center, Room M–1500, Waterside Mall, U.S. EPA, 401 M Street, SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Stoneman, Sulfur Dioxide/Particulate Matter Programs Branch, Mail Drop 15, Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, telephone (919) 541–0823.

SUPPLEMENTARY INFORMATION: The content of today's preamble is listed in the following outline:

I. Background
A. Introduction
B. Consequences of State Failure
1. Section 179(a) Scope and Findings
2. Section 179(b) Sanctions
3. Applications and Timing of Section 179(b) Sanctions
C. Notice of Proposed Rulemaking
1. Proposal
2. Rationale for Sanction Order
3. Sanction Effectuation
4. Opportunity for Comment
II. Today's Action
A. Final Action
B. Summary of Comments and Responses
1. Sanction Sequence and Rationale
2. Sanction Effectuation
3. Sanction Clock Policy
4. Other Areas of Comment
C. Summary of Changes in Rule
1. Section 52.31(a)—Purpose
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I. Background

A. Introduction

On October 1, 1993, EPA proposed a rule (58 FR 51270) governing the sequence of mandatory sanctions under section 179(a) (42 U.S.C. 7509(a)) of the amended Act. The document included extensive background on the Act, some of which is briefly resummarized in this background section because it relates directly to the Act's sanction provisions. The information not repeated concerns the overview at pages 51270–2 of the proposal provided on the Clean Air Act Amendments of 1990 (1990 Amendments), title I requirements of the Act, and EPA action on SIP's. This background section also summarizes the proposal and the rationale.

B. Consequences of State Failure

1. Section 179(a) Scope and Findings

The 1990 Amendments revised the law concerning sanctions [1] to address State failures to comply with the requirements of the Act. Under section 179(a) of the Act, for any plan or plan revision required under part D of title I or required in response to a finding of substantial SIP inadequacy under section 110(k)(5) (42 U.S.C. 7410(k)(5)),[2] the Act sets forth four findings [3] that EPA can make, which may lead to the application of one or both of the sanctions specified under section 179(b) (42 U.S.C. 7509(b)). The four findings are: (1) A finding under section 179(a)(1) that a State has failed, for a nonattainment area, to submit a SIP or an element of a SIP, or that a submitted SIP or SIP element fails to meet the completeness criteria established pursuant to section 110(k) (42 U.S.C. 7410(k)); (2) a finding under section 179(a)(2) where EPA disapproves a SIP submission for a nonattainment area based on its failure to meet one or more plan elements required by the Act; (3) a finding under section 179(a)(3) that the State has not made any other submission required by the Act (including an adequate maintenance plan) or has made any other submission that fails to meet the completeness criteria or has made a required submission that is disapproved by EPA for not meeting the Act's requirements; or (4) a finding under section 179(a)(4) that a requirement of an approved plan is not being implemented.

The EPA makes section 179(a) findings of failure to submit and findings of incompleteness via letters from EPA Regional Administrators to State governors or other State officers to whom authority has been delegated.[4] The letter itself triggers the sanctions clock. To make findings of failure to submit and findings of incompleteness under section 179(a)(1) and section 179(a)(3)(A), EPA is not required to go through notice-and-comment rulemaking.[5] For section 179(a)(2) and section 179(a)(3)(B) findings of disapproval, the **Federal Register** document in which EPA takes final action disapproving the submittal (after notice and comment) initiates the sanctions clock. For section 179(a)(4)

[1] The 1990 Amendments also revised the Act's provisions concerning Federal implementation plans (FIP's). Under section 110(c)(1), the FIP requirement is triggered by an EPA finding that a State has failed to make a required submittal or that a received submittal does not satisfy the minimum completeness criteria established under section 110(k)(1)(A), or an EPA disapproval of a SIP submittal in whole or in part. However, since FIP's are not the subject of this notice, these provisions are not addressed here.

[2] A finding of substantial inadequacy under section 110(k)(5)—known as a "SIP call"—is made whenever EPA finds that a plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard (NAAQS).

[3] Section 179(a) refers to findings, disapprovals, and determinations. These will all be referred to by the one term "findings."

[4] 7–62, *Finding of Failure to Submit a Required State Implementation Plan or Any Other Required Submission of the Act*, Clean Air Act, Delegations Manual, 12/13/91.

[5] Notice and comment considerations vis-a-vis findings of failure to submit and incompleteness are discussed in the proposal at page 51272, footnote 7, and in section IV.G. of this document.

findings of nonimplementation, the sanctions clock starts when EPA makes a finding of nonimplementation in the Federal Register through notice-and-comment rulemaking. For both disapprovals and findings of nonimplementation, the clock actually starts on the date the final Federal Register actions are effective.

2. Section 179(b) Sanctions

Under section 179(b), two sanctions are available for selection by EPA following a section 179(a) finding.[6] One available sanction is a restriction on highway funding, as provided in section 179(b)(1) (42 U.S.C. 7509(b)(1)), which is discussed in the proposal at pages 51273–51274. The other available sanction is the offset sanction, as provided in section 179(b)(2) (42 U.S.C. 7509(b)(2)), which is also discussed in the proposal at page 51274.

3. Application and Timing of Section 179(b) Sanctions

Although application of section 179(b) sanctions may become mandatory when EPA makes a finding under section 179(a) (if the State does not correct the deficiency), it is not immediate. Instead, section 179(a) provides for a sanction "clock," which is described in the proposal at page 51274. Generally, under section 179(a)'s sanction clock, the sanction selected by EPA applies if the deficiency that prompted the finding is not corrected before the sanction clock expires. (The sanction clock is further discussed in section II.B.3. of this document.)

C. Notice of Proposed Rulemaking

1. Proposal

In the proposal, EPA proposed that the section 179(b)(2) offset sanction would apply in an area 18 months from the date when EPA makes a finding under section 179(a). Furthermore, EPA proposed that the section 179(b)(1) highway sanction would apply in an area 6 months following application of the offset sanction. The EPA proposed to sequence the application of sanctions under section 179(a) in this manner in all cases unless EPA determines, through individual notice-and-comment rulemaking, that the highway sanction will apply first.

The proposal addressed the sequence in which sanctions shall apply as required under section 179(a) with respect to a finding made under subsections (1)–(4) specific to any implementation plan or plan revision required under part D or any implementation plan or revision required under part D found substantially inadequate pursuant to section 110(k)(5). In general, part D plans and plan revisions are required for areas designated nonattainment under section 107.[7] The proposal did not encompass findings EPA can make under section 179(a) regarding SIP calls for non-part D plans or plan revisions or the sanction provisions in section 110(m) of the Act.[8] It also does not encompass any findings EPA may make under other titles of the Act (e.g., section 502(d) for operating permitting programs).

2. Rationale for Sanction Order

At pages 51274–51275 of the proposal, EPA described the purpose sanctions can serve. One function is to encourage compliance with the Act's requirements. A second function of sanctions is to protect and preserve air quality in areas until the deficiency prompting the sanctions-initiating finding can be corrected.

In the proposal at page 51275, for three reasons, EPA proposed that, as a general matter, the offset sanction apply at 18 months followed by the highway sanction 6 months thereafter. First, EPA stated that conceptually the offset sanction will, in general, provide a more certain air quality benefit in the shorter and longer term than the highway sanction.

Second, the proposal stated the offset sanction provides greater potential for more significant air quality protection because it potentially affects all categories of stationary sources and, depending on the pollutant(s) addressed in the deficiency prompting the finding, may affect all criteria pollutants (i.e., pollutants for which EPA has promulgated national ambient air quality standards (NAAQS) such as carbon monoxide (CO), PM–10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers), etc.). By contrast, the highway sanction would affect only mobile sources and pollutants emitted by mobile sources. (Mobile sources are not, for instance, regarded as significant emitters of lead and sulfur dioxide (SO_2).)

Third, in addition to air quality considerations, the 2-to-1 offset sanction is less complicated to implement and administer than the highway sanction by its very nature and because of the manner in which EPA intends to effectuate it, as discussed in the proposal at pages 51275–51277.

In addition, EPA noted in the proposal that it does not regard sanctions as a long-term solution to air quality problems but rather intends to work with States to resolve deficiencies as rapidly as possible. Thus, by applying the offset sanction at 18 months, if the State corrects the deficiency prompting the finding prior to 6 months thereafter, then the highway sanction would not apply and EPA and other affected agencies (most notably the Department of Transportation (DOT)) would not be faced with its comparatively greater implementation and administration burden.

The EPA, therefore, proposed, as a general matter, that the offset sanction apply before the highway funding sanction following a section 179(a) finding. The EPA recognized, however, that in specific cases the particular circumstances may lead EPA to conclude that it is more appropriate for the highway sanction to apply first. Therefore, EPA has specifically noted that it may go through notice-and-comment rulemaking for the highway sanction to apply after 18 months and the offset sanction 6 months thereafter. (The sanction sequence rationale is further discussed in section II.B.1. of this document.)

3. Sanction Effectuation

At pages 51275–51277 of the proposal, EPA describes how the offset sanction applies and notes that, under the highway sanction, EPA imposes a prohibition on approval by the Secretary of DOT of certain highway projects and grants. Thus, the highway sanction is not directly implemented by EPA. However, EPA noted that it is in the

[6] In addition, section 179(a) provides for an air pollution grant sanction that applies to grants the EPA may award under section 105. However, since it is not a sanction provided under section 179(b), it is not one of the sanctions that automatically apply under section 179(a).

[7] While part D generally applies to nonattainment areas, some requirements extend to other areas. For example, section 184(a) specifically created at enactment an ozone transport region, called the Northeast Ozone Transport Region (NOTR), which is comprised of several mid-Atlantic and New England States and the Consolidated Metropolitan Statistical Area containing the District of Columbia (see "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" at page 13527 (57 FR 13498)). Though areas within some of these States may not be designated nonattainment, the States must submit revisions to their SIP's by certain statutory deadlines to include specific part D measures for these areas (e.g., enhanced vehicle inspection and maintenance program, reasonably available control technology for volatile organic compounds (VOC) sources).

[8] Section 110(m) of the Act grants EPA broad discretionary authority to apply either sanction listed in section 179(b) "at any time (or at any time after) the Administrator makes" a finding under section 179(a) with respect to any portion of the State, subject to certain limitations (57 FR 44534, Sept. 28, 1993). The selection of sanctions being made by this action, however, does not apply to the imposition of sanctions by EPA under section 110(m). Note that sanction selection for section 110(m) findings will be made through notice-and-comment rulemaking independent from this action.

process of developing procedures with DOT to provide for the coordinated implementation of the highway sanction. (Sanction effectuation is further discussed in section II.B.2 of this document.)

4. Opportunity for Comment

As discussed above, under section 179(a), the Act requires that sanctions apply if the deficiency that prompted EPA's finding is not corrected within the timeframes prescribed. The only discretion afforded EPA is which of the two section 179(b) sanctions applies at 18 months and which 6 months thereafter. The proposal noted that if in the future EPA makes exceptions to this rule, then in individual notice-and-comment rulemakings EPA will seek comment on whether the highway sanction shall apply after 18 months and the offset sanction shall apply 6 months thereafter given the circumstances at hand.

The proposal also noted that the Administrative Procedure Act (APA) provides citizens with a means that could be used to petition EPA to propose that the highway sanction apply first. The APA, 5 U.S.C. 553(e), provides that "Each agency (including EPA) shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." This provision could conceivably be invoked by a citizen to petition EPA to propose that the highway sanction apply first with respect to a section 179(a) finding covered by this action.

II. Today's Action

A. Final Action

By this document, EPA is promulgating a rule which provides that the section 179(b)(2) offset sanction shall apply in an area 18 months from the date when EPA makes a finding under section 179(a) with regard to that area if the deficiency prompting the finding is not corrected within such period. The final rule also provides that the section 179(b)(1) highway sanction shall apply in an area 6 months following application of the offset sanction in cases where the deficiency has still not been corrected within that period. The section 179(b) sanctions shall be sequenced in this manner in all cases unless EPA proposes the highway sanction to apply first through separate notice-and-comment rulemaking. This final rule applies to plan or plan revisions required under part D but does not apply to plans or plan revisions required under part D found substantially inadequate pursuant to section 110(k)(5). The proposed rule applied to both types of SIP's; a discussion of why the latter type of SIP's—commonly known as part D "SIP calls"—are not covered by the final rule is in section II.C.3. This rule also has the immediate effect of applying the offset sanction on September 6, 1994 in affected areas for which the Administrator has not determined that the 18-month sanction clock has expired by that date and for which the deficiency prompting the finding has not been corrected by that date. Specifically, in the notice section of today's **Federal Register**, EPA is providing a list of areas that will be potentially subject to sanctions on September 6, 1994.

Note that the proposed rule did include tables in which EPA intended to list areas subject to sanctions. In the final rule, EPA has removed the tables from the rule and decided to provide information on areas that will be potentially subject to sanctions in the separate notice mentioned above. (Sections II.C.5. and III.B. below include a discussion of why the tables were removed from the proposed rule and why such removal does not carry any substantive significance.)

B. Summary of Comments and Responses

With one exception, this section consists of a brief summary of the comments received on the proposal and EPA's responses. A more detailed summary of comments and EPA's responses can be found in the docket in a document entitled " Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act: Detailed Summary of Comments and EPA's Responses" (herein referred to as "Detailed Summary of Comments"). The one exception is for the sanction clock policy; a detailed summary is provided here, as well as in the companion document, in order to fully explain in the **Federal Register** the changes EPA has made to the final rule in this area and because of the complexity of this issue.

1. Sanction Sequence and Rationale

a. *Summary of Comments.* The EPA's proposal for the sequence of mandatory sanctions and the rationale are provided in sections I.C.1. and I.C.2. of this document, as well as in the proposal at pages 51274–5. The EPA received 14 comments on this part of the proposed rule. Comments on the sanction sequence and rationale can generally be considered in four groups: (1) Commenters who believe the sequence should be reversed with the highway sanction applying first, (2) commenters who believe that EPA should determine sanction order on a case-by-case basis, (3) commenters who believe that the nature of the deficiency should be considered in determining sanction sequence, and (4) commenters who support the sequence as proposed.

Four commenters stated that the sequence in which sanctions apply should be reversed with the highway sanction generally applying first. Several of the commenters contend that the highway sanction will be more effective at compelling State correction of SIP deficiencies because it would have greater economic impact, and it will be more effective at addressing political and statewide failures. One commenter disagrees with EPA's rationale that the offset sanction is more likely to produce a greater air quality benefit, arguing instead that the highway sanction better encourages early State compliance. Several commenters challenge EPA's rationale that the offset sanction potentially applies to all criteria pollutants; the commenters argue that the fact that stationary sources emit more types of pollutants is irrelevant since, in the proposed rule, the offset sanction applies only to the pollutant(s) in the deficiency. The commenters also raise an argument that EPA's proposed sequence unfairly burdens industry when the SIP deficiency is State-caused and that sources will be unfairly penalized due to project location and timing.

Four commenters believe that EPA should determine sanction order on a case-by-case basis. These commenters express concern that EPA's streamlined approach provides insufficient notice of sanctions and leaves many sanction application details unclear. One commenter argues that EPA should streamline its own rulemaking processes rather than deny notice to affected parties. These commenters were also concerned that general application of the offset sanction would negatively impact stationary sources. One commenter argues economic competitiveness and air quality will deteriorate under the offset sanction. Two commenters were concerned that because of the length of the EPA rulemaking process stationary sources will bear the brunt of the sanction burden.

Two commenters believe that the nature of the SIP deficiency should be considered in determining sanction sequence. One commenter believes that the sanction chosen should be linked to the SIP deficiency and that EPA must conduct notice-and-comment

rulemaking to determine whether the highway sanction applies first as to specific types of SIP deficiencies. The commenter is concerned that stationary sources will bear the brunt of the sanctions burden, and that this result could stifle economic development.

Three commenters support the proposed sequence of sanctions. One commenter supports the position that the link between the highway sanction and air quality benefits is uncertain and another commenter agrees that the offset sanction provides a quantifiable and more likely air quality benefit. Another commenter supported EPA's concerns regarding the administrative and implementation burdens of the highway sanction as a basis for the offset sanction applying first.

b. *Response to Comments.* In this final rule, EPA has maintained the proposed sanction sequence with the offset sanction generally applying first and the highway sanction second. The EPA continues to believe this sequence is supported by the proposed rationales that the offset sanction (compared to the highway sanction) will:

(1) Provide a more certain and direct air quality benefit,

(2) Potentially affect more criteria pollutants, and

(3) Be easier to implement and administer. The EPA disagrees with the comments that highway sanctions will always more effectively address SIP-related deficiencies and should, therefore, be generally applied first. In addition, EPA does believe that the offset sanction will more likely produce a net air quality benefit. In some cases, the offset sanction may be more effective at resolving SIP deficiencies. For example, in an area that is undergoing significant economic growth, the offset sanction could help bring pressure through stationary sources wishing to expand or locate in the area and which are faced with the need for an additional emission offset increment. Furthermore, offsets achieved by such a sanction would benefit air quality in the affected area. However, in particular instances, the EPA does not deny that the offset sanction may not be as effective because, for example, the area may be economically depressed and not experiencing growth. In such a case, there may be less air quality benefit and perhaps less pressure to correct the deficiency in applying the offset sanction first.

Nonetheless, overall EPA continues to believe that conceptually the offset sanction (compared to the highway sanction) provides a more certain, direct air quality benefit in the near and long term and potentially covers more pollutants. An increased new source review (NSR) offset ratio necessarily reduces air pollutant emissions as sources modify or locate in an area under the offset sanction. By contrast, the highway sanction may not directly reduce overall motor vehicle emissions in the near term and any air quality benefits resulting from the highway sanction would be indirect, as application of the highway sanction would not necessarily prevent motorists from driving, nor even necessarily result in overall emissions reductions, at least in the short term. The EPA recognizes that in some instances it may be more appropriate for the highway sanction to apply to address a political failure and believes there are adequate mechanisms provided under the rule to address these instances.[9]

The EPA did not intend to suggest in the proposal that the offset sanction will apply, in every case, to all criteria pollutants. The offset sanction will apply only to all criteria pollutants (and their precursors) for which the area is subject to the section 173 (42 U.S.C. 7503) offset requirement when the SIP deficiency is general in nature. When the finding is specific to one or more pollutants (and its/their precursor(s)), the sanction applies only to those pollutants (and/or precursor(s)). The statement in the proposal intended that the offset can potentially affect all criteria pollutants, either because of pollutant-specific findings or general findings. This means that, regardless of whether the finding is pollutant-specific or general, the offset sanction will generally apply at least to the pollutants of direct concern, and sometimes to others as well. On the other hand, the highway sanction will potentially affect only those pollutants mobile sources emit significantly and not, for instance, lead or SO_2. However, EPA also realizes that since CO nonattainment area problems are due primarily to mobile sources, arguably application of the offset sanction may not address the more significant sources contributing to CO nonattainment problems. Nonetheless, the offset sanction still applies to CO for nonattainment NSR purposes and thus will affect sources subject to nonattainment NSR that wish to locate or expand in a CO nonattainment area, which would provide some air quality benefit in the area under the offset sanction. Therefore, EPA continues to believe that overall the offset sanction is more likely to produce a greater air quality benefit than the highway sanction because, as sources locate in an area, direct emission reductions will be achieved through the 2-to-1 offset for potentially any of the criteria pollutants.

With respect to imposing sanctions on a case-by-case basis, EPA believes there are two main disadvantages to this approach which have led EPA to reject it. First, the individual notice-and-comment rulemakings that would be needed for implementing the sanctions on a case-by-case basis would impose significant demands on EPA's resources. These resources could otherwise be spent on activities that more directly serve the goal of the Act, namely, clean air. Second, the approach taken in the final rule will provide certainty and sufficient notification to the parties affected about the details of sanction application and consistency in the implementation of section 179. These details are further discussed in section III.A. and in the detailed summary of comments document.

As to establishing a rule that links the first sanction to the deficiency on which the sanction is based, EPA believes that approach fails to consider other important considerations with respect to sanctions such as which sanction is more likely to yield the greater air quality benefit. The EPA believes, as a general matter, that the sanction that results in the greater air quality benefit is a more important consideration than selecting the sanction sequence based primarily on the nature of the deficiency.

At the same time, EPA recognizes that in some cases it may be more appropriate to apply the highway sanction first if the circumstances of the deficiency warrant and the offset sanction is unlikely to yield significant air quality benefits. The EPA believes the rule provides the flexibility to do so. Additionally, EPA cannot predict, across all sanction findings, which sanction will more effectively address State inaction and thus could not base the general sanction sequence proposal on that factor. Fundamentally, EPA has based its sanction sequencing rationale primarily on the basis of which sanction EPA believes is likely to yield the greater air quality benefit. It is impossible to gauge the impact since the universe of areas which will be sanctioned and for what duration are not known.

The EPA does not disagree that the offset sanction has the potential to impact industry and that this burden may be greater on industry than on the transportation sector. However, by

[9] As noted in section I.C.4. of this notice, under the APA citizens can petition the EPA for rulemaking to propose the highway sanction to apply first.

including the offset sanction in the Act, Congress clearly intended that certain sources, by virtue of the timing and location of their projects, would be impacted.

2. Sanction Effectuation

A discussion of EPA's approach for effectuating the offset and highway sanctions is provided in section I.C.3. of this document and at pages 51275–7 of the proposal. The following is a brief summary of major comments and EPA's responses.

a. *Major Comments.* (1) Offset Sanction. Comments on offset sanction effectuation addressed both the source and pollutant applicability aspects of EPA's proposal. One commenter objects to the timing of the applicability of the offset sanction and believes EPA's proposed approach is contrary to past EPA practice. The commenter argues that applying the increased offset ratio to all sources that have not received a permit as of the date the sanction begins would stop many sources during the permitting process for reasons beyond their control. The commenter believes that in the past EPA has avoided these problems by applying tighter NSR requirements only where permit applications were not complete when the requirements became effective. The commenter recommends EPA continue with this approach.

Two comments concern the pollutant applicability of the offset sanction. One commenter objects to the application of the offset requirement to both ozone precursors (nitrogen oxides (NO_X) and volatile organic compounds (VOC)) even when the deficiency relates only to one of the pollutants. In support, the commenter notes the broad nature of section 179 and the manner in which NO_X emissions are treated under the Act vis-a-vis VOC emissions. Regarding PM–10 precursors, the commenter argues that the offset sanction should apply to precursors only in those areas where EPA has approved a PM–10 SIP control strategy imposing the offset requirement on PM–10 precursors.

Another commenter believes that regardless of the SIP deficiency the offset sanction should apply to all criteria pollutants and precursors. In support, the commenter argues that section 179 references section 173, which applies to all offset requirements in title I of the Act, and that this reflects a clear Congressional intent to apply the offset sanction to these pollutants. The commenter also believes that areas that have not yet received a section 182(f) (42 U.S.C. 7511a(f)) NO_X exemption from the section 173 offset requirements should remain subject to the increased offset ratio for NO_X until EPA grants an exemption.

(2) *Highway Sanction.* One commenter requests that the rule include a requirement that EPA notify several government entities of highway sanctions to focus multi-agency resources on resolving SIP deficiencies. Another commenter believes that the flow of flexible funds for certain programs (e.g., congestion mitigation air quality improvement program) should continue to flow if sanctions apply because the funds are important for achieving the Act's goals by improving transit.

b. *Response to Comments.* (1) Offset Sanction Applicability. Regarding offset sanction source and pollutant applicability, in the final rule, EPA has maintained the approaches in the proposal.

On source applicability, EPA believes it is important to maximize the air quality benefit of the offset sanction by requiring that sources whose permits are issued after the date the offset sanction applies comply with a 2-to-1 emission offset requirement. Contrary to the comment, the source applicability definition is not a departure from all past EPA practices because historically EPA has not always used the "complete application" definition. (The different source applicability definitions EPA has used in the past are discussed in the detailed response to comments document.) Therefore, EPA believes that past practice does not constrain it from determining today that it is important to enhance the effectiveness of the offset sanction by defining source applicability on a permit issuance basis.

Moreover, EPA believes that once the offset sanction applies, it would be a violation of the sanction for a permit to be issued with an emission offset of less than 2-to-1. The plain language of section 179(a) and section 179(b)(2) does not provide for nor contemplate any grace period based on whether a source has submitted a complete application.

Regarding pollutant applicability of the offset sanction, EPA believes the proposed applicability is reasonably supported and will have the potential to effectively protect air quality. Section 179(b)(2) generally references the offset requirements of section 173 and does not restrict EPA's ability to base the applicability of the sanction on a pollutant or pollutants (and its/their precursor(s)). Moreover, pollutant-specific application of the offset sanction is consistent with the requirements of section 179. Section 179(b)(2)'s language providing that "the ratio of emission reductions to increased emissions shall be at least 2 to 1" is general enough such that EPA can determine the most reasonable method to apply the sanction. While section 179(b)(2) references the broader section 173 requirement, EPA believes it is more reasonable, with one caveat,[10] to apply the offset sanction to the criteria pollutants specifically related to the SIP deficiency in question. Pollutant-specific application of the offset sanction will encourage the State to correct its SIP deficiencies and will provide reductions in emissions of the relevant pollutant in the interim, without unnecessarily punishing stationary sources in cases where the State's program for other pollutants is adequate.

Regarding ozone and PM–10 precursors, EPA is maintaining the approach in the proposal that the sanction applies to ozone and PM–10 precursors. The caveat to that general rule has expanded in one minor respect with respect to the ozone precursor NO_X. As provided in the proposed rule, sources will need to achieve the increased offset ratio for VOC and NO_X when the finding concerns an ozone requirement unless EPA approves a section 182(f) demonstration that the Act's NO_X nonattainment NSR requirements should not apply. In addition, EPA has added the exception that if the area otherwise is not subject to the section 173 offset requirement for NO_X (e.g., submarginal ozone nonattainment areas), then sources in that area would not be subject to that requirement under the offset sanction (see sections 182(f) and 182(b)(2)). This exception is necessary in light of the specific language of the offset provision, which ties the offset sanction specifically to offsets required under section 173. For PM–10 precursors, EPA has retained the caveat for cases in which EPA has made a section 189(e) (42 U.S.C. 7513a(e)) determination for an area that PM–10 precursors are not significant.

(2) Highway Sanction Effectuation. The issues raised by the commenters are not a subject of this rulemaking. The DOT has primary responsibility for implementing the highway sanction and EPA is coordinating with DOT on the development of procedures for that purpose.

[10] Where the SIP deficiency is general, the offset sanction applies to the criteria pollutant(s) (and its/their precursor(s)) for which the area is required to meet the section 173 NSR requirements. (This pollutant applicability definition for general SIP deficiencies is also discussed in section II.C.5. below.)

3. Sanction Clock Policy

a. *Summary of Proposal.* In the proposal, EPA described its proposed policy with respect to the sanctions clock at pages 51272–51273.[11] Under that interpretation, once the sanctions clock has started upon EPA making a finding under section 179(a), in order to stop the clock, EPA must determine that the State has corrected the deficiency that prompted the finding. Similarly, to remove section 179(b) sanctions applied under section 179(a), EPA must determine that the State has come into compliance by correcting the deficiency that prompted the finding that resulted in the application of one or both sanctions.

For a finding that a State has failed to submit a SIP or an element of a SIP, or that the SIP or SIP element submitted fails to meet the completeness criteria of section 110(k), the proposal provided that EPA will stop the sanctions clock or remove any sanctions applied upon EPA's determination that the State has submitted the missing plan or plan element and that the submittal meets the completeness criteria established pursuant to section 110(k)(1). Note that EPA's July 9, 1992 SIP processing guidance indicated that if the 18-month sanction clock elapses during a completeness review, sanctions would not be imposed unless and until EPA determined the plan to be incomplete.[12] In such a case, the 18-month clock would continue to run so that if EPA determined the plan to be incomplete after 18-months had elapsed, sanctions would immediately apply.

The proposal provided that if EPA disapproves a SIP submission based on its failure to meet one or more plan elements required by the Act, to correct the deficiency for purposes of stopping the sanctions clock or removing the sanction, the State must submit a revised SIP to EPA and EPA must approve that submittal pursuant to section 110(k). For a finding that a requirement of an approved plan is not being implemented, the proposal provided that the sanctions clock would stop or sanctions would be removed through notice-and-comment rulemaking determining that the State is implementing the approved plan or part of a plan.

b. *Summary of Comments.* Two commenters raise both practical and legal issues with respect to the proposal's sanction clock policy where it indicates that EPA must fully approve SIP submittals before sanctions clocks that are started by disapprovals can be stopped.

The first commenter's practical concern is time. With respect to a sanctions clock started by a disapproval, because of the length of the State's regulatory development, approval and adoption processes and EPA's review period, the interpretation in the proposed rule could result in sanctions being imposed even if a State had fully adopted and submitted the corrective rule. Sanctions would remain in effect until EPA finished its rulemaking approving the corrected rule. The commenter is concerned that the rule could have an adverse impact solely because EPA had not had time to act on SIP revisions that are fully approvable.

The commenter further believes that EPA's policy is not supported by the language of the Act. The commenter argues that the Act elsewhere explicitly distinguishes between correcting the deficiency and EPA's process of approving a SIP. Section 110(c)(1)(B) states that the Administrator must promulgate a Federal implementation plan (FIP) within two years of SIP disapproval "* * * unless the state corrects the deficiency, and the Administrator approves the plan or plan revision * * *." Section 179(a), though, merely provides that sanctions shall apply "unless such deficiency has been corrected * * *" and does not include the phrase regarding EPA plan approval. The commenter believes that EPA cannot ignore the difference between sections 110 and 179 because to do so would constitute "reading out" or rendering meaningless the additional phrase of section 110(c)(1)(B).

To support its legal argument, the commenter states that principles of statutory construction provide that effect must be given to each word in a statutory provision, and that every effort must be made to avoid an interpretation which renders other provisions of the same statute inconsistent, meaningless, or superfluous (*Boise Cascade Corp.* v. *United States Environmental Protection Agency,* 942 F.2d 1427, 1432 (9th Cir. 1991)). The commenter also notes that an agency cannot ignore or "read out" part of a statute (*Natural Resources Defense Council* v. *United States Environmental Protection Agency,* 822 F.2d 104, 113 (D.C. Cir. 1987)).

As an alternative to EPA's proposal, the commenter recommends that the sanctions clock policy for disapprovals follow the process in the proposal for findings of nonsubmittal and incompleteness. The commenter states that under that alternative policy the clock would be stopped if a new submittal is received, pending EPA's determination of whether the deficiency has been corrected. The commenter urges EPA to adopt a consistent policy to stop sanction clocks in all cases upon receiving a revised SIP submittal. If EPA's preliminary review indicates the deficiency has been corrected, then the clock would remain stopped and EPA would proceed to approve the plan through rulemaking. If the deficiency was not corrected initially, the clock would restart via a letter to the State.

A second commenter raised similar concerns with EPA's proposal that actual approval was needed to stop a sanctions clock started by a disapproval. According to the commenter, the clock should be suspended with the submittal to EPA of a completed rulemaking and remain suspended unless EPA disapproves the SIP. The commenter notes that EPA has the opportunity to participate in the State's rulemaking process to ensure the deficiency is corrected.

c. *Response to Comments.* In response to the comments received, EPA reevaluated its proposed sanction clock policy and made two changes.[13]

(1) Overview of Change One. For the reasons stated in subsection (4) of this section II.B.3.c., EPA does not adopt the exact approach set forth by the commenters, which would actually stop a sanctions clock started by a disapproval upon State submittal of a SIP. However, EPA has determined that it is reasonable to temporarily defer and/or stay the application of sanctions, as appropriate,[14] following SIP disapprovals, where EPA proposes to fully approve a SIP revision or proposes to conditionally approve a SIP.[15] In

[11] For general guidance on EPA's interpretation, at the time of proposal, of how the sanctions clock functions and what is necessary to stop it, see the memorandum entitled "Processing of State Implementation Plan (SIP) Submittals" from John Calcagni to Air Division Directors, Regions I–X, July 9, 1992. A copy of this memorandum has been placed in the docket for this rulemaking.

[12] The policy also provided that, following findings of nonsubmittal and incompleteness, sanctions which had applied would continue to apply upon State submittal until the submittal was determined to be complete.

[13] The EPA is also making a clarification to the sanction clock policy which is discussed in section II.C.4.

[14] As discussed below under change two, the proposed sanction clock policy specifically provided for the deferral of sanctions during completeness reviews of SIP's submitted following nonsubmittal and incompleteness findings, but not staying the sanctions. The concept set forth here for initial disapprovals and findings of failure to implement is carried forth from this process developed in the proposal for initial findings of failure to submit or of incompleteness. In carrying this concept over, EPA believes that it is logical and necessary that if the effect of sanction application is to be deferred that sanctions actually applied should be stayed.

[15] Note that a proposed partial or limited approval would not result in the deferral and/or staying of

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addition, EPA has determined that such deferral and/or staying of sanction application is reasonable following findings of nonimplementation [16] where EPA proposes to find that a State is implementing its SIP. Simultaneous with such proposed approval or finding of SIP implementation, EPA will issue a separate, interim final determination that the State has corrected the deficiency that prompted the finding that started the sanctions clock. In all these cases, whether sanctions are deferred and/or stayed depends on the timing of EPA's proposed action vis-a-vis the sanction clocks.

For initial SIP disapprovals where EPA subsequently fully approves the revised SIP, sanctions would be deferred and/or stayed unless and until EPA's proposed full approval was reversed by a proposed disapproval or final disapproval of the revised SIP in whole or in part. At that point, the interim final determination that the deficiency had been corrected would be rescinded or reversed. For initial SIP disapprovals where EPA subsequently proposes to conditionally approve the revised SIP, sanctions would be deferred and/or stayed unless and until EPA reverses its proposed conditional approval by a proposed disapproval or final disapproval of the revised SIP in whole or in part. For initial SIP disapprovals where EPA subsequently conditionally approves the revised SIP in final, sanctions would be deferred and/or stayed unless and until the conditional approval converts to a disapproval, or EPA proposes to disapprove in whole or in part the revised SIP the State submits to fulfill the commitment in its conditionally-approved SIP.[17] When any of these events occur with respect to a proposed or final conditional approval, the interim final determination that the deficiency had been corrected would be rescinded or reversed.

For initial findings of nonimplementation, sanctions would be deferred and/or stayed unless and until EPA reversed its proposed finding that the State was implementing its SIP by proposing to find or finally finding that the State was not implementing its SIP or by withdrawing its proposed finding that the State was implementing its SIP. At the point of that subsequent action, the interim final determination that the State had corrected the deficiency would be rescinded or reversed. (Exactly how the application of sanctions would be deferred and/or stayed following SIP disapprovals and nonimplementation findings is discussed in greater detail below in this section. Change one is reflected in the rule in § 52.31 (d)(2), (d)(3), and (d)(4).)

The rationale for the deferring and staying of sanctions in these cases is that the proposed full or conditional approval or proposed finding that the State is implementing its SIP would be the basis for EPA's interim final determination that the State has corrected the deficiency.[18] When EPA issues this proposal, the Agency indicates that it believes it is more likely than not that the State is complying with the relevant requirements of the Act. The EPA believes it would be inequitable for sanctions to apply in situations where EPA has made such an affirmative finding, even though it is only preliminary. Moreover, EPA believes it would be unfair to apply sanctions merely because the clock had expired before EPA is able to take final action on the submittal in these situations given the length of the rulemaking process.

(2) Overview of Change Two. The second change to the rule concerns the guidance discussed in the preamble to the proposed rule at page 51273, footnote 9, where EPA indicated that if the sanction clock started by a finding of failure to submit or incompleteness expires during a completeness review for a subsequent SIP submittal, the sanction would not apply unless and until EPA found the submittal incomplete. In this instance, EPA intended that the sanction clock would not temporarily stop, but instead would continue to run. During that time, EPA would simply defer the application of the sanction while it reviewed the SIP submittal to determine whether or not the State had corrected the deficiency prompting the finding. Thus, if and when EPA found the SIP incomplete after expiration of the 18-month clock, the sanction would apply on the date EPA found the plan incomplete.[19]

After further analysis of this aspect of the sanction clock policy in the context of addressing comments, EPA has determined that it is inappropriate to defer and/or stay sanctions when sanction clocks elapse during review for completeness of plans submitted by States following findings of nonsubmittal and incompleteness. Therefore, EPA's rule provides that the temporary deferral and staying of the application of sanctions occurs only when EPA takes an affirmative action in which it indicates the Agency's belief that the State has corrected the deficiency prompting the finding (e.g., that the State has corrected the finding of nonsubmittal or incompleteness). The EPA believes this change is necessary since, upon further reflection, EPA realizes that in such a situation there has been no prior affirmative action by EPA preliminarily or finally determining that the State has, in fact, corrected the deficiency. A proposed approval of a revised SIP following a disapproval constitutes such an action as does a proposed finding that a State is implementing its SIP following a finding of nonimplementation. However, mere EPA receipt of a SIP submittal from a State following a nonsubmittal or incompleteness finding does not constitute such an action, since EPA takes no affirmative action preliminarily indicating that the State has submitted a complete SIP, and there is nothing to give rise to an interim final determination that the State has corrected the deficiency.

Under this change, sanctions will apply if a sanction clock expires during a completeness review of a SIP submitted following a nonsubmittal or incompleteness finding. An example illustrates the implications of this change. Suppose EPA finds that a State failed to submit a SIP and then at month 17 the State submits a SIP which the Agency then starts reviewing for completeness. Month 18 arrives and EPA is still reviewing the submittal. Under the approach in the proposal, application of the offset sanction at month 18 would be deferred unless and until EPA found the plan incomplete. Under the final rule, the sanction will apply at month 18 and only be lifted

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the application of sanctions because such actions are associated with proposed partial or limited disapprovals. (For a discussion of partial and limited approvals/disapprovals, see the memorandum entitled "Processing of State Implementation Plan (SIP) Submittals" from John Calcagni to Air Division Directors, Regions I–X, July 9, 1992.)

[16] Although the comments focused on a clock started by a disapproval, EPA has extended its changes to a clock started by a finding of failure to implement, finding no reason to treat findings of failure to implement differently.

[17] On July, 9, 1992, EPA issued a policy that included a discussion of how conditional approvals convert to disapprovals (see memorandum entitled "Processing of State Implementation Plan (SIP) Submittals" from John Calcagni to Air Division Directors, Regions I–X, July 9, 1992). But note that, by this action, EPA is withdrawing the part of the July 1992 guidance that addresses how conditional approvals convert to disapprovals. In the near future, EPA intends to issue additional guidance to address this aspect of the conditional approval policy.

[18] The EPA's final conditional approval would merely continue any stay or deferral initiated by EPA's proposed conditional approval and EPA's simultaneous interim final determination the deficiency has been corrected.

[19] Note that this specific aspect of the proposed sanction clock policy was not actually reflected in the regulatory language of the proposed rule but was discussed in the preamble only.

once EPA takes affirmative action finding the plan complete.

For EPA to continue with the proposed policy of deferring sanctions following nonsubmittal and incompleteness findings, EPA would have to view mere receipt of a submittal from the State as a preliminary correction of the deficiency. However, EPA's view is that receipt of a State plan does not constitute an affirmative EPA determination that the revised SIP is complete.[20] Therefore, it is inappropriate to defer and/or stay sanctions following nonsubmittal and incompleteness findings. Furthermore, once EPA has affirmatively determined the plan is complete, any sanctions clock or any applied sanctions would be permanently stopped. Therefore, it is inappropriate to defer or stay sanctions following nonsubmittal and incompleteness findings until EPA has affirmatively determined the plan is complete.[21] The EPA believes this change, as well as change one, makes the Agency's approach in deferring and staying the application of sanctions more consistent with the requirements of the Act.

(3) Scenarios Illustrating First Change. The following five scenarios illustrate how sanctions can be deferred and/or stayed following SIP disapprovals and nonimplementation findings.[22] They are provided to clarify change one discussed above. (Section III.A. discusses how the States and the public will be kept informed of the status of sanction application.)

First, if, before month 18, EPA proposes to fully or conditionally approve a plan or proposes to find that a State is implementing its SIP and that action is reversed 24 or more months after the finding, at which time the 18-month clock has expired, application of the offset sanction is deferred until EPA's proposed approval or proposed finding that the State is implementing its SIP is reversed.[23] For both types of findings, the offset sanction applies on the date EPA reverses its preliminary finding. Following disapprovals, where EPA proposed to fully approve the SIP, the reversal would be either a proposed or final disapproval in whole or in part, whichever occurs. Following disapprovals, where EPA proposes to or finally conditionally approves the SIP, the reversal would occur as described in subsection (1) above of this section II.B.3.c. Following findings of nonimplementation, the reversal would be either a proposed or final finding, whichever occurs, that the State was not implementing its SIP. For both disapprovals and nonimplementation findings, the highway sanction applies 6 months from the date the offset sanction applies, unless EPA determines within that period that the State corrected the deficiency prompting the finding. (This scenario is provided for in the rule in § 52.31 (d)(2)(i), (d)(3)(i), and (d)(4)(i).)

The following discussion and Figure 1 provide an example of how this process functions with respect to a sanctions clock started by an initial disapproval. The process would function in the same manner where the initial finding was a finding of failure to implement. Suppose EPA issues a SIP disapproval, initiating the section 179 sanction process. Suppose that the State submits a revised SIP to EPA which EPA proposes to fully or conditionally approve, prior to 18 months from the date the sanctions clock started. The EPA would simultaneously issue an interim final rule, making a finding that the State has corrected the deficiency. In that case, the application of the offset sanction would be deferred. Now suppose that, at month 25, EPA reverses its preliminary determination. The reversal would be a proposal to disapprove the SIP in whole or in part or a final disapproval of the SIP in whole or in part. At month 25 (or, for final actions, on the action's effective date), the offset sanction applies. The highway sanction then applies 6 months later at month 31 (or, for final actions, shortly thereafter, as appropriate), if within that period EPA has not determined that the State has corrected the deficiency.

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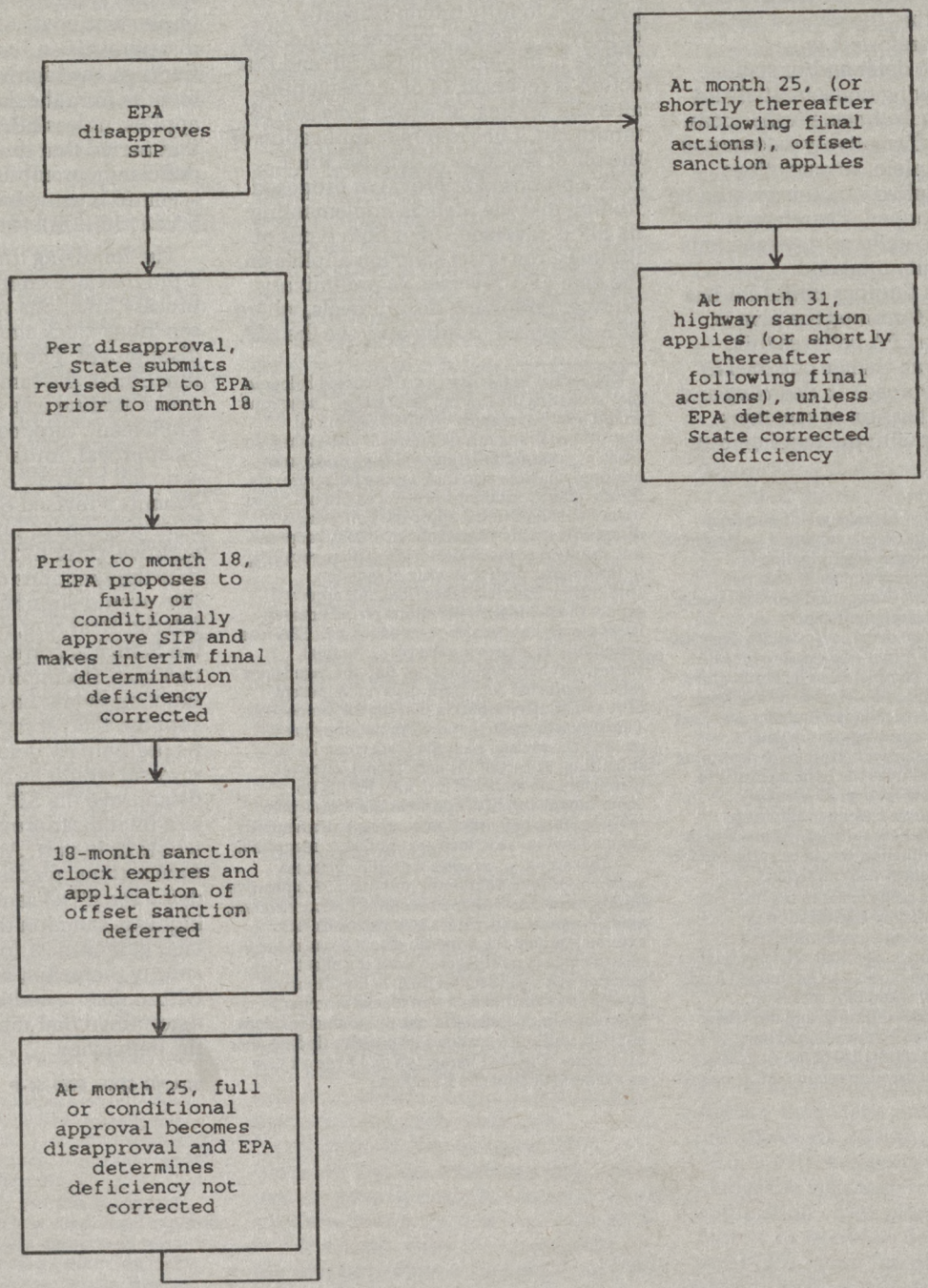
[20] Arguably, EPA could make an interim final determination that the State's submittal is complete. However, such an interim determination is impractical and inappropriate for at least two reasons. One, the short time period provided under the Act for EPA to make completeness determinations (i.e., 60 days) indicate that Congress did not intend for EPA (nor contemplate for EPA) to make preliminary completeness determinations. Two, the nature of the completeness review does not lend itself to EPA making preliminary and final determinations. The completeness review is intended as a straightforward exercise to determine if the SIP revision includes the basic elements to warrant further review for overall adequacy. Therefore, there is no room for a preliminary determination; any review sufficient to make such a preliminary determination would be sufficient for EPA's final completeness determination.

[21] A clarification is being made in the final rule which was not specifically addressed in the proposed rule. Following nonsubmittal and incompleteness findings, the final rule effectively provides that sanction clocks can be stopped (and sanctions lifted) only when EPA makes an affirmative completeness finding, and not when SIP's become complete by operation of law pursuant to section 110(k)(1)(B) of the Act. This change is further discussed in section II.C.4. below.

[22] Note that in the five cases discussed below in the "scenarios illustrating first change," sanctions would apply or reapply when a conditional approval converts to a disapproval just as they do when a proposed full approval is reversed to a disapproval. Note also that, unlike full approvals, the mandatory sanctions process would not cease upon final conditional approval. Following a disapproval, as indicated above, if EPA proposes full approval of the State's revised plan, resulting in the deferral and/or staying of sanction application, and then takes final, full approval action, the mandatory sanctions process ceases. However, if the scenario were one where EPA was conditionally approving the plan, the final conditional approval does not stop the mandatory sanction process because it does not represent EPA's final determination that the SIP is adequate. The EPA will make that determination when it reviews the revised plan the State commits to submitting as part of the conditional approval. Ultimately, of course, if the State fulfills its commitment and EPA approves the State's plan revision, then any sanction clocks are permanently stopped and no sanctions are applied or reapplied.

[23] This scenario assumes that EPA proposes approval prior to 18 months and that EPA's positive finding is reversed after 24 months. In that instance, after 24 months, only the 18-month clock has expired (and not the 6-month clock) because the 6-month clock is not triggered until the offset sanction applies. (Section III.A. below discusses how the section 179 sanction clocks function.) Therefore, in this scenario, the 6-month clock does not start until EPA reverses its positive finding after 24 months. The next paragraph and Figure 1 give an example of how this functions.

Figure 1: Case 1 for SIP Disapprovals



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Second, if EPA proposes (before expiration of the 18-month sanctions clock) to fully or conditionally approve a plan or proposes to find that a State is implementing its SIP and that proposal action is reversed before the 6-month clock expires that would have followed upon application of the offset sanction, application of the offset sanction is deferred until such reversal of EPA's proposed finding. The offset sanction applies on the date EPA's proposal finding is reversed (or, for final actions, on the action's effective date). The highway sanction then applies 6 months later if EPA has not determined during that period that the State has corrected the deficiency. (This scenario is provided for in the rule at §§ 52.31 (d)(2)(i), (d)(3)(i) and (d)(4)(i).)

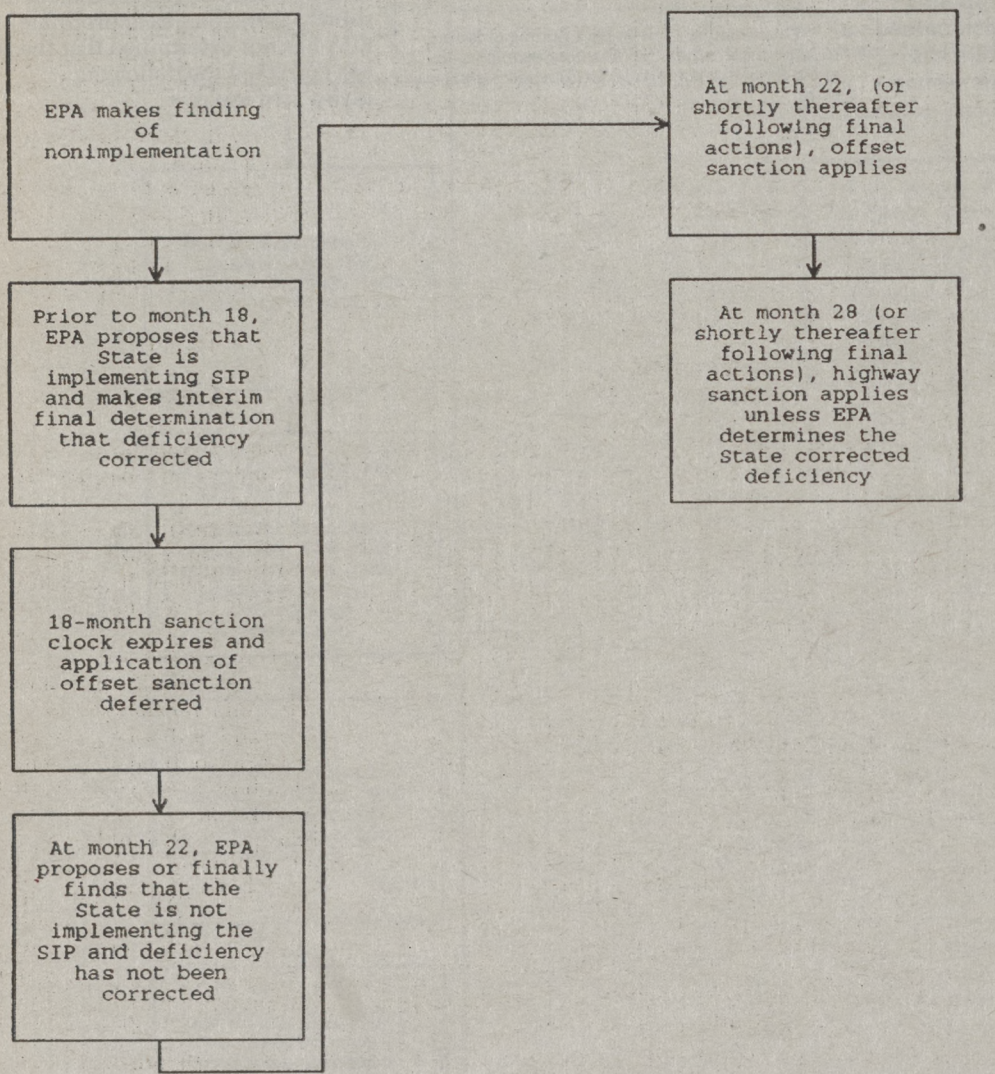
The following discussion and Figure 2 provide an example of how this process functions for a finding of nonimplementation.[24] The process would be the same for an initial disapproval. Suppose EPA makes a finding of nonimplementation, initiating the section 179 sanction process. Suppose that EPA, prior to the end of the 18 month sanctions clock, proposes to find that the State is implementing its approved SIP. At the time of the positive finding, EPA would simultaneously issue an interim final rule, finding that the State has corrected the deficiency.

In this case, the application of the offset sanction would be deferred unless and until EPA reverses its proposed positive finding. Now suppose that EPA, at month 22, reverses its proposed positive finding by withdrawing its proposed finding that the State is implementing its SIP. At month 22 (or, for final actions, on the action's effective date), the offset sanction applies. The highway sanction then applies 6 months later at month 28 (or, for final actions, shortly thereafter, as appropriate), if EPA has not determined that the State has corrected the deficiency.

[24] This example is given for a finding of failure to implement, while the other four examples are given for SIP disapprovals, for illustrative purposes only.

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Figure 2: Case 2 for Findings of Nonimplementation



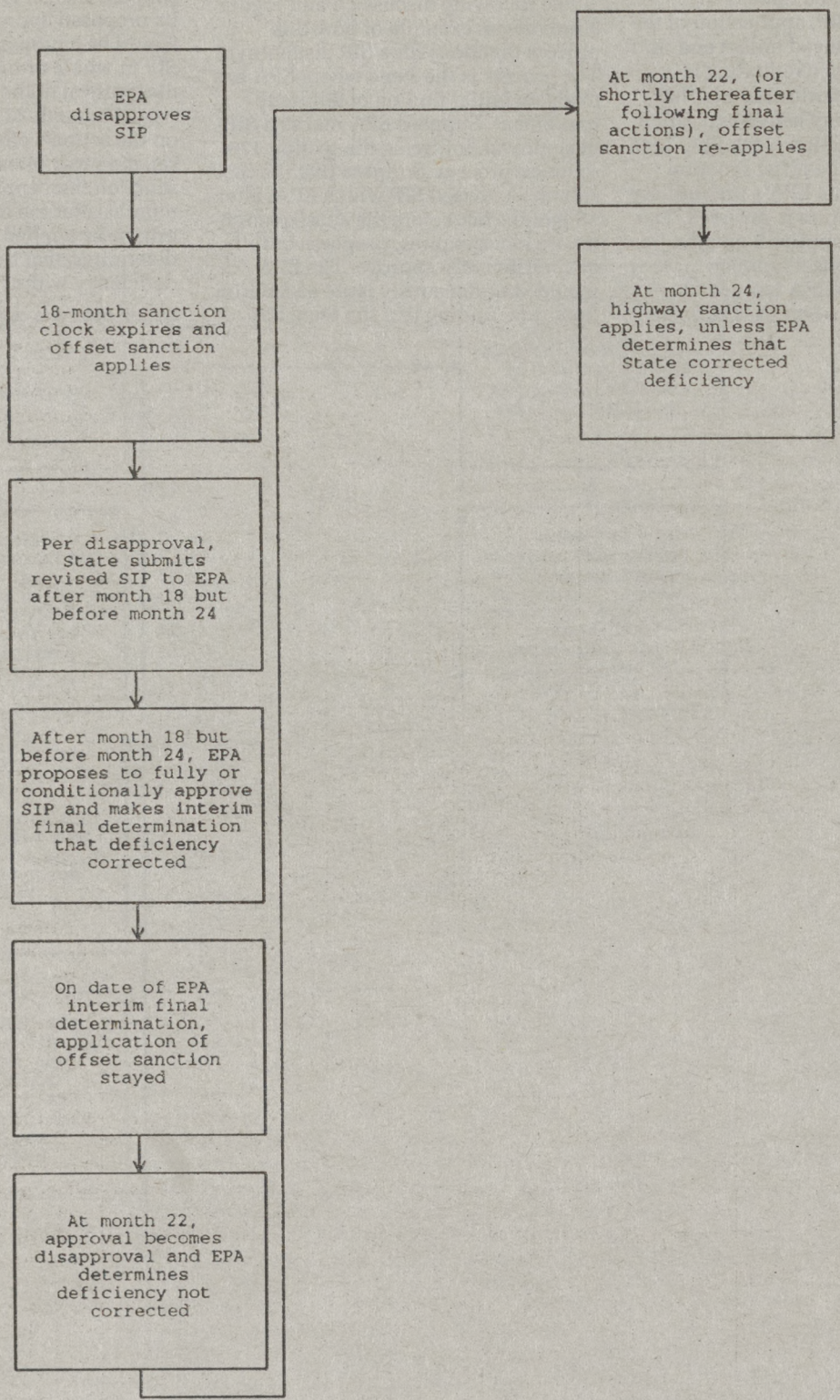
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Third, if EPA proposes (after month 18 but before expiration of the subsequent 6-month sanctions clock) to fully or conditionally approve a plan or proposes to find that a State is implementing its SIP, application of the offset sanction is stayed unless and until EPA's proposed positive finding is reversed. (This scenario assumes that EPA's reversal occurs before expiration of the 6-month sanction clock.) For both types of findings, the offset sanction reapplies on the date EPA's preliminary positive determination is reversed. The highway sanction applies 6 months from the date the offset sanction initially applied, if EPA has not determined that the State has corrected the deficiency prompting the finding. (This scenario is provided for in the rule at § 52.31 (d)(2)(ii), (d)(3)(ii) and (d)(4)(ii).)

The following discussion and Figure 3 provide an example of how this process functions for a SIP disapproval. The process is the same where EPA has made an initial finding of failure to implement. Suppose EPA makes a SIP disapproval, initiating the section 179 sanction process. Suppose that the State submits a revised SIP which EPA, after 18 months but before the subsequent 6-month clock expires, proposes to fully or conditionally approve. The EPA would simultaneously issue an interim final rule, finding that the State has corrected the deficiency. In that case, application of the offset sanction would be stayed unless and until EPA's proposed approval is reversed. Now suppose that, at month 22, EPA reverses its proposed approval. The reversal would be a proposal to disapprove the SIP in whole or in part or a final disapproval of the SIP in whole or in part. At month 22 (or, for final actions, on the action's effective date), the offset sanction reapplies. The highway sanction then applies at month 24, 6 months after the offset sanction originally applied, unless EPA determines that the State corrected the deficiency within that period.

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Figure 3: Case 3 for SIP Disapprovals



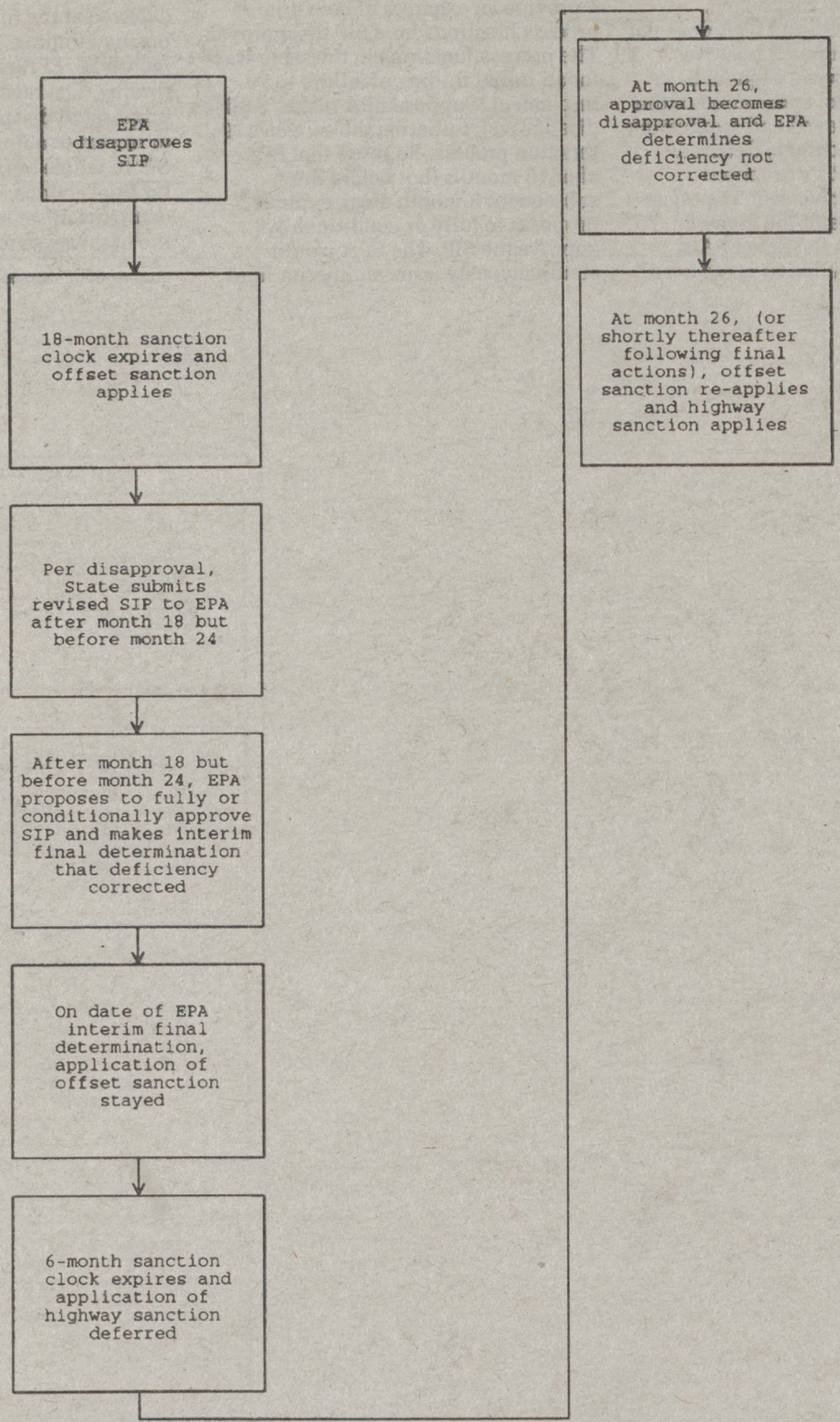
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Fourth, if EPA proposes (after month 18, but before the subsequent 6-month sanctions clock expires) to fully or conditionally approve a plan or proposes to find that the State is implementing its SIP, and EPA does not take action reversing such positive action until after the subsequent 6-month clock expires, application of the offset sanction is stayed and application of the highway sanction is deferred unless and until EPA's proposed positive finding is reversed. The offset sanction reapplies and the highway sanction applies on the date EPA's preliminary determination is reversed. (This scenario is provided for in the rule at §§ 52.31(d)(2)(ii), (d)(3)(ii) and (d)(4)(ii).)

The following discussion and Figure 4 provide an example of how this process functions for a SIP disapproval. The process functions in the same way for an initial finding of failure to implement. Suppose EPA makes a SIP disapproval, initiating the section 179 sanction process. Suppose that EPA, after 18 months (but before the subsequent 6-month clock expires), proposes to fully or conditionally approve the SIP. The EPA would simultaneously issue an interim final rule, finding that the State has corrected the deficiency. In that case, application of the offset sanction would be stayed and application of the highway sanction deferred at the time EPA makes its positive finding. Now suppose that, at month 26, EPA reverses its positive finding. The reversal would be a proposal to disapprove the SIP in whole or in part or a final disapproval of the SIP in whole or in part. At month 26 (or, for final actions, on the action's effective date), the offset sanction reapplies and the highway sanction applies.

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Figure 4: Case 4 for SIP Disapprovals



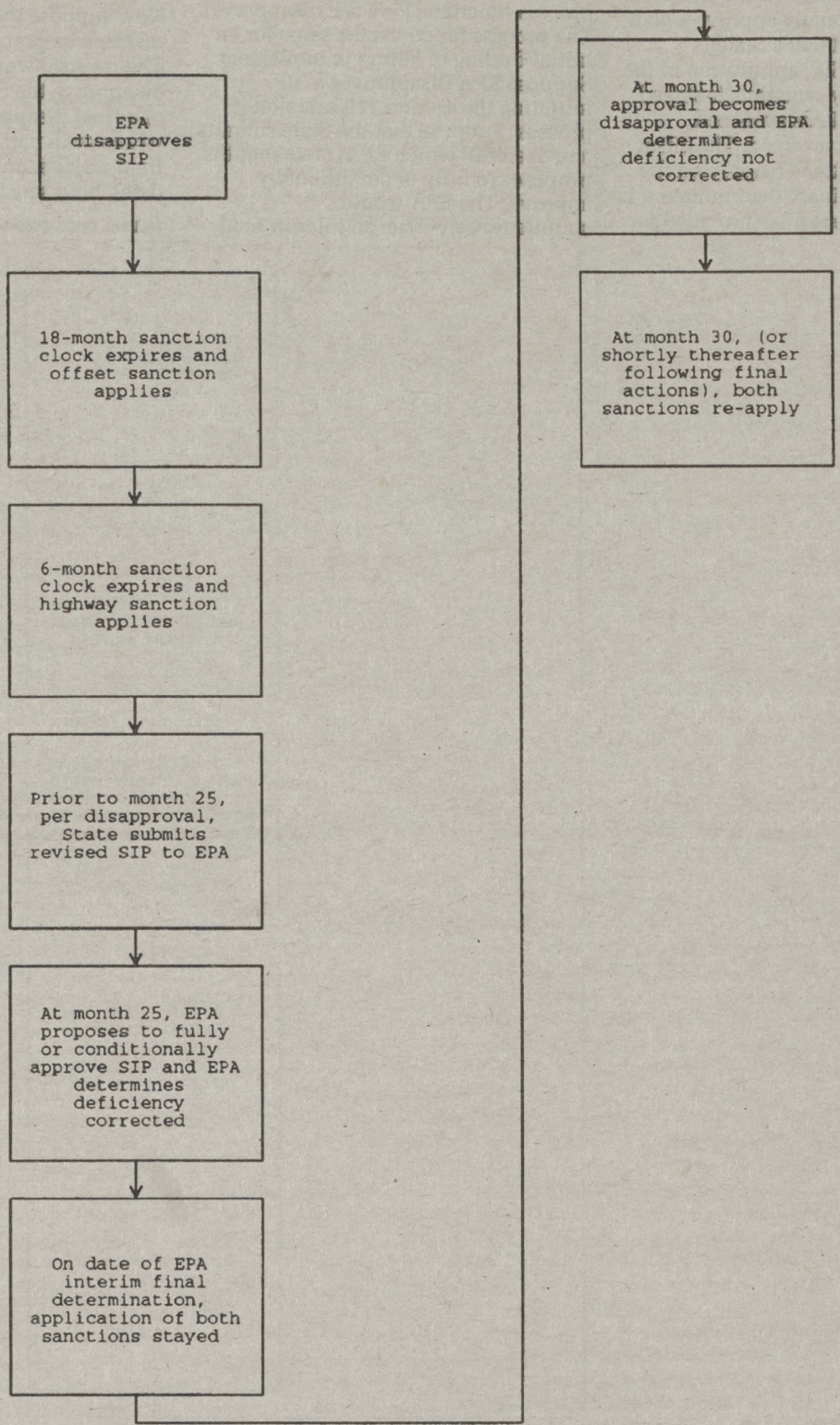
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Lastly, the rule also provides that, following a SIP disapproval or a finding of failure to implement, if EPA proposes after both sanctions clocks have expired to fully or conditionally approve a plan or proposes to find that a State is implementing its SIP, application of the offset and highway sanctions is stayed unless and until EPA's proposed positive finding is reversed. The offset and highway sanctions reapply on the date EPA's preliminary determination is reversed. (This scenario is provided for in the rule at § 52.31 (d)(2)(iii), (d)(3)(iii) and (d)(4)(iii).)

The following discussion and Figure 5 provide an example of how this process functions for a SIP disapproval. The process functions the same for an initial finding of failure to implement. Suppose EPA disapproves a SIP, initiating the section 179 sanction process. Suppose that the State submits a revised SIP which EPA, at 25 months, proposes to fully or conditionally approve. The EPA would simultaneously issue an interim final rule, finding that the State has corrected the deficiency. In that case, the application of both sanctions would be stayed on the date of the positive action. Now suppose that, at month 30, EPA reverses its proposed positive finding. The reversal would be a proposal to disapprove the SIP in whole or in part or a final disapproval of the SIP in whole or in part. At month 30 (or, for final actions, on the action's effective date), both sanctions reapply.

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Figure 5: Case 5 for SIP Disapprovals



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In all cases following disapprovals and findings of nonimplementation, the sanctions clock stops permanently and any sanctions applied are permanently lifted only when EPA completes final notice-and-comment rulemaking action fully approving the SIP revision or finding that the State is implementing its SIP.[25]

(4) Legal Basis and Rationale for Change One. The EPA believes that its policy clarification is consistent with the statutory language of section 179 and that it is a reasonable interpretation of that language. The EPA believes this policy is consistent with the legal requirements of section 179 of the Act and section 553 of the APA. Section 179(a) of the Act requires sanctions to apply 18 months after a deficiency finding "unless such deficiency has been corrected * * *," and requires that sanctions apply "until the Administrator determines that the State has come into compliance * * *." The EPA interprets this language to require that EPA make a determination that the State has corrected the deficiency before permanently stopping the sanctions clock or lifting sanctions. In the case of a clock started by a disapproval, such a determination would be represented by a final, full approval. However, EPA does not believe that section 179(a) requires a final approval in order to defer or stay the application of sanctions, since the statutory language speaks generally in terms of "correcting" deficiencies and "determining" compliance without explicitly linking those events to final approval actions.

Regarding SIP disapprovals, EPA recognizes the first commenter's concern over timing and believes that this policy clarification eliminates the potential for sanctions applying in an area when EPA has a submittal in house for which EPA has determined that it is more likely than not that the State has corrected the deficiency that prompted the original disapproval. Extending the approach for disapprovals to findings of nonimplementation also serves to avoid applying sanctions when EPA has proposed that a State is implementing its approved SIP.

Consequently, EPA believes it is consistent with section 179 to treat proposed full approvals following disapprovals[26] as the basis for deferring or staying the application of sanctions, while not permanently stopping the sanctions clock or permanently lifting sanctions. The EPA also believes it is consistent with section 179 for proposed and final conditional approvals to be the basis for deferring and/or staying the application of sanctions.[27] The proposed full or conditional approval then forms the basis for EPA to issue an interim final determination, which EPA would publish in a separate action in the **Federal Register** contemporaneously with the proposed approval notice, that the State had corrected the deficiency and come into compliance with the requirements of the Act.[28] While this interim final determination would have the effect of deferring or staying sanctions, it would not have the final effect of either approving the submitted SIP revision, or permanently stopping a sanctions clock or permanently lifting sanctions. The interim final determination would be subject to notice and comment and would have effect only until either EPA made a final determination that the deficiency was corrected at the time of a final approval of the SIP revision, or EPA reversed its interim final determination at the time EPA reverses its proposed full or conditional approval. If an EPA proposed full approval were reversed by a proposed disapproval, the Agency would publish a separate action in the **Federal Register** withdrawing the interim final determination (that the State has corrected the deficiency) contemporaneously with the notice of the proposed disapproval. If an EPA proposed approval were reversed by a final disapproval, EPA would take final action finding that the deficiency has not been corrected in the final disapproval action. For an EPA proposed conditional approval, a reversal could occur by a proposed or final disapproval. For an EPA final conditional approval, a reversal would occur when the conditional approval converts to a disapproval through the State's failing to submit a complete revised SIP to which it committed or by EPA's disapproval of the State's revised SIP.

The EPA believes that this approach is similar to the method courts traditionally use to grant interim equitable relief. Courts may grant preliminary injunctions to parties that the court determines are likely to succeed on the merits of their case, where there is no adequate legal remedy available, and where the public interest would not be served in not granting the injunction. Such injunctions may typically last until the court has finally decided the merits of the case, either for or against the party granted the injunction. Deferring or staying the application of sanctions upon proposed approval of a SIP revision is analogous, in that an EPA proposed approval represents EPA's view that it is more likely than not that the State has corrected the disapproval deficiency and come into compliance with the requirements of the Act. Also, as SIP approval actions generally require notice-and-comment rulemaking before they can become final, if a sanctions clock is due to expire after proposed approval but before the Agency can practicably fulfill its notice and comment duties and grant final approval, there is no other "remedy" available to relieve the State from the punishment of sanctions, even though it is probable that the State has corrected the deficiency.

Moreover, EPA does not believe, following proposed approvals, that it would be in the public interest for sanctions to remain in effect, as at that point the Agency believes that there is nothing further that the State need do to come into compliance, and thus there is no further need for the deterrent effect of sanctions. The EPA also believes that in these situations it would be especially unfair to States to begin the application of sanctions where the only reason the sanctions clock has not permanently stopped is that the Agency cannot complete its rulemaking process to finally approve the SIP before sanctions apply. Finally, EPA notes that like the judicial preliminary injunction model, this approach provides that upon reversal of EPA's preliminary assessment that the SIP revision is approvable, and that, therefore, the deficiency has not been corrected, sanctions would be in effect as if the interim final determination that the State had corrected the deficiency had never been made.

The EPA also believes that this approach is consistent with the requirements of section 553 of the APA.

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[25] These actions permanently stop the sanctions clock and permanently remove sanctions because such actions represent EPA's final determination that the State has met the requirements of the Act and thus has corrected the deficiency that initiated the sanctions process.

[26] The following discussion on EPA's legal rationale and basis for staying and deferring sanctions only explicitly addresses SIP disapprovals but applies equally to findings of nonimplementation.

[27] In NRDC v. EPA, No. 92–1535, slip. op. at 18 (D.C. Cir. May 6, 1994), the Court struck down EPA's policy of conditionally approving committal SIP's (i.e., SIP's consisting solely of a commitment). However, the Court provided that "the conditional approval mechanism was intended to provide EPA with an alternative to disapproving substantive, but not entirely satisfactory, SIP's * * *." The EPA will issue conditional approvals consistent with that Court's opinion.

[28] Since a final conditional approval has the effect of continuing the staying and/or deferring of sanctions, upon final conditional approval, EPA would not publish a second interim final determination that the State has corrected the deficiency (see footnote 18).

Generally, under the APA, agency rulemaking affecting the rights of individuals must comply with certain minimum procedural requirements, including publishing a notice of proposed rulemaking in the **Federal Register** and providing an opportunity for the public to submit written comments on the proposal, before the rulemaking can have final effect. The EPA will not be providing an opportunity for public comment before those deferrals or stays are effective. Consequently, EPA's approach may appear to conflict with the requirements of the APA. However, EPA will provide an opportunity to comment on the proposed approval that was the basis for the interim final decision and will provide an opportunity, after the fact, for the public to comment on the interim final decision. Thus, an opportunity for comment will be provided before any sanctions clock is permanently stopped or any already applied sanctions are permanently lifted. In the context of the SIP approval rulemaking, and with respect to the interim final rule, the public would have an opportunity to comment on the appropriateness of EPA's interim determination that the State had corrected the deficiency and on whether the State should remain subject to sanctions, even though the deferral or stay is already effective.

The basis for allowing such an interim final action stems from section 553(b)(B) of the APA which provides that the notice and opportunity for comment requirements do not apply when the Agency finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." In the case of sanctions, EPA believes it would be both impracticable and contrary to the public interest to have to propose and provide an opportunity to comment before any relief is provided from the effect of sanctions. First, until EPA proposes approval of a SIP revision, the Agency's first step in determining whether a State's SIP submittal meets the requirements of the Act, EPA is not in a position to propose that the State has corrected the deficiency; thus, there is no point in the process before proposed approval at which EPA could propose that the State has corrected the deficiency and provide an opportunity for meaningful public comment on the issue. Second, as discussed above, EPA believes it would be unfair to the State and its citizens, and thus not in the public interest, for sanctions to remain in effect following an EPA proposed approval, since at that point the Agency has completed a thorough evaluation of the State's SIP revision and publicly stated its belief that the submittal is approvable and that the State has corrected the deficiency, but due to the procedural requirements of the Act the Agency has not yet been able to issue a final approval. The EPA believes sanctions coming into effect following proposed approvals would unnecessarily risk potential dislocation in government programs and the marketplace. The EPA also believes that the risk of an inappropriate deferral or stay would be comparatively small, given the limited scope and duration deferrals and stays would have and given the rule's mechanism for making sanctions effective upon reversal of its initial determination that the State had corrected the deficiency. Consequently, EPA believes that the "good cause" exception under the APA allows the Agency to dispense with notice and comment procedures before deferrals and stays of sanctions become effective, and that it is thus appropriate to respond to the commenters with the approach adopted in today's rule.

(5) Responses to Other Comments. The EPA does not support the alternative proposed by the commenters that EPA temporarily or permanently stop the sanction clocks started by disapprovals upon EPA receipt of a submittal that the State believes corrects the deficiency.

The EPA cannot determine whether the State has corrected the deficiency until it reviews the plan for adequacy. If the sanction clock were temporarily or permanently stopped upon mere submission of a plan following any section 179(a) disapproval (or finding of nonimplementation) and not started again until subsequent disapproval, mandatory sanctions would then take that much longer to have the effect of encouraging State compliance and protecting air quality in the area. Temporarily or permanently stopping the clock upon mere submission of a plan could result in abuse of the system by States knowingly submitting SIP's that EPA cannot approve in order to defer the application of sanctions. By allowing such abuses, such an approach would also be unfair to States which, despite a good faith effort at developing a corrective rule, are unable to avert sanctions following disapproval. In sum, under the revised policy, the underlying requirement for stopping the sanction clock is maintained: EPA must take final action to fully approve a submitted SIP revision or find that a State is implementing its SIP in order to permanently stop the sanctions clock and permanently lift any sanctions. As discussed above, EPA will defer and/or stay the application of sanctions when it proposes a positive finding that forms the basis for EPA to determine through an interim final action that the deficiency has been corrected; but in these cases EPA will not temporarily or permanently stop the underlying clock.

The EPA also believes that its interpretation is legally supported under the Act. Generally, section 179 states that, "* * * unless such deficiency has been corrected within 18 months after the finding, disapproval, or determination * * *" one of the sanctions shall apply, as selected by the Administrator. Section 110(c)(1) of the Act requires EPA to promulgate a FIP at any time within 2 years after the Administrator finds that a State has not made a required submission or has made an incomplete submission, or disapproves a plan submission, "unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan."

The running of the sanctions clock is tied to the particular deficiency at issue. For example, if the clock was triggered by a finding of failure to submit or a finding of incompleteness, the clock will stop if EPA determines that the State submits a complete plan; it is not also necessary for the plan to be actually approved to stop the clock. If the complete submission is later disapproved, then a new 18-month clock will begin to run, as provided in section 179(a), and will continue to run until that deficiency is corrected with an EPA approved plan. For the FIP clock, in addition to the deficiency being corrected, section 110(c)(1) includes an additional criterion—EPA SIP approval—that must be satisfied for EPA not to have to promulgate a FIP within 2 years of a finding of nonsubmittal or incompleteness. The explicit reference to an approval as an added prerequisite—beyond "correcting the deficiency"— makes clear that, in the context of failures to submit or submission of incomplete plans, plan approval is quite distinct from "correcting the deficiency." Therefore, the Administrator's approval is distinct from "correcting the deficiency" for failure to submit and incompleteness. Therefore, the fact that the "SIP approval" language is redundant for disapprovals, where SIP approval is part of correcting the deficiency, does not render that clause superfluous.

This interpretation of the section 179 sanction clock does not "read out" the section 110(c) requirement, but rather merely illustrates that following disapprovals what is necessary to stop

the sanction and FIP clocks is the same: EPA approval of the SIP. (See EPA's July 9, 1992 SIP processing guidance, page 10.) However, as discussed above, this is not the case for sanction clocks started by a finding of failure to submit or a finding of incompleteness. There, the State can correct the deficiency merely by submitting a SIP EPA finds complete. This would stop the sanctions clock. In these situations, the additional step of EPA approval is required to stop the FIP clock, under the plain language of section 110(c)(1).

Therefore, EPA's interpretation of section 179(a) does not render the provisions of section 110(c)(1)(B) inconsistent, meaningless or superfluous. The *Boise Cascade* case cited by the commenter addressed a situation in which one word, "promulgation," was argued by petitioners to have the same meaning as another, "approval" (942 F.2d at 1342). The court rejected that argument because failing to distinguish between the terms would have resulted either in a conflict between two subsections of the Clean Water Act or made superfluous the use of "approval" in another subsection (Id). Here, EPA's interpretation of what is required to correct a deficiency under section 179(a) does not conflict with the requirement for EPA approval to stop a FIP clock. It logically follows that approval is implicitly required to correct a deficiency based on a disapproval, since a State cannot be considered to have remedied the underlying flaw that led to a disapproval until EPA has determined that the State's attempt to do so is approvable.[29] The explicit language in section 110(c)(1)(B) is necessary because FIP clocks also may be started by a finding of failure to submit or SIP disapproval. Congress was explicitly providing that in both these instances EPA approval is required to stop a FIP clock. Therefore, the reference in section 110(c) to the need for EPA approval still has meaning when the initial failure was a failure to submit or an incompleteness finding. Thus, EPA's interpretation does not render superfluous the explicit language in section 110(c)(1)(B).

Moreover, EPA's interpretation does not ignore or "read out" of the statute section 110(c)(1)(B) (*NRDC* v. *USEPA*, 822 F.2d at 113). That case addressed a petitioner's attempt to ignore a specific condition of the Clean Water Act's applicability provision, which the court viewed as an unacceptable method of construing statutes (Id). Here, rather than disregarding the requirement that EPA approval is necessary to stop a FIP clock, EPA is interpreting section 179(a) to implicitly require that same element to be satisfied before a sanctions clock started for a disapproval can be stopped. This in no way ignores the section 110(c)(1)(B) language for purposes of the FIP clock, nor represents an attempt to interpret the Act such that the language of section 110(c)(1)(B) does not have full effect. As stated above, the reference to EPA approval in that section still has meaning where the clock was started by a finding of failure to submit or incompleteness.

(5) *Additional Comments Regarding the Sanctions Clock.*

(a) *Comments.* Another commenter believes that the final rule should provide for resetting the sanctions clock whenever a State that had failed to submit a timely SIP submits one, even if the SIP is later found to be incomplete. The commenter notes that section 179 provides for an 18-month period following one of four different types of findings of inadequate State action before sanctions can be imposed. The commenter argues that EPA illegally shortens this period by combining into one, two types of inadequate action under the same 18-month period, and that the final rule should provide for separate clocks for each type of inadequate action.

Another commenter is concerned that States may be tempted to view the 18-month sanctions clock as additional time in which to meet a deadline. The commenter believes that Congress did not intend that States that failed to submit a timely SIP and later submitted an inadequate SIP would have more time before facing sanctions than States that submitted a complete but unapprovable SIP on time. While the commenter agrees with EPA's policy that incomplete submittals cannot temporarily stop the sanctions clock, the commenter believes the overall policy rewards delay in completing programs. The commenter believes that the final rule should state that only EPA approval of a final rule stops the clock.

(b) *Responses.* As noted above, section 179 indicates that sanctions apply within certain timeframes, unless EPA determines that the deficiency that prompted the finding starting the sanctions clock has been corrected within those timeframes. Therefore, EPA believes the Act requires that sanction clocks stop for findings of failure to submit and findings of incompleteness when EPA finds a subsequently submitted SIP complete (i.e., finds that the deficiency has been corrected).

The EPA disagrees that a clock started by a finding of failure to submit should stop based on a mere submittal that may or may not be complete. The Act provides under section 110(k)(1)(C) that where the Administrator determines that a plan is incomplete the State is treated as not having made the submission. Based on this, EPA believes that an affirmative finding that a SIP is complete is necessary to cure a nonsubmittal or incompleteness deficiency and stop sanction clocks initiated by such findings.[30] This interpretation is further supported by the fact that a finding of failure to submit and incompleteness are provided for under the same provision of sections 179(a)(1) and 179(a)(3)(A).

On the other hand, EPA does not believe that it is appropriate to allow only EPA approval to permanently stop the sanction clock for all types of findings.[31] It is conceivable that a State could abuse the system under the process established in the final rule by submitting a complete but inadequate SIP at 17 months that stops a sanctions clock that started based on a finding of failure to submit or a finding of incompleteness. Such an area could face sanctions later than the State that submitted a timely, complete but unapprovable SIP. However, as discussed above, EPA believes the reference to "such deficiency" immediately following the list of the types of deficiency findings in section 179(a) indicates that sanctions clocks will stop if and when the State corrects the specific deficiency that prompted the finding. Consequently, the running and stopping of the clock is tied to the particular deficiency at issue, and EPA believes that it lacks the statutory

[29] As discussed above, EPA believes it is appropriate at the point of proposed approval to contemporaneously issue an interim final determination that the State has corrected the deficiency for purposes of deferring or staying the application of any sanctions that are due. Again, this interim final determination would be subject to the condition that EPA grant final approval to the SIP, and would not have any final effect on the actual approval action. If the subsequent condition is not met (i.e., if EPA's proposed approval is reversed by a proposed or final disapproval), from that point on the interim final determination would have no effect and any sanctions required to be applied would be applied.

[30] As noted above in this section, this change is reflected in the rule and is discussed in section II.C.4. of this document.

[31] As noted above, the commenter indicates that it agrees with EPA's proposed policy that incomplete submittals cannot temporarily stop the sanctions clock. The EPA's proposed policy did not state that incomplete submittals cannot *temporarily stop* the sanctions clock. Rather, EPA's proposed policy stated that incomplete submittals cannot permanently stop the sanctions clock initiated by a finding of failure to submit or incompleteness. Thus, in responding to the comment permanently stop has been substituted for temporarily stop.

authority to apply mandatory sanctions under section 179 upon those States that initially failed to make a submission (through failure to submit or by virtue of an incomplete submission) but which have subsequently submitted a complete plan. The submission of a complete plan is sufficient to stop a clock started for a failure to submit any or a complete plan because at that point the State has corrected the specific earlier deficiency of not having submitted a complete plan. Following this correction, the plain language of section 179 does not allow application of mandatory sanctions due to the original deficiency, but if the complete submission is later disapproved, a new sanction clock will begin to run and will continue to run until that specific deficiency is corrected.[32] The EPA believes that overall its policy is consistent with the language of section 179 and rational in that it recognizes that what the State must do to correct a deficiency relates directly to the nature of the finding, and that overall this policy will encourage compliance with Act requirements.

Finally, the Act contains due dates by which the State is required to submit certain SIP's. The EPA does not believe that Congress established the 18-month period before mandatory sanctions must apply as a grace period in which States have a legal right under section 179 to submit SIP's after the relevant statutory due date. In fact, EPA interprets section 110(m) of the Act as providing EPA with the authority to "* * * apply any of the sanctions listed in section 179(b) at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under * * * section 179(a) * * *." Therefore, EPA is not precluded from taking more aggressive action than required under section 179 when States fail to correct deficient plans.

4. Other Areas of Comment

This section addresses the remaining areas of the proposal where comment was received.

a. *Lack of Good Faith Determination.* Under section 179(a), both the offset and highway sanctions shall apply after 18 months if the Administrator finds a lack of good faith on the part of the State. In the proposal at page 51274, EPA indicated that any finding of a lack of good faith EPA makes under section 179(a) will be subject to notice-and-comment rulemaking.

One commenter believes that the final rule should define a "lack of good faith" and require application of both sanctions as a default where it exists. The commenter believes that some situations may require fact specific judgment, while others are so extreme that they presumptively prove the State has decided not to make a good faith effort at complying. The commenter believes that EPA need not undertake notice-and-comment rulemaking with respect to findings of a lack of good faith. Another commenter believes that the phrase "if the Administrator finds a lack of good faith on the part of the State" is subjective and ambiguous and needs defining.

In response to the comments, EPA still believes findings of a lack of good faith under section 179(a) must be subject to notice-and-comment since it is a discretionary action which requires exercise of a substantial degree of judgment on EPA's part. The public should have an opportunity to comment on the basis for these actions. Further, EPA does not yet have a policy on how to further define the Act's language, or when and where it plans to make findings of a lack of good faith other than the case-by-case approach described above. The notice-and-comment rulemaking will provide an opportunity for the public to comment on EPA's interpretation of a lack of good faith in each case-specific circumstance.

b. *Sanction Timing.* The proposal at page 51272 indicated that since section 179(a) provides for automatic sanction application once EPA has made the selection, under this sanction sequence rule sanctions will apply automatically in the order prescribed herein in all instances in which sanctions are applied following findings under section 179(a) (1)–(4) that EPA has already made or that EPA will make in the future, except when EPA takes a separate action to select a different sequence of sanction application. However, the proposal indicated that where the sanction clock expires for any findings before this action is final and effective and EPA has not taken independent sanction selection action, EPA interprets section 179(a) to provide that sanctions shall not apply until EPA makes the sanction selection through notice-and-comment rulemaking, such as this action.

At page 51272 of the proposal EPA also indicated that EPA intends to notify States of the automatic sanctions by letter and publish a document in the **Federal Register** in which EPA amends the language of the rule to indicate areas subject to the applicable sanctions. The proposal provided that if removal of sanctions is warranted, EPA would notify the State that sanctions are being removed and amend the rule to reflect that.

One commenter believes that EPA's interpretation of section 179 is incorrect and that section 179 unambiguously requires sanction application within 18 months of a finding. The commenter believes that Congress did not condition EPA's mandatory sanction application duty on completion of notice-and-comment rulemaking.

The plain reading of section 179(a) is that sanctions, "as selected by the Administrator," apply within certain prescribed timeframes. The section does not provide any guidance to EPA on sanction application sequence. Given this wide discretion, EPA believes that it is necessary for sanction selection to be subject to notice-and-comment in order to provide for public comment. The EPA interprets the phrase "as selected by the Administrator" as words of condition that must be met before mandatory sanctions apply. Indeed, EPA is undertaking this rulemaking to satisfy the conditional duty so that sanctions may apply automatically when sanctions clocks expire.

The EPA is also conducting this rulemaking to eliminate the future need (except to reverse the sanction sequence) for individual rulemakings for every finding with respect to part D requirements. The EPA believes in the long run this action will facilitate smooth application of sanctions to encourage State compliance and protect air quality.

c. *Notice and Comment for Nonsubmittal and Incompleteness Findings.* In the proposal at page 51272, EPA's view was that notice-and-comment is not required for findings of failure to submit because of insufficient time provided by the statute. Since EPA has less than 60 days to determine whether a State's submittal is complete, and it is impossible to provide notice-and-comment in 60 days, EPA believes that Congress clearly intended that EPA should not go through notice-and-comment rulemaking prior to making findings of failure to submit. Additionally, EPA argued that even if EPA's findings of failure to submit were subject to APA rulemaking procedures, EPA believed that the good cause exception to the rulemaking requirement applies (APA section 553(b)(B)). Section 553(b)(B)of the APA provides that EPA need not provide notice and an opportunity for comment if EPA determines that notice and comment are "impracticable,

[32] Furthermore, it appears that the approach articulated by this commenter (i.e., that sanctions clocks and FIP clocks are both stopped by EPA approval of a revised SIP) would present the problems recognized in reading out of section 110(c)(1) the clause "the Administrator approves the plan or plan revision" (*Boise Cascade*, 942 F.2d at 1432, and *NRDC* v. *EPA*, 822 F.2d at 113).

unnecessary, or contrary to the public interest." The EPA argued that notice and comment for findings of failure to submit does not require any judgment on the part of EPA and, therefore, is unnecessary.

One commenter states that under the APA, burdens such as sanctions cannot be imposed without notice-and-comment. The commenter argues that EPA provides no defense of its denial of public comment for findings of incompleteness and cannot defend such denial for findings of nonsubmittal and incompleteness. The commenter further argues the judgment of whether a SIP meets the SIP completeness criteria is often debatable and discretionary. Therefore, the commenter argues, the public should be able to comment.

Another commenter believes that EPA's proposal contradicts the spirit and letter of the notice-and-comment provisions in the Act. The commenter argues the proposal is contradictory on when it allows for public comment in some instances but not others.

In response to the comments, EPA maintains that notice and comment is not necessary for findings of failure to submit and incompleteness. The 60 days the Act provides EPA to determine whether a State submittal is complete does not provide sufficient time to conduct notice-and-comment rulemaking prior to making findings of failure to submit or findings of incompleteness. The EPA continues to believe that the impossibility of conducting notice-and-comment rulemaking within the 60 days provided for completeness decisions is itself compelling evidence that Congress did not intend such rulemaking. Additionally, EPA does not believe that notice and comment are necessary for findings of incompleteness because section 110(k)(1)(B) does not specifically require it. By enacting section 110(k)(1) on completeness, Congress was codifying an EPA practice created in late 1989 in which EPA did not provide notice-and-comment rulemaking before making incompleteness findings.[33] By codifying that practice and by not specifically requiring anything more than the process EPA already established, Congress appears to have adopted EPA's established process of making completeness determinations by letter. Moreover, EPA does not believe that the completeness determination is highly discretionary, but instead is a straightforward exercise to assure a State's submittal has all the basic elements to warrant further review for overall adequacy.

Regarding the APA, EPA continues to believe that even if EPA's findings of failure to submit and incompleteness were subject to rulemaking procedures under the APA, the good cause exception applies to such findings for the reasons discussed above. It would not be practicable to subject every completeness review to notice and comment because of the limited time afforded by the statute. It would also not be in the public's interest because it would impose a tremendous burden on the Agency and divert resources from more important substantive SIP reviews.

Regarding the consistency comment, EPA believes that it is adhering to the notice-and-comment provisions of the amended Act and the APA. Where it is appropriate, because the determination requires EPA judgment, EPA provides for notice and comment (i.e., for SIP disapprovals or findings of nonimplementation). Additionally, as EPA has done via this action, when EPA makes a sanction selection notice and comment are also provided. On the other hand, as discussed above, in other cases sufficient time does not exist to provide for notice and comment and the determinations themselves require little, if any, judgment. Finally, as discussed in section II.C.3., the final rule does not cover findings of substantial inadequacy under section 110(k)(5) for part D SIP's (so-called SIP calls), which were covered by the proposed rule, because of concerns about adequate notice and comment before sanctions are applied for State failure to respond to a SIP call. The EPA intends to develop an alternative approach for applying mandatory sanctions for State failure to respond to SIP calls that provides for notice and comment.

d. *PM–10 Waivers.* The proposal did not address the PM–10 waiver provisions in section 188(f) of the Act. The commenter expresses a frustration with the definition of PM–10 "significance" and argues that in the West, PM–10 levels above the standard are caused predominately by fugitive dust and mobile sources. Therefore, the commenter believes, applying 2-to-1 offsets to industrial sources will have a negligible effect on PM–10 24-hour concentrations.

A July 1992 draft addendum to the General Preamble (57 FR 31477, July 16, 1992) addresses several waiver policy issues, including significance levels. The EPA believes the comment period for that policy, rather than this action selecting sanctions, is the appropriate forum for comments on that issue. The EPA recognizes that in some nonattainment areas industrial sources may be less significant contributors. In those cases, EPA may decide to apply the highway sanction first, which this rule provides flexibility to do.

C. Summary of Changes in Rule

1. Section 52.31(a)—Purpose

Section 52.31(a) sets forth the purpose of this rulemaking, which is to establish the sequence of sanctions required to apply under section 179(a). The substance of this provision was not changed from the proposed rule.

2. Section 52.31(b)—Definitions

Section 52.31(b) sets forth the definitions applicable under 40 CFR 52.31. The definitions of "Act" and "1990 Amendments" are not substantively changed. However, the citations for these two definitions were inadvertently switched and they now correctly provide that the Act is located at 42 U.S.C. et seq. and the 1990 Amendments were set forth in Public Law 101–549.

In addition, several definitions were added. Since the regulation provides that the offset sanction only applies to the pollutant(s) that the finding concerns and its precursors, EPA has added a definition of "precursors." The EPA has also added a definition of "ozone precursors" which specifically identifies the two ozone precursors—VOC and NO_x.

The EPA has added a new definition for "affected area." This term, while used in the proposed rule (e.g., the tables), was not previously defined. Furthermore, its usage in the final rule has been expanded; in many places the word "area" has now been replaced by "affected area." The definition provides that an "affected area" is the geographic area subject to or covered by the Act requirement that is the subject of the finding and either, for purposes of the offset and highway sanctions, is or is within an area designated nonattainment area pursuant to 42 U.S.C. 7407(d) or, for purposes of the offset sanction, is or is within an area otherwise subject to the emission offset requirements of 42 U.S.C. 7503. As used in this rule, in conjunction with § 52.31(e) (1) and (2), the affected area is the area potentially subject to a

[33] Note that in promulgating the completeness criteria, EPA noted that the purpose of the completeness procedure is to "keep incomplete packages out of the more extensive review system (i.e., rulemaking for approval), thereby saving both EPA and the State valuable time" (54 FR 2138, 2139 (January 19, 1989)). Therefore, requiring rulemaking action to determine whether a SIP submittal is complete would defeat the purpose of the completeness criteria, which is to allow for a quick rejection of those submittals that are "essentially unreviewable" (*Id*).

sanction based on a finding. The new definition clarifies that the sanction applies to the geographic area subject to or covered by the requirement at issue in the finding. This will usually be the entire designated area, but in some instances may be a portion of a designated area. This point is made through the first portion of the definition. Moreover, since the affected area is the area in which a sanction applies, it was necessary to limit the definition to those areas that could be subject to a sanction. Therefore, the second portion of the definition restricts the definition of "affected area" by incorporating the geographic limits of the highway and offset sanctions. First, the highway sanction, as applied under section 179(a), is limited to nonattainment areas, since section 179(b)(1) provides that the highway sanction may be "applicable to a nonattainment area."[34] Second, by its terms, the offset sanction has effect only in those areas in which the offset requirements of section 173 are required to apply. (See 59 FR 1480 (January 11, 1994) for a further discussion of the geographic applicability of section 179(b) sanctions.) This includes all nonattainment areas. In addition, some attainment and unclassified areas (e.g., those located in the NOTR could be subject to the offset sanction, since those areas may be subject to the offset requirements of section 173, even though they are not designated nonattainment (see section 184, for example). Therefore, the second clause of the definition limits affected areas to nonattainment areas (which would be subject to both the highway and offset sanction) and areas otherwise subject to the emission offset requirements of section 173 (which would be subject to the offset sanctions).

Three examples illustrate how this definition applies. One, if EPA finds that a State fails to submit a PM–10 plan for a moderate PM–10 nonattainment area pursuant to section 189(a) and the State does not correct the deficiency within 18 months, then, pursuant to this rule, the offset sanction shall apply in the PM–10 nonattainment area whose boundaries are described in 40 CFR part 81. If 6 months later the deficiency remains uncorrected, then the highway sanction applies in the nonattainment area as well. In both cases the sanction applies only in the nonattainment area because that is the geographic area covered by the Act requirement.

[34] Section 171(2) defines "nonattainment area" as "an area which is designated 'nonattainment' with respect to (an air) pollutant within the meaning of section 107(d)."

Two, if EPA finds a State fails to submit a required SIP revision under the Act for a requirement that applies to only a portion of an area, then the sanctions apply to the portion of the area subject to the requirement and not the whole area. For example, the enhanced inspection and maintenance plan requirement for serious, severe, and extreme nonattainment areas applies only to "each urbanized area (in the nonattainment area) as defined by the Bureau of the Census, with a 1980 population of 200,000 or more" (see section 182(c)(3)(A)). Section 184 provides that for all areas within the NOTR, this requirement will apply to urbanized areas with a population in excess of 100,000. Therefore, this requirement could apply to a smaller area within a designated nonattainment, attainment or unclassified area. If the State fails to adopt the program for such an area, the section 179 sanctions would apply only to that smaller area.

Finally, if EPA finds that a State within the NOTR fails to submit a reasonably available control technology SIP for VOC required pursuant to section 184(b)(1)(B) with respect to all the sources in the State subject to this requirement, and the State does not correct the deficiency within 18 months, then, pursuant to this rule, the offset sanction would apply in the entire State. If 6 months later the deficiency remained uncorrected, then the highway sanction would apply to all of the nonattainment areas in the State. If there were no designated nonattainment areas within the State, the highway sanction would not apply in that State.

The remaining definitions remain substantively unchanged from those in the proposed rule.

3. Section 52.31(c)—Applicability

Section 52.31(c) establishes the applicability of the final rule. The portions of § 52.31(c) setting forth the findings that trigger the sanctions clock remain unchanged as these portions were taken directly from sections 179(a)(1)–(4). Generally, these findings are that a State has failed to submit a required SIP or SIP element, has submitted a SIP or SIP element that does not meet EPA's completeness criteria, has submitted a SIP that is not approvable, or that the State is failing to implement an approved SIP.

The portions of § 52.31(c) indicating the SIP requirements to which this rule applies have been modified. The proposal indicated the rule covers any part D SIP or SIP revision required under the Act, or any part D SIP or SIP revision required in response to a finding of substantial inadequacy under section 110(k)(5). This section of the final rule has been modified to cover only part D SIP and SIP revisions and not calls for part D SIP's or SIP revisions under section 110(k)(5). The final rule does not cover part D SIP calls because of concerns about applying sanctions for State failures to respond to such SIP calls following EPA nonsubmittal findings without opportunity for notice and comment. SIP calls are currently not subject to notice-and-comment. The public and affected sources must be given notice and opportunity to comment before SIP calls can have binding effect as a result of a section 179(a) finding that a State has failed to submit a SIP in response to a SIP call. Thus, if this rule were to apply to State failures to respond to SIP calls, mandatory sanctions could apply without an opportunity for such comment before new obligations become binding against affected sources. This would be inconsistent with the APA requirements of section 553. Therefore, as discussed in section II.C.3., the final rule does not cover part D SIP calls. The EPA will develop another approach to address SIP calls, providing an opportunity for notice and comment before mandatory sanctions apply for a State failure to respond to a SIP call.

4. Section 52.31(d)—Sanction Application Sequencing

Section 52.31(d)(1) is the heart of this rule in that it establishes the order in which the automatic sanctions under section 179(a) shall apply. Several clarifications have been made to the section.

One, this provision now requires affirmative EPA action to stop sanction clocks and lift sanctions following section 179(a) findings, including nonsubmittal and incompleteness findings. The EPA's proposed and final sanction clock policy provides that, following findings of nonsubmittal and incompleteness, sanction clocks are permanently stopped (and any sanctions applied are permanently lifted) when EPA finds the plan complete. Section 110(k)(1)(B) provides that a submittal is deemed complete if a completeness finding is not made by EPA within 6 months of EPA's receipt of the plan. Under this clarification to § 52.31(d), a SIP becoming complete by operation of law will not be sufficient to stop sanction clocks or for an area to avoid sanctions. The EPA will need to affirmatively determine that the SIP is complete in order for the sanction clock to stop and any sanctions to be lifted.

This policy clarification will henceforth govern what is required to

stop sanctions clocks and lift sanctions following findings of nonsubmittal and incompleteness, and the other section 179 findings. Prior to this policy clarification, in certain cases EPA did stop sanction clocks started by EPA findings of failure to submit or incompleteness by SIP submittals being deemed complete "by operation of law." The EPA believes that this approach was consistent with EPA guidance at the time and that it is appropriate to grandfather these areas under EPA's grandfathering guidance.

The EPA believes that after consideration of its grandfathering policy for SIP requirements[35] it is permissible to grandfather these cases from this policy clarification. The EPA's general grandfathering guidance provides that SIP revisions will remain subject to the requirements in effect on the date that the State adopts the SIP revision, provided a complete, fully adopted SIP revision is submitted promptly, generally within 60 days of the adoption. Since the policy clarification is effective by this action and all of the SIP submittals in question were adopted more than 60 days prior to September 6, 1994, under this general grandfathering, these cases are grandfathered. However, the guidance includes several exceptions to the general guidance which must be addressed before an action is considered by EPA to be grandfathered.

The first exception concerns the intent of the policy not to grandfather SIP's submitted hurriedly to avoid new requirements. In the cases at issue, such action has not occurred on the part of the State since the States have received no early, formal notification that the sanction clock policy is being clarified in the manner it is today.

The second exception to general guidance on grandfathering concerns situations where a court ruling has explicitly changed a current Federal requirement or has convinced EPA that a previous requirement is no longer supportable. Here no such court ruling is at issue so no exception should be made in this case.

The third exception is that the Administrator may determine that grandfathering is not appropriate under a new policy. In this case, the Administrator is determining that grandfathering is appropriate.

The fourth exception indicates that grandfathering is not appropriate if it would have an imminent and substantial adverse environmental effect or could permanently foreclose use of part D provisions such as sanctions. The EPA does not believe that grandfathering these areas from this policy clarification will have an imminent and substantial environmental impact given the limited number of areas and given that the States' submittals must be adequate to attain and maintain the relevant NAAQS before EPA can approve them. In addition, this grandfathering does not permanently foreclose the application of sanctions in these areas should EPA, through rulemaking, find the SIP submittals inadequate to attain and maintain the NAAQS and disapprove them.

The fifth exception provides that action on a SIP revision which comports with the revised requirements but not the original requirements may be based on the revised requirements. In this instance, this is indeed the case; conceivably, one or more of those SIP's deemed complete by operation of law may have lacked one or more of the elements needed for EPA to find a plan affirmatively complete. Nonetheless, EPA cannot fully approve a plan if any of the required completeness elements are lacking. For example, if a SIP submittal lacks compliance/enforcement strategies, one of technical elements required for completeness, then EPA could not fully approve the plan. Therefore, while EPA is grandfathering these SIP submittals from completeness, EPA is not grandfathering these areas from having adequate SIP's to attain and maintain the standards.

The sixth exception raises a concern as to whether grandfathering the SIP from the requirements in question would render the SIP as a whole substantially inadequate. Grandfathering these SIP submittals from this policy does not raise direct concern that doing so might render the SIP's substantially inadequate since the completeness review is not a review intended to pass judgement on the adequacy of SIP's. Rather, it is intended as a straightforward exercise to determine whether the SIP's contain all the technical and administrative elements to warrant further review. As discussed above, if any of these SIP submittals deemed complete by operation of law lack any such elements, then such deficiency will be reflected in EPA's determination as to the SIP's adequacy to attain and maintain the air quality standards.

The seventh exception concerns certain classes of changes which are only indirectly related to attainment and maintenance of the air quality standards. Completeness reviews are only indirectly related to attainment and maintenance of the standards in that the completeness review is not intended to be review of the SIP's adequacy to meet the standards. Therefore, the grandfathering of these SIP submittals from the policy clarification satisfies this exception as well.

Two, the phrase "affected area" has been substituted for "area." This is to clarify that the sanction only applies in affected areas, and not necessarily all areas for which EPA makes a section 179(a) finding. (See the discussion of "affected area" under the definitions section above.) Three, the second sentence regarding highway sanctions has been clarified to provide that correction of the deficiency "forming the basis of the finding" is needed to stop the clock. This language is consistent with the language included in the proposal section 52.31(d)(1) for the offset sanction in sentence 1 and consistent with the interpretation established in the preamble to the proposed rule at pages 51272–51273. This revision merely clarifies what deficiency needs to be corrected in order to stop the sanctions clock.

Finally, a new final sentence has been added to the section. The sentence provides that for clocks started by rulemaking actions (i.e., disapprovals and findings of failure to implement), the date of the finding starting the clock is the "effective date" of the action, not necessarily the date it is signed or the date it is published in the **Federal Register**. Since the disapproval or finding of failure to implement is not effective until the "effective date" of the final action, the sanctions clock should not start until such action is effective. Upon further reflection, EPA determined that the clarification should be included in the rule in order to ensure that the public is adequately apprised of when the sanctions clock has started for particular areas based on a rulemaking action.

The EPA has revised the final rule to add new sections §§ 52.31(d)(2), (d)(3), and (d)(4). In response to comments, these sections incorporate a revision made to the rule concerning how and when sanctions, not yet applied, may be deferred and sanctions, already applied, may be stayed. A complete discussion of the revisions is set forth in section II.B.3. above. These corrections concern the circumstance where EPA has disapproved a required submittal or where EPA has found that a State has failed to implement an approved SIP. Sections 52.31(d)(2) and 52.31(d)(3) set forth language concerning disapproved SIP's and § 52.31(d)(4) sets forth the

[35] See "'Grandfathering' of Requirements for Pending SIP Revisions," memorandum from Gerald A. Emison to Air Division Director, Regions I–X, June 27, 1988. This memorandum has been entered in the docket for this rulemaking.

language regarding cases where EPA has made a final finding of failure to implement. For purposes of an initial disapproval or an initial finding of failure to implement for which EPA subsequently proposes a positive finding and issues an interim final rule finding that the State has corrected the deficiency, any sanctions resulting from a clock that expires will be deferred and any sanctions that have been applied will be stayed. (A final conditional approval would continue any stay or deferral that resulted from a proposed conditional approval.) This change providing for a stay or deferral of sanctions does not change the rule's requirement that sanctions and sanctions clocks are not permanently stopped until EPA issues a final full approval or determination that a State is implementing its SIP.

A new § 52.31(d)(5) has been added which reaffirms what EPA actions are necessary for the mandatory sanctions process to permanently cease. Specifically, it provides that any sanction clock will be permanently stopped and sanctions applied, stayed or deferred will be permanently lifted upon a final EPA finding that the deficiency forming the basis of the finding has been corrected. For a sanctions clock and applied sanctions based on a finding of failure to submit or incompleteness, a finding that the deficiency has been corrected will occur by letter from EPA to the governor. For a sanctions clock or applied, stayed or deferred sanctions based on a SIP disapproval, a finding that the deficiency has been corrected will occur through a final notice in the **Federal Register** fully approving the revised SIP. For a sanctions clock or applied, stayed or deferred sanctions based on a finding of nonimplementation, a finding that the deficiency has been corrected will occur through a final notice in the **Federal Register** finding that the State is implementing the approved SIP.

Section 52.31(d)(6) is essentially unchanged from § 52.31(d)(2) of the proposed rule. This section makes clear that EPA may take rulemaking action in any specific circumstance to reverse the order in which sanctions will be applied under section 179(a). In other words, EPA can take rulemaking action so that the highway sanction would apply after 18 months and the offset sanction 6 months thereafter. Two minor, nonsubstantive, changes were made. First, EPA replaced the phrase "the EPA" with "the Administrator." Second, EPA changed the term "should" to "shall" to more firmly reflect the mandatory nature of the sanctions

5. Section 52.31(e)—Available Sanctions and Methods for Implementation

Section 52.31(e) sets forth the two sanctions that are applied by section 179(a). This rule, as did the proposed rule, interprets in greater detail the offset sanction provided under section 179(b)(2).

Regarding § 52.31(e)(1), applicability of the offset sanction, there have been several changes that are intended to more clearly capture the concepts in the proposed rule and the preamble to the proposed rule. The EPA has clarified the applicability of the offset sanction to PM–10 precursors, modified the rule for PM–10 and ozone precursors, and clarified the language in the rule regarding the pollutant applicability of the offset sanction when the SIP deficiency in question is not specific to a pollutant or pollutants. A discussion of these changes in the context of the specific sections follows.

The EPA has revised § 52.31(e)(1)(i) in several ways. First, EPA has removed the offset sanction table from the rule and decided to provide the public information on areas that will be potentially subject to sanctions in a separate **Federal Register** notice. As EPA makes clear elsewhere in this paragraph and the rule, the sanctions automatically apply in the timeframes prescribed under § 52.31(d), unless EPA determines that the State has corrected the relevant SIP deficiency forming the basis of the finding. The EPA never intended the inclusion of areas in a table in this rule to be necessary for sanctions to apply automatically. The EPA does believe that it must provide the public with as accurate information as possible on areas that may face sanctions and has elected to do so through notices in the **Federal Register** rather than through a table in the body of the rule. Substantively, there is no difference in the sense that areas will face sanctions in the timeframes prescribed under § 52.31(d) regardless of whether they are listed in a table in the rule or listed in a separate notice.

Second, EPA has added the clause "in the timeframe prescribed under § 52.31(d) of this section on those affected areas subject under § 52.31(d) to the offset sanction of this section." As noted above, sanctions apply automatically regardless of whether there is a table in the rule listing the areas subject to sanctions. Thus, this change was made to make it clear that the sanctions apply within the time frames set forth in § 52.31(d). To further clarify this point, a second change to proposed § 52.31(e)(1)(i) was to delete "following" in the clause referencing the offset ratio for pollutants and their precursors. The reason for this change is because the table has been deleted and thus no areas will be listed. The first sentence of § 52.31(e)(1)(i) continues to require that the 2 to 1 offsets be achieved for the pollutant or pollutants and any precursors for which the finding is made. (For further discussion of this issue, see section II.B.2.)

The EPA has added a second sentence to § 52.31(e)(1)(i). This sentence is partially derived from § 52.31(e)(1)(iv) of the proposed rule. The purpose of moving this sentence was to alleviate redundancy in the proposed rule. The first sentence of proposed § 52.31(e)(1)(iv) appeared to echo proposed § 52.31(e)(1)(i) by stating that offsets must be achieved for the pollutant(s) and its (their) precursors for which the finding was made. Therefore, EPA has not included the first sentence of proposed § 52.31(e)(1)(iv) in the final rule and has moved the second sentence of proposed § 52.31(e)(1)(iv) to final § 52.31(e)(1)(i). The sentence now located as the second sentence of § 52.31(e)(1)(i) continues to provide that if the underlying finding is not specific to one or more pollutants and their precursors, then the offset sanction shall apply to all pollutants and, as relevant, their precursors for which the area is subject to the new source requirement of section 173 of the Act. (See section II.B.2. for further discussion of pollutant applicability of the offset sanction.) This provision, of course, would apply to any area (nonattainment, attainment, or unclassified) that is the subject of the finding.

In its entirety, then, § 52.31(e)(1)(i) now provides: (1) That the emission offset sanction applies within the time specified in § 52.31(d), even though the rule now contains no offset sanction table; (2) that the ratio of emission reductions to increased emissions shall be 2:1; and (3) that the offset ratio shall apply to the one or more pollutants and their precursors for which the § 52.31(c) finding was made or to all pollutants and their precursors (for which the area is subject to the new source requirement of section 173 of the Act) if the finding was not pollutant specific.

The EPA has added new § 52.31(e)(1)(ii) to specifically address the issue of findings made with respect to ozone and its two precursors, VOC and NO_X. This was discussed generally in the preamble to the proposed rule at page 51276, footnote 18, although no specific language was included in the proposed rule. The Act establishes requirements for ozone nonattainment areas, some of which are specific for either VOC or NO_X. However, since the

general assumption is that both precursors are critical to ozone formation, EPA believes that even though a finding may be specific as to one ozone precursor, the offset sanction should apply for both precursors. However, there are two exceptions to this general requirement, both of which are based on the Act. First, affected areas that are designated nonattainment for ozone but that are not classified as marginal, moderate, serious, severe or extreme, are not required to achieve offsets under section 173 for NO_X. The second exception is for affected areas that have received a NO_X exemption from the NSR requirement pursuant to section 182(f). These two exceptions and the rationale for them are discussed in section II.B.2. above. A new § 52.31(e)(1)(iii) sets up a similar provision with respect to PM–10 precursors, which is also discussed in more detail in section II.B.2. above.

Section 52.31(e)(1)(iv) of the final rule has merely been renumbered. Section 52.31(e)(1)(iii) of the proposed rule previously contained these requirements and substantially remains unchanged. The preamble to the proposed rule at page 51276 provides that this section requires States to apply the offset sanction consistent with amended section 173, regardless of whether the State has approved NSR rules consistent with section 173 requirements. The purpose of this provision is to ensure that States that have been delinquent in meeting the NSR requirements of the amended Act are not benefitted by applying sanctions in accordance with NSR rules that are more lenient than required by the Act or by the absence of NSR requirements within the State. Under this section, therefore, all affected areas subject to the offset sanctions would be subject to similar requirements in achieving those offsets, as specified in the amended Act.

Section 52.31(e)(1)(v) of this rule is unchanged from § 52.31(e)(1)(v) of the proposed rule. The purpose of this provision is to establish when the increased offset requirement will be applied. As noted in section II.B.2. above, EPA received numerous comments on this issue. For purposes of applying the offset sanction, EPA had some flexibility in determining what permits would be subject to the increased offset requirement. As noted in section II.B.2., numerous commenters suggested other possibilities. For example, some suggested that the increased offset ratio only apply to permits for which an application was received after the date the offset sanction applied. As stated more fully in the detailed response to comments document located in the docket, EPA has determined that the offset sanction should have immediate effects in affected areas.

Section 52.31(e)(2) of the final rule sets forth the highway sanction. Several revisions have been made to this section. As with § 52.31(e)(1)(i), EPA has removed the highway sanction table from § 52.31(e)(2) of the proposed rule for the same reasons discussed above for why the offset sanction table was removed. Similarly, § 52.31(e)(2) includes new language that directly refers to the timing provisions of § 52.31(d). As with the similar revised language in § 52.31(e)(1)(i), this is merely to clarify that the highway sanction applies with respect to the times set forth in that subsection, even though the area is not listed in a table in the rule. In addition, a new sentence has been added which specifies that the highway sanction only applies to affected areas that are also nonattainment areas. Although this issue was not specifically addressed in the proposed rule, the proposed rule and the preamble to the proposed rule referred back to the section 179(b)(1) highway sanction requirement of the Act (58 FR 51274, 51279; § 51.32(e)(2) of the proposed rule.) Section 179(b)(1) states that "[t]he Administrator may impose a prohibition, applicable to a nonattainment area * * *." Therefore, EPA is incorporating this language, which was merely referenced in the proposed rule, into the final rule.

III. Implications of Today's Rulemaking

A. Implementation of the Sanctions

Section 179(a) provides that unless the deficiency prompting the finding (i.e., nonsubmittal, disapproval, and nonimplementation) has been corrected within the time periods prescribed therein one of the sanctions in section 179(b) "shall apply, as selected by the Administrator." Under this final rule, sanctions will apply automatically in the sequence prescribed herein in all instances in which mandatory sanctions are applied under section 179(a) following findings under section 179(a)(1)–(4) for part D plans or plan revisions that EPA has already made or that EPA will make in the future, except when EPA takes a separate action to reverse the sanction sequence. However, if the sanction clock has expired for any findings before September 6, 1994, no sanction has yet applied since EPA interprets section 179(a) to provide that sanctions shall not apply until EPA makes the sanction selection through notice-and-comment rulemaking. Since this action constitutes the final sanction selection rulemaking, the offset sanction begins to apply on any areas for which the sanction clock has elapsed on September 6, 1994. To understand the timing of the application of mandatory sanctions in these cases, it is first necessary to clarify the discussion in the proposal at p. 51274 on how the sanction clocks function under section 179(a).

Section 179(a) sets up two distinct sanction clocks. The Act states that if the State does not correct the deficiency within 18 months after a finding, one of the two available sanctions shall apply, as selected by the Administrator. It then provides that if the deficiency has not been corrected within 6 months thereafter, then both available sanctions shall apply. The EPA interprets this to mean that the second sanction always follows 6 months from the actual application of first, regardless of whether this would cause the application of the second sanction to be delayed beyond 24 months from the date of the finding. Therefore, on September 6, 1994 the offset sanction shall apply on any area(s) for which an 18-month sanction clock has elapsed and EPA has not determined that the State has not corrected the deficiency. Both sanctions shall then apply 6 months from that date if EPA has not determined the deficiency has been corrected by then.

The EPA intends to notify States of the application and removal of section 179 mandatory sanctions (as provided for in § 52.31(d) of this rule) before they apply. In addition, in its actions on submittals received after a section 179(a) finding, EPA will indicate what the effect of its action is on the sanctions clock and sanctions application. The following discussion explains how this will occur, first providing the examples where, prior to 18 months, EPA finally determines whether the State has corrected the deficiency prompting the finding, and then providing examples where EPA finally determines the deficiency has been corrected after month 18.

In the cases where, prior to 18 months, EPA completes its action determining that the State has corrected the section 179(a) deficiency, sanctions would not apply. The following two examples address instances in which EPA finally determines within 18 months of the finding that started the sanctions clock whether the State has corrected the deficiency and how EPA's action finding the State corrected the deficiency affects the sanction clock.

In the case where, within 18 months following a finding of nonsubmittal or incompleteness, EPA determines

whether a State's SIP submittal corrects the deficiency prompting the finding (i.e., is complete or incomplete), EPA will inform the State of whether the sanctions clock is stopped when it sends the completeness or incompleteness letter to the State. If the SIP submittal is incomplete, then the letter will indicate that the sanctions clock continues and that automatic sanctions will apply as prescribed by this rule. If the SIP submittal is complete, then the letter will indicate that the sanctions clock started by the prior finding of failure to submit or incompleteness permanently stops.

In the case where, within 18 months following a SIP disapproval or finding of nonimplementation, EPA determines whether the State has corrected the deficiency prompting the finding (i.e., whether the SIP is approvable or whether the nonimplementation deficiency has been corrected), EPA will indicate whether the sanctions clock is stopped when it takes final rulemaking action on the SIP.[36] If EPA finally disapproves the SIP or finally determines that the nonimplementation deficiency has not been corrected, then the **Federal Register** action will indicate that the sanctions clock continues and that automatic sanctions will apply as prescribed by this rule. If EPA finally approves the SIP or finally determines that the nonimplementation deficiency has been corrected, then the **Federal Register** action will indicate that the sanctions clock started by the prior disapproval or finding of nonimplementation permanently stops.

The following examples address how, following the section 179(a) findings, the States will be kept informed when EPA's actions on revised SIP's are not completed within 18 months of the finding's deficiency. As provided in this rule at § 52.31(d)(1) through (4), in explaining how the States will be kept informed, these examples address sanction removal, as well as sanction deferral and staying.

In EPA interim final determinations that the State has corrected the deficiency, issued simultaneously with EPA proposed approvals and proposed findings that States are implementing their SIP's (after EPA SIP disapprovals or findings of nonimplementation), EPA intends to notify interested parties, including States, of any deferral or staying of sanctions that will result from **Federal Register** actions proposing to approve SIP's or to find that the State is implementing its SIP, as provided for in § 52.31(d)(2), (3) and (4) of this rule. In these cases, EPA will also indicate to all interested parties whether sanctions are removed, apply or reapply when it takes subsequent final action on the plan in the **Federal Register**. If subsequently EPA's proposed positive finding is reversed, then in that action EPA will indicate that sanctions apply or reapply, as appropriate, and what sanctions, if any, apply subsequently. If EPA subsequently fully approves the revised plan, then in that action EPA will indicate that the sanctions clock permanently stops and that any sanctions previously applied due to the original disapproval or finding of failure to implement are removed.

In addition to these letters and **Federal Register** actions, the EPA will also periodically publish notices in the **Federal Register** in which EPA will provide the public with information on areas for which EPA has made findings and which, therefore, are likely to be subject to the offset and highway sanctions.[37] If removal, staying, or deferral of sanctions is warranted, EPA will similarly provide the public with information that sanctions have either been removed, stayed or deferred in the area. Finally, to supplement the various letters and actions discussed above, EPA will provide information on the status of sanction 12 findings on EPA's Technology Transfer Network (TTN).[38]

B. Areas Potentially Subject to Sanctions

The EPA has made section 179(a) findings of failure to submit and incompleteness for numerous submittals due under the amended Act. As explained in section II.C.5 above, EPA has elected to provide the public with information on areas potentially subject to sanctions in a separate notice that appears in the notice section of today's **Federal Register** rather than in tables in today's rule. Therefore, for further information on areas likely to face sanctions on September 6, 1994 see that other notice.

IV. Miscellaneous

A. Executive Order 12866

Under Executive Order 12866 (Order), (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Order. The Order defines "significant regulatory actions" 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, a sector of 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 interface 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 or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Order.

Pursuant to the terms of the Order, OMB has notified EPA that it considers this a "significant regulatory action" within the meaning of the Order. The EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Regulatory Flexibility Act

1. Proposal

The proposal includes a discussion of the impact of the rule on small entities at pages 51277–8. The regulatory flexibility analysis (RFA) (5 U.S.C. 600 et seq.) requires Federal agencies to identify potentially adverse impacts of Federal regulations upon small entities. Agencies are required to perform an RFA where the significant impacts are possible on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and governmental entities with populations of less than 50,000.

Because this action will have some impact, an initial RFA was prepared pursuant to EPA guidelines, which has been placed in the docket to this rulemaking. For the following three reasons, EPA believes the impact of this rule on small entities will be limited. First, any impact that may occur from the offset sanction is limited to sources defined as "major" for nonattainment

[36] As discussed above in section II.B.1., proposed approval (or a proposal that the nonimplementation deficiency had been corrected) following a SIP disapproval or nonimplementation finding has the effect of deferring and/or staying the application of sanctions. In this case, though, such proposal action would not have a deferral and/or staying effect because it is assumed (for the purposes of this example) that EPA completes final rulemaking action on the SIP within 18 months.

[37] In some cases, the letter and/or the action may be combined with another action relating to the submittal. For example, if following a disapproval EPA proposes to approve a SIP at month 20 after the offset sanction is in place, the interim final determination issued simultaneously with the proposed approval action would also serve to notify the public that application of the offset sanction has been stayed.

[38] The TTN is EPA's bulletin board system for making air quality information available to interested parties. For questions on what information is available on the TTN and how to access it, contact the systems operator (919) 541–5384).

NSR purposes, generally 100 tons per year (TPY) or more of a criteria pollutant, except in the more serious ozone nonattainment areas. The major sources most likely to also be small entities as defined pursuant to the RFA are in these more serious ozone areas where the major source TPY threshold has been lowered under part D of title I of the Act. Second, the amended Act also increases the nonattainment NSR offset ratio in the ozone nonattainment areas. The ratio ranges from 1.1-to-1 to 1.5-to-1, depending on the severity of the area's classification. Thus, any impact the 2-to-1 offset sanction will have may not be as significant in precisely those ozone nonattainment areas where small entities that are also major sources are most likely to exist. Third, as stated above, the only relevant impact period is 6 months in duration, since after that period the State will either have become subject to both sanctions or have corrected the deficiency and been relieved from any sanctions.

2. Comments

Section II.B.1. of this document includes several comments concerning the impact of the proposed rule. One additional comment is summarized here.

The commenter states that the lowering of the major source threshold under the Act exposes many more small sources to control and the likelihood of sanctions. The commenter believes that many such small sources are small businesses and that, contrary to the analysis in the proposal, an increase in the offset ratio of 0.5 could have a significant impact on the ability of businesses to find adequate offsets.

3. Response

The EPA believes that the final rule will have some impact on small entities. The lowering of the major source threshold could expose more sources to the offset sanction. The EPA does not disagree that in individual cases an increase in the offset ratio could have a significant impact on a small business. However, EPA believes that the impact of this rule on small entities will be limited for the second and third reasons discussed above. Additionally, EPA notes that the impact of this rule will also be lessened by the provision in final rules that provides for the deferral and/or staying of the application of sanctions in certain instances when EPA believes it is more likely than not a deficiency has been corrected (see discussion in section II.B.3. of this document). However, because this action will have some impact, a final RFA has been prepared pursuant to EPA guidelines, which has been placed in the docket to this rulemaking.

C. Paperwork Reduction Act

This rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

When the offset sanction applies, sources subject to it will not incur an additional information collection burden because sources are already required under the section 173 offset requirements to obtain an emission offset from between 1-to-1 and 1.5-to-1. When the offset sanction applies, it should not impose an additional information collection burden because sources will not have to provide any information in permit applications beyond that which is already required in the absence of the sanction. (For the information collection burden of new requirements of the amended Act for nonattainment NSR and prevention of significant deterioration, an information collection request is being prepared to support rulemaking changes to parts 51 and 52.)

When the highway sanction applies, the Secretary of DOT is required to determine which projects or grants should not be affected by the sanction and which, therefore, are exempt. This determination will be based on information readily available in existing documentation gathered for the purpose of evaluating the environmental, social, and economic impacts of different alternatives for transportation projects. These analyses are required for the preparation of environmental assessments and impact statements under the National Environmental Policy Act (NEPA), (42 U.S.C. sec. 4321 et seq.). Historically, exemption determinations by DOT for sanctions have been based on such NEPA documentation and have not necessitated additional information gathering and analysis by the States. In addition, since under NEPA final environmental documents must be approved by DOT, in most cases the NEPA documentation will already be in DOT's possession. Therefore, EPA does not believe that the highway sanction, when applied, will impose an additional information collection burden on the States.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, and Sulfur dioxide.

Dated: July 21, 1994.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, part 52 of title 40, Code of Federal Regulations, is amended as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 is revised to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart A—[Amended]

2. Subpart A is amended by adding a new § 52.31 to read as follows:

§ 52.31 Selection of sequence of mandatory sanctions for findings made pursuant to section 179 of the Clean Air Act.

(a) *Purpose.* The purpose of this section is to implement 42 U.S.C. 7509(a) of the Act, with respect to the sequence in which sanctions will automatically apply under 42 U.S.C. 7509(b), following a finding made by the Administrator pursuant to 42 U.S.C. 7509(a).

(b) *Definitions.* All terms used in this section, but not specifically defined herein, shall have the meaning given them in § 52.01.

(1) *1990 Amendments* means the 1990 Amendments to the Clean Air Act (Pub. L. No. 101–549, 104 Stat. 2399).

(2) *Act* means Clean Air Act, as amended in 1990 (42 U.S.C. 7401 *et seq.* (1991)).

(3) *Affected area* means the geographic area subject to or covered by the Act requirement that is the subject of the finding and either, for purposes of the offset sanction under paragraph (e)(1) of this section and the highway sanction under paragraph (e)(2) of this section, is or is within an area designated nonattainment under 42 U.S.C. 7407(d) or, for purposes of the offset sanction under paragraph (e)(1) of this section, is or is within an area otherwise subject to the emission offset requirements of 42 U.S.C. 7503.

(4) *Criteria pollutant* means a pollutant for which the Administrator has promulgated a national ambient air quality standard pursuant to 42 U.S.C. 7409 (i.e., ozone, lead, sulfur dioxide, particulate matter, carbon monoxide, nitrogen dioxide).

(5) *Findings* or *Finding* refer(s) to one or more of the findings, disapprovals, and determinations described in subsection 52.31 (c).

(6) *NAAQS* means national ambient air quality standard the Administrator has promulgated pursuant to 42 U.S.C. 7409.

(7) *Ozone precursors* mean nitrogen oxides (NO_x) and volatile organic compounds (VOC).

(8) *Part D* means part D of title I of the Act.

(9) *Part D SIP or SIP revision* or *plan* means a State implementation plan or plan revision that States are required to submit or revise pursuant to part D.

(10) *Precursor* means pollutant which is transformed in the atmosphere (later in time and space from point of emission) to form (or contribute to the formation of) a criteria pollutant.

(c) *Applicability*

This section shall apply to any State in which an affected area is located and for which the Administrator has made one of the following findings, with respect to any part D SIP or SIP revision required under the Act:

(1) A finding that a State has failed, for an area designated nonattainment under 42 U.S.C. 7407(d), to submit a plan, or to submit one or more of the elements (as determined by the Administrator) required by the provisions of the Act applicable to such an area, or has failed to make a submission for such an area that satisfies the minimum criteria established in relation to any such element under 42 U.S.C. 7410(k);

(2) A disapproval of a submission under 42 U.S.C. 7410(k), for an area designated nonattainment under 42 U.S.C. 7407(d), based on the submission's failure to meet one or more of the elements required by the provisions of the Act applicable to such an area;

(3)(i) A determination that a State has failed to make any submission required under the Act, other than one described under paragraph (c)(1) or (c)(2) of this section, including an adequate maintenance plan, or has failed to make any submission, required under the Act, other than one described under paragraph (c)(1) or (c)(2) of this section, that satisfies the minimum criteria established in relation to such submission under 42 U.S.C. 7410(k)(1)(A); or

(ii) A disapproval in whole or in part of a submission described under paragraph (c)(3)(i) of this section; or

(4) A finding that any requirement of an approved plan (or approved part of a plan) is not being implemented.

(d) *Sanction Application Sequencing*

(1) To implement 42 U.S.C. 7509(a), the offset sanction under paragraph (e)(1) of this section shall apply in an affected area 18 months from the date when the Administrator makes a finding under paragraph (c) of this section unless the Administrator affirmatively determines that the deficiency forming the basis of the finding has been corrected. To further implement 42 U.S.C. 7509(a), the highway sanction under paragraph (e)(2) of this section shall apply in an affected area 6 months from the date the offset sanction under paragraph (e)(1) of this section applies, unless the Administrator affirmatively determines that the deficiency forming the basis of the finding has been corrected. For the findings under paragraphs (c)(2), (c)(3)(ii), and (c)(4) of this section, the date of the finding shall be the effective date as defined in the final action triggering the sanctions clock.

(2)(i) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following the findings under paragraphs (c)(2) and (c)(3)(ii) of this section, if the State has submitted a revised plan to correct the deficiency prompting the finding and the Administrator, prior to 18 months from the finding, has proposed to fully or conditionally approve the revised plan and has issued an interim final determination that the revised plan corrects the deficiency prompting the finding, application of the offset sanction under paragraph (e)(1) of this section shall be deferred unless and until the Administrator proposes to or takes final action to disapprove the plan in whole or in part. If the Administrator issues such a proposed or final disapproval of the plan, the offset sanction under paragraph (e)(1) of this section shall apply in the affected area on the later of the date the Administrator issues such a proposed or final disapproval, or 18 months following the finding that started the sanctions clock. The highway sanction under paragraph (e)(2) of this section shall apply in the affected area 6 months after the date the offset sanction under paragraph (e)(1) of this section applies, unless the Administrator determines that the deficiency forming the basis of the finding has been corrected.

(ii) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following the findings under paragraphs (c)(2) and (c)(3)(ii) of this section, if the State has submitted a revised plan to correct the deficiency prompting the finding and after 18 but before 24 months from the finding the Administrator has proposed to fully or conditionally approve the revised plan and has issued an interim final determination that the revised plan corrects the deficiency prompting the finding, application of the offset sanction under paragraph (e)(1) of this section shall be stayed and application of the highway sanction under paragraph (e)(2) of this section shall be deferred unless and until the Administrator proposes to or takes final action to disapprove the plan in whole or in part. If the Administrator issues such a proposed or final disapproval of the plan, the offset sanction under paragraph (e)(1) of this section shall reapply in the affected area on the date the Administrator issues such a proposed or final disapproval. The highway sanction under paragraph (e)(2) of this section shall apply in the affected area on the later of 6 months from the date the offset sanction under paragraph (e)(1) of this section first applied in the affected area, unless the Administrator determines that the deficiency forming the basis of the finding has been corrected, or immediately if the proposed or final disapproval occurs more than 6 months after initial application of the offset sanction under paragraph (e)(1) of this section.

(iii) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following the findings under paragraphs (c)(2) and (c)(3)(ii) of this section, if the State has submitted a revised plan to correct the deficiency prompting the finding and more than 24 months after the finding the Administrator has proposed to fully or conditionally approve the revised plan and has issued an interim final determination that the revised plan corrects the deficiency prompting the finding, application of the offset sanction under paragraph (e)(1) of this section and application of the highway sanction under paragraph (e)(2) of this section shall be stayed unless and until the Administrator proposes to or takes final action to disapprove the plan in whole or in part. If the Administrator issues such a proposed or final disapproval, the offset sanction under paragraph (e)(1) of this section and the highway sanction under paragraph (e)(2) of this section shall reapply in the affected area on the date the Administrator issues such proposed or final disapproval.

(3)(i) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following the findings under paragraphs (c)(2) and (c)(3)(ii) of this section, if the State has submitted a revised plan to correct the deficiency prompting the finding and the Administrator, prior to 18 months from the finding, has conditionally-approved the revised plan and has issued an interim final determination that the revised plan corrects the deficiency prompting the finding,

application of the offset sanction under paragraph (e)(1) of this section shall be deferred unless and until the conditional approval converts to a disapproval or the Administrator proposes to or takes final action to disapprove in whole or in part the revised SIP the State submits to fulfill the commitment in the conditionally-approved plan. If the conditional approval so becomes a disapproval or the Administrator issues such a proposed or final disapproval, the offset sanction under paragraph (e)(1) of this section shall apply in the affected area on the later of the date the approval becomes a disapproval or the Administrator issues such a proposed or final disapproval, whichever is applicable, or 18 months following the finding that started the sanctions clock. The highway sanction under paragraph (e)(2) of this section shall apply in the affected area 6 months after the date the offset sanction under paragraph (e)(1) of this section applies, unless the Administrator determines that the deficiency forming the basis of the finding has been corrected.

(ii) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following the findings under paragraphs (c)(2) and (c)(3)(ii) of this section, if the State has submitted a revised plan to correct the deficiency prompting the finding and after 18 but before 24 months from the finding the Administrator has conditionally approved the revised plan and has issued an interim final determination that the revised plan corrects the deficiency prompting the finding, application of the offset sanction under paragraph (e)(1) of this section shall be stayed and application of the highway sanction under paragraph (e)(2) of this section shall be deferred unless and until the conditional approval converts to a disapproval or the Administrator proposes to or takes final action to disapprove in whole or in part the revised SIP the State submits to fulfill the commitment in the conditionally-approved plan. If the conditional approval so becomes a disapproval or the Administrator issues such a proposed or final disapproval, the offset sanction under paragraph (e)(1) of this section shall reapply in the affected area on the date the approval becomes a disapproval or the Administrator issues such a proposed or final disapproval, whichever is applicable. The highway sanction under paragraph (e)(2) of this section shall apply in the affected area on the later of 6 months from the date the offset sanction under paragraph (e)(1) of this section first applied in the affected area, unless the Administrator determines that the deficiency forming the basis of the finding has been corrected, or immediately if the conditional approval becomes a disapproval or the Administrator issues such a proposed or final disapproval, whichever is applicable, more than 6 months after initial application of the offset sanction under paragraph (e)(1) of this section.

(iii) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following the findings under paragraphs (c)(2) and (c)(3)(ii) of this section, if the State has submitted a revised plan to correct the deficiency prompting the finding and after 24 months from the finding the Administrator has conditionally approved the revised plan and has issued an interim final determination that the revised plan corrects the deficiency prompting the finding, application of the offset sanction under paragraph (e)(1) of this section and application of the highway sanction under paragraph (e)(2) of this section shall be stayed unless and until the conditional approval converts to a disapproval or the Administrator proposes to or takes final action to disapprove in whole or in part the revised SIP the State submits to fulfill its commitment in the conditionally-approved plan. If the conditional approval so becomes a disapproval or the Administrator issues such a proposed or final disapproval, the offset sanction under paragraph (e)(1) of this section and the highway sanction under paragraph (e)(2) of this section shall reapply in the affected area on the date the conditional approval becomes a disapproval or the Administrator issues such a proposed or final disapproval, whichever is applicable.

(4)(i) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following findings under paragraph (c)(4) of this section, if the Administrator, prior to 18 months from the finding, has proposed to find that the State is implementing the approved plan and has issued an interim final determination that the deficiency prompting the finding has been corrected, application of the offset sanction under paragraph (e)(1) of this section shall be deferred unless and until the Administrator preliminarily or finally determines, through a proposed or final finding, that the State is not implementing the approved plan and that, therefore, the State has not corrected the deficiency. If the Administrator so preliminarily or finally determines that the State has not corrected the deficiency, the offset sanction under paragraph (e)(1) of this section shall apply in the affected area on the later of the date the Administrator proposes to take action or takes final action to find that the finding of nonimplementation has not been corrected, or 18 months following the finding that started the sanctions clock. The highway sanction under paragraph (e)(2) of this section shall apply in the affected area 6 months after the date the offset sanction under paragraph (e)(1) of this section first applies, unless the Administrator preliminarily or finally determines that the deficiency forming the basis of the finding has been corrected.

(ii) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following findings under paragraph (c)(4) of this section, if after 18 months but before 24 months from the finding the Administrator has proposed to find that the State is implementing the approved plan and has issued an interim final determination that the deficiency prompting the finding has been corrected, application of the offset sanction under paragraph (e)(1) of this section shall be stayed and application of the highway sanction under paragraph (e)(2) of this section shall be deferred unless and until the Administrator preliminarily or finally determines, through a proposed or final finding, that the State is not implementing the approved plan and that, therefore, the State has not corrected the deficiency. If the Administrator so preliminarily or finally determines that the State has not corrected the deficiency, the offset sanction under paragraph (e)(1) of this section shall reapply in the affected area on the date the Administrator proposes to take action or takes final action to find that the finding of nonimplementation has not been corrected. The highway sanction under paragraph (e)(2) of this section shall apply in the affected area on the later of 6 months from the date the offset sanction under paragraph (e)(1) of this section first applied in the affected area, unless the Administrator preliminarily or finally determines that the deficiency forming the basis of the finding has been corrected, or immediately if EPA's proposed or final action finding the deficiency has not been corrected occurs more than 6 months after initial application of the offset sanction under paragraph (e)(1) of this section.

(iii) Notwithstanding paragraph (d)(1) of this section, to further implement 42 U.S.C. 7509(a), following findings under paragraph (c)(4) of this section, if after 24 months from the finding the

Administrator has proposed to find that the State is implementing the approved plan and has issued an interim final determination that the deficiency prompting the finding has been corrected, application of the offset sanction under paragraph (e)(1) of this section and the highway sanction under paragraph (e)(2) of this section shall be stayed unless and until the Administrator preliminarily or finally determines, through a proposed or final finding, that the State is not implementing the approved plan, and that, therefore, the State has not corrected the deficiency. If the Administrator so preliminarily or finally determines that the State has not corrected the deficiency, the offset sanction under paragraph (e)(1) of this section and the highway sanction under paragraph (e)(2) of this section shall reapply in the affected area on the date the Administrator proposes to take action or takes final action to find that the finding of nonimplementation has not been corrected.

(5) Any sanction clock started by a finding under paragraph (c) of this section will be permanently stopped and sanctions applied, stayed or deferred will be permanently lifted upon a final EPA finding that the deficiency forming the basis of the finding has been corrected. For a sanctions clock and applied sanctions based on a finding under paragraphs (c)(1) and (c)(3)(i) of this section, a finding that the deficiency has been corrected will occur by letter from the Administrator to the State governor. For a sanctions clock or applied, stayed or deferred sanctions based on a finding under paragraphs (c)(2) and (c)(3)(ii) of this section, a finding that the deficiency has been corrected will occur through a final notice in the **Federal Register** fully approving the revised SIP. For a sanctions clock or applied, stayed or deferred sanctions based on a finding under paragraph (c)(4) of this section, a finding that the deficiency has been corrected will occur through a final notice in the **Federal Register** finding that the State is implementing the approved SIP.

(6) Notwithstanding paragraph (d)(1) of this section, nothing in this section will prohibit the Administrator from determining through notice-and-comment rulemaking that in specific circumstances the highway sanction, rather than the offset sanction, shall apply 18 months after the Administrator makes one of the findings under paragraph (c) of this section, and that the offset sanction, rather than the highway sanction, shall apply 6 months from the date the highway sanction applies.

(e) *Available Sanctions and Method for Implementation*

(1) *Offset sanction.* (i) As further set forth in paragraphs (e)(1)(ii)–(e)(1)(vi) of this section, the State shall apply the emissions offset requirement in the timeframe prescribed under paragraph (d) of this section on those affected areas subject under paragraph (d) of this section to the offset sanction. The State shall apply the emission offset requirements in accordance with 42 U.S.C. 7503 and 7509(b)(2), at a ratio of at least two units of emission reductions for each unit of increased emissions of the pollutant(s) and its (their) precursors for which the finding(s) under paragraph (c) of this section is (are) made. If the deficiency prompting the finding under paragraph (c) of this section is not specific to one or more particular pollutants and their precursors, the 2-to-1 ratio shall apply to all pollutants (and their precursors) for which an affected area within the State listed in paragraph (e)(1)(i) of this section is required to meet the offset requirements of 42 U.S.C. 7503.

(ii) Notwithstanding paragraph (e)(1)(i) of this section, when a finding is made with respect to a requirement for the criteria pollutant ozone or when the finding is not pollutant-specific, the State shall not apply the emissions offset requirements at a ratio of at least 2-to-1 for emission reductions to increased emissions for nitrogen oxides where, under 42 U.S.C. 7511a(f), the Administrator has approved an NO_X exemption for the affected area from the Act's new source review requirements under 42 U.S.C. 7501–7515 for NO_X or where the affected area is not otherwise subject to the Act's new source review requirements for emission offsets under 42 U.S.C. 7501–7515 for NO_X.

(iii) Notwithstanding paragraph (e)(1)(i) of this section, when a finding under paragraph (c) of this section is made with respect to PM–10, or the finding is not pollutant-specific, the State shall not apply the emissions offset requirements, at a ratio of at least 2-to-1 for emission reductions to increased emissions to PM–10 precursors if the Administrator has determined under 42 U.S.C. 7513a(e) that major stationary sources of PM–10 precursors do not contribute significantly to PM–10 levels which exceed the NAAQS in the affected area.

(iv) For purposes of applying the emissions offset requirement set forth in 42 U.S.C. 7503, at the 2-to-1 ratio required under this section, the State shall comply with the provisions of a State-adopted new source review (NSR) program that EPA has approved under 42 U.S.C. 7410(k)(3) as meeting the nonattainment area NSR requirements of 42 U.S.C. 7501–7515, as amended by the 1990 Amendments, or, if no plan has been so approved, the State shall comply directly with the nonattainment area NSR requirements specified in 42 U.S.C. 7501–7515, as amended by the 1990 Amendments, or cease issuing permits to construct and operate major new or modified sources as defined in those requirements. For purposes of applying the offset requirement under 42 U.S.C. 7503 where EPA has not fully approved a State's NSR program as meeting the requirements of part D, the specifications of those provisions shall supersede any State requirement that is less stringent or inconsistent.

(v) For purposes of applying the emissions offset requirement set forth in 42 U.S.C. 7503, any permit required pursuant to 42 U.S.C. 7503 and issued on or after the date the offset sanction applies under paragraph (d) of this section shall be subject to the enhanced 2-to-1 ratio under paragraph (e)(1)(i) of this section.

(2) *Highway Funding Sanction.* The highway sanction shall apply, as provided in 42 U.S.C. 7509(b)(1), in the timeframe prescribed under paragraph (d) of this section on those affected areas subject under paragraph (d) of this section to the highway sanction, but shall apply only to those portions of affected areas that are designated nonattainment under 40 CFR part 81.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL–5023–2]

Notice of Areas Potentially Subject to Sanctions Based on Findings Issued Under Section 179 of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice lists those areas for which EPA had previously issued a finding, under the Clean Air Act (Act), and for which the 18-month mandatory sanction clock had expired on or before July 15, 1994 or is projected to expire through August 31, 1994. If these areas do not correct the outstanding deficiencies before the effective date of the "Selection of Sequence of Mandatory Sanctions Rule" (sanctions rule), which is found in today's **Federal Register** in the rules section and becomes effective September 6, 1994, these areas would be subject to sanctions. The sanctions rule describes in detail the process by which sanctions will apply to areas that do not meet deadlines specified in the Act and for which findings are made.

As noted in the list, the vast majority of areas plan to take corrective action before the sanctions rule goes into effect. However, any area that does not take the required action before that time will be subject to the 2 to 1 emissions offset sanction (offset sanction) as provided by the Act. Futhermore, in most cases, if EPA has not determined that the deficiency has been corrected within 6 months of the imposition of the offset sanction, the second sanction, affecting Federal highway funding, will also apply.

ADDRESS(ES): Air Docket A–94–41, The Air and Radiation Docket and Information Center (6202), Environmental Protection Agency, 401 M St. SW., Room M–1500, Washington, DC 20460.

SUPPLEMENTARY INFORMATION: The table below lists those areas with active sanctions clocks resulting from a finding. This table should not be used as the sole guide to determine which areas will be subject to sanctions when the sanctions rule goes into effect. In fact, it is likely that today's list may be obsolete with respect to many areas by the effective date of the sanctions rule because these areas will have corrected the relevant deficiency by that date. It is important to note that the enclosed table reflects only those areas for which clocks had expired as of July 15, 1994 or is projected to expire through August 31, 1994. There are other sanctions clocks running under the Act (e.g., any area that has not yet made a complete submission to EPA for State implementation plan (SIP) elements due on November 15, 1993). In the future, other sanction clocks will be initiated if EPA finds that a State has failed to make a required submittal, if EPA determines that a State submittal is incomplete, if EPA disapproves a State submission, or if a State fails to implement an approved plan.

The EPA will periodically provide the public with access to updated information through the Office of Air Quality Planning and Standards' Technology Transfer Network computer bulletin board system and through updates of this information in the **Federal Register**. These updates will indicate cases in which sanctions have been deferred or stayed, delete areas for which EPA has made a final determination that the deficiencies prompting the findings have been corrected, and add additional areas as findings are made triggering sanctions clocks. Furthermore, EPA will publish a notice with a similar table, as appropriate, for areas that later may be subject to the highway sanction.

For each area potentially subject to the offset sanction on the effective date of the sanctions rule, the table below identifies the State, the affected area, the type of finding the area received, the SIP element, the pollutants affected by the offset sanction, the date the sanctions clock expires, and the corrective actions needed to stop the sanctions clock.

The "Affected Area" column lists the area in which the offset sanction would apply if the deficiencies are not corrected by the effective date of the sanctions rule. For more information on the boundaries of any listed area, the public can refer to 40 CFR part 81, which sets forth the designations for areas and establishes their boundaries. Footnoted areas are included because a SIP submittal was disapproved. All other areas are included as a result of a finding of nonsubmittal or incompleteness. The full set of letters reflecting the findings of nonsubmittal or incompleteness that EPA has already issued can be found in Air Docket A–94–41. Please refer to the sanctions rule for a discussion on the significance of finding type.

The "State Implementation Plan Element" column describes the SIP element on which the finding was based. Abbreviations are as follows: VOC—volatile organic compounds, CO—carbon monoxide, NOx—nitrogen oxides, PM–10—particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers. The SIP elements and their respective sections in the Act are as follows: VOC Reasonably Available Control Technology Fix-ups—section 182(a)(2)(A); PM–10 SIP Attainment Demonstration—section 189(a); Emission Statements—section 182(a)(3)(B); PM–10 New Source Review—sections 172(c)(5) and 189(a)(1)(A); Basic Vehicle Inspection and Maintenance—for ozone, section 182(b)(4), and for CO, section 187(a)(4); Enhanced Vehicle Inspection and Maintenance—section 182(c)(3)(A); VOC Reasonably Available Control Technology Catch-up—section 182(b)(2); NOx Reasonably Available Control Technology Rules—section 182(b)(2) and (f); Employer Commute Option Program—section 182(d)(2); Oxygenated Fuels—for serious areas, section 187(b)(3) and for moderate areas, section 211(m); CO Contingency Measures—section 187(a)(3); CO Attainment Demonstration—section 187(a)(7).

The "Pollutants Affected" column describes which pollutants and their precursors would be affected should the offset sanction be applied. The preamble of the sanctions rule explains when precursors will be subject to the offset sanction. The "Date Sanction Clock Expires" column is the date the 18-month sanction clock expires. In the future, this column will include information on the deferral and stay of any sanction under § 52.31(d) of the sanctions rule. The "Corrective Actions Needed" column provides specific actions that must be completed to stop imposition of sanctions for each area on the list.

STATUS OF SANCTIONS CLOCKS

[Outstanding State Plan Submittals as of July 15, 1994]

State	Affected area	State implementation plan element	Pollutants affected	Date sanction clock expires	Corrective actions needed
AZ	Phoenix area	Ozone New Source Review.	VOC, NOx	07/15/94	The State and Maricopa County adoption of rules is scheduled for August 9, 1994. The State and County are expected to submit plans to EPA on August 12. The EPA expects to issue completeness determinations by August 31.
AZ	Phoenix area	VOC Reasonably Available Control Technology Catch-up.	VOC, NOx	07/15/94	Maricopa County adoption of rules is scheduled for August 5, 1994. The State is expected to submit the plan to EPA on August 10. The EPA expects to issue a completeness determination by August 17.
AZ	Maricopa County; Phoenix planning area.	PM–10 New Source Review.	PM–10 and precursors.	07/15/94	The State and Maricopa County adoption of rules is scheduled for August 9, 1994. The State and County are expected to submit plans to EPA on August 12. The EPA expects to issue completeness determinations by August 31.
AZ	Pima County; Ajo planning area.	PM–10 New Source Review.	PM–10 and precursors.	07/15/94	The State and Pima County adoption of rules is scheduled for August 9, 1994. The State and County are expected to submit plans to EPA on August 12. The EPA expects to issue completeness determinations by August 31.
AZ	Pima County; Rillito planning area.	PM–10 New Source Review.	PM–10 and precursors.	07/15/94	The State and Pima County adoption of rules is scheduled for August 9, 1994. The State and County are expected to submit plans to EPA on August 12. The EPA expects to issue completeness determinations by August 31.
AZ	Pima County; Rillito planning area.	PM–10 Attainment Demonstration.	PM–10 and precursors.	11/14/93	The State plan was submitted to EPA on April 22, 1994. The EPA expects to issue a completeness determination by August 15.
AZ	Yuma County; Yuma planning area.	PM–10 Attainment Demonstration.	PM–10 and precursors.	11/14/93	The State expects to submit the plan to EPA on July 18, 1994. The EPA expects to issue a completeness determination by August 15.
CA	Los Angeles-South Coast Air Basin area.	CO Contingency Measures.	CO	07/15/94	The State expects to submit the plan to EPA on July 18, 1994. The EPA expects to issue a completeness determination by July 22.
CA	Los Angeles-South Coast Air Basin area[1].	VOC Reasonably Available Control Technology Fix-up.	VOC, NOx	05/26/94	The State plan was submitted to EPA on May 24, 1994. The EPA expects to publish an action in the FEDERAL REGISTER by August 19.
CA	Sacramento Metro area.	VOC Reasonably Available Control Technology Catch-up.	VOC, NOx	07/15/94	The State plan was submitted to EPA on July 13, 1994. The EPA expects to issue a completeness determination by July 22.
CA	San Diego area	Ozone New Source Review.	VOC, NOx	07/15/94	The State plan was submitted to EPA on July 18, 1994. The EPA expects to issue a completeness determination by July 22.
CA	San Diego area	VOC Reasonably Available Control Technology Catch-up..	VOC, NOx	07/15/94	The State plan was submitted to EPA on July 13, 1994. The EPA expects to issue a completeness determination by July 22.
CA	San Diego area[1]	VOC Reasonably Available Control Technology Fix-up.	VOC, NOx	05/26/94	The State plan was submitted to EPA on May 24, 1994. The EPA expects to publish an action in the FEDERAL REGISTER by August 19.
CA	San Francisco-Bay area[1].	VOC Reasonably Available Control Technology Fix-up.	VOC, NOx	05/26/94	The State plan was submitted to EPA on July 13, 1994. The EPA expects to publish an action in the FEDERAL REGISTER by August 19.

STATUS OF SANCTIONS CLOCKS—Continued

[Outstanding State Plan Submittals as of July 15, 1994]

State	Affected area	State implementation plan element	Pollutants affected	Date sanction clock expires	Corrective actions needed
CA	San Joaquin Valley area.	VOC Reasonably Available Control Technology Catch-up.	VOC, NOx	07/15/94	The State plan was submitted to EPA on July 13, 1994. The EPA expects to issue a completeness determination by July 22.
CA	Santa Barbara-Santa Maria-Lompoc area.	VOC Reasonably Available Control Technology Catch-up.	VOC, NOx	07/15/94	The State plan was submitted to EPA on July 13, 1994. The EPA expects to issue a completeness determination by July 22.
CA	Southeast Desert Modified AQMA area.	VOC Reasonably Available Control Technology Catch-up.	VOC, NOx	07/15/94	The State plan was submitted to EPA on July 13, 1994. The EPA expects to issue a completeness determination by July 22.
IN	Lake and Porter Counties portion of Chicago-Gary-Lake County area.	VOC Reasonably Available Control Technology Catch-up.	VOC, NOx	07/15/94	The State Board is expected to adopt the rule on August 3, 1994. The rule would become effective on August 6. The State expects to submit the plan to EPA by August 10. The EPA expects to issue a completeness determination by August 15.
MD	Baltimore area	Employer Commute Option.	VOC, NOx	07/19/94	The State submitted a preliminary plan to EPA on July 15, 1994. The State expects to adopt the rule on August 5, and submit the final rule to EPA shortly thereafter. The EPA expects to issue a completeness determination by August 15.
MD	Cecil County Portion of Philadelphia-Wilmington-Trenton area.	Employer Commute Option.	VOC, NOx	07/19/94	The State submitted a preliminary plan to EPA on July 15, 1994. The State expects to adopt the rule on August 5, and submit the final rule to EPA shortly thereafter. The EPA expects to issue a completeness determination by August 15.
ME	Knox County and Lincoln County.	NOx Reasonably Available Control Technology Rules.	VOC, NOx	07/15/94	A State-wide rule was sent out for public comment on June 15, 1994. The State expects to adopt the rule by July 20 and submit it to EPA by August 15. The EPA expects to issue a completeness determination by August 22.
ME	Lewiston-Auburn area.	NOx Reasonably Available Control Technology Rules.	VOC, NOx	07/15/94	A State-wide rule was sent out for public comment on June 15, 1994. The State expects to adopt the rule by July 20 and submit it to EPA by August 15. The EPA expects to issue a completeness determination by August 22.
ME	Portland area	NOx Reasonably Available Control Technology Rules.	VOC, NOx	07/15/94	A State-wide rule was sent out for public comment on June 15, 1994. The State expects to adopt the rule by July 20 and submit it to EPA by August 15. The EPA expects to issue a completeness determination by August 22.
ME	Rest of State (Attainment and Marginal areas in Northeast Ozone Transport Region).	NOx Reasonably Available Control Technology Rules.	VOC, NOx	07/15/94	A State-wide rule was sent out for public comment on June 15, 1994. The State expects to adopt the rule by July 20 and submit it to EPA by August 15. The EPA expects to issue a completeness determination by August 22.
MO	St. Louis area	Basic Vehicle Inspection and Maintenance.	VOC, NOx	07/15/94	Necessary legislation was passed in May 1994, but will not go into effect until August 28. The State has scheduled a public hearing on July 28 and expects to adopt an emergency rule that will become effective on August 28. The State will then submit the plan to EPA and EPA expects to issue a completeness determination shortly thereafter.

STATUS OF SANCTIONS CLOCKS—Continued

[Outstanding State Plan Submittals as of July 15, 1994]

State	Affected area	State implementation plan element	Pollutants affected	Date sanction clock expires	Corrective actions needed
TN	Memphis area	Oxygenated Fuels (for moderate areas).	CO	07/15/94	The EPA expects to publish a direct final FEDERAL REGISTER notice approving the State's request for redesignation by July 22, 1994. The EPA expects to make the final action effective shortly after August 22.
TN	Memphis area	Basic Vehicle Inspection and Maintenance.	CO	07/15/94	The EPA expects to publish a direct final FEDERAL REGISTER notice approving the State's request for redesignation by July 22, 1994. The EPA expects to make the final action effective shortly after August 22.
TN	Nashville area	Ozone New Source Review.	VOC, NOx	07/15/94	The State has indicated the rule will be effective August 15, 1994 and submitted to EPA by August 16. The EPA expects to issue a completeness determination by August 18.
VT	Burlington Metropolitan Statistical area.	Enhanced Vehicle Inspection and Maintenance.	VOC, NOx	07/15/94	The State legislature needs to authorize the program and will not reconvene until January 1995.
VT	Entire State (Attainment areas in Northeast Ozone Transport Region).	VOC Reasonably Available Control Technology Catch-up.	VOC, NOx	07/15/94	The EPA has determined that the State has made a complete submittal for 10 of 11 required rules. The remaining rule will go into effect on August 17, 1994. The State expects to submit the plan to EPA by August 19. The EPA expects to issue a completeness determination by August 22.
WV	Charleston area	Basic Vehicle Inspection and Maintenance.	VOC, NOx	07/15/94	The EPA proposed redesignation approval of this area to attainment on June 13, 1994. The comment period closed; no adverse comments were received. Final redesignation approval is expected by August 15.
WV	Huntington-Ashland area.	Basic Vehicle Inspection and Maintenance.	VOC, NOx	07/15/94	The EPA expects to publish a direct final FEDERAL REGISTER notice approving the State's request for redesignation by August 15, 1994. The EPA expects to make the final action effective shortly after September 15.
WV	Parkersburg-Marietta area.	Basic Vehicle Inspection and Maintenance.	VOC, NOx	07/15/94	The EPA proposed redesignation approval of this area to attainment on June 10, 1994. The comment period closed; no adverse comments were received. Final redesignation approval is expected by August 15.

[1] These plans were formally disapproved because they did not fully meet EPA published requirements. The final disapproval started an 18-month sanction clock, which expired in May 1994. To stop the sanctions clock, EPA must finalize an approval action in the FEDERAL REGISTER incorporating a revision that corrects the deficiencies in the State plan. Sanctions may be stayed or deferred based on a determination that the deficiency has been corrected. This determination would be made by an interim final rule published on or after the time EPA has proposed approval of the plan.

Dated: July 21, 1994.

Mary D. Nichols,

Assistant Administrator.

[FR Doc. 94–18571 Filed 8–3–94; 8:45 am]

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Federal Register

Thursday
August 4, 1994

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Species: Cuyamaca Lake Downingia; San Diego Fairy Shrimp; Laguna Mountains Skipper, et al.; Proposed Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AC84

Endangered and Threatened Wildlife and Plants; Proposed Rule To List the Laguna Mountains Skipper and Quino Checkerspot Butterflies as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and petition findings.

SUMMARY: The Fish and Wildlife Service (Service) proposes to list the Laguna Mountains skipper (*Pyrgus ruralis lagunae*) and quino checkerspot (*Euphydryas editha quino*) butterflies as endangered species throughout their respective ranges in southwestern California and northwestern Baja California, Mexico pursuant to the Endangered Species Act of 1973, as amended (Act). The Laguna Mountains skipper occupies two montane meadow habitats in a very restricted range within San Diego County, California. The quino checkerspot is locally distributed in sunny openings within chaparral and coastal sage shrublands in portions of Riverside County, California and northwestern Baja California, Mexico. These species are threatened by one or more of the following factors: Grazing, urban development, collection by lepidopterists and other human disturbance, stochastic events, and the inadequacy of existing regulatory mechanisms to provide for their conservation. This proposed rule, if made final, would extend protection under the Act to these species.

DATES: Comments from all interested parties must be received by October 3, 1994. Public hearing requests must be received by September 19, 1994.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Field Office, 2730 Loker Avenue West, Carlsbad, California 92008. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Marjorie Nelson at the above address (telephone 619/431–9440).

SUPPLEMENTARY INFORMATION:

Background

The Laguna Mountains skipper (*Pyrgus ruralis lagunae*) is a small butterfly within the skipper family (Hesperiidae). It is about 3 centimeters (cm) (1 inch) in length and is distinguished from the rural skipper (*P. ruralis ruralis*) by extensive white wing markings that give it an overall appearance of white rather than mostly black (Scott 1981). The Laguna Mountains skipper is found in wet montane meadow habitats.

Pyrgus ruralis lagunae is one of two recognized subspecies of the rural skipper, *Pyrgus ruralis* (Boisduval). Scott (1981) first described *Pyrgus ruralis lagunae* from a collection made in 1956 by F. Thorne in the Laguna Mountains of San Diego County California, based upon population isolation and color differentiation. The Laguna Mountains skipper is restricted to the Laguna Mountains and Mount Palomar in San Diego County.

The other subspecies of the rural skipper (*Pyrgus ruralis ruralis*) ranges from the mountains of British Columbia and Alberta south to central California, Nevada, Utah, and northern Colorado (J. Brown, Dudek and Associates, *in litt.*, 1992) and has darker wings than the Laguna Mountains skipper.

Three other species in the genus *Pyrgus* occur in San Diego County: the common checkered skipper (*P. communis*); the small checkered skipper (*P. scriptura*); and the western checkered skipper (*P. albescens*). The Laguna Mountains skipper can be distinguished from all three of these species by the whitish appearance of the adults and the use of a single larval host plant in the rose family (*Horkelia clevelandi*) (Garth and Tilden 1986, Scott 1986). In addition, the western checkered skipper and southern California populations of the small checkered skipper are restricted to desert areas (Garth and Tilden 1986).

The Laguna Mountains skipper is currently found at one site in the Laguna Mountains and one site on Mount Palomar in San Diego County, California (Dr. John Brown, *in litt.*, 1992). The total population of the Laguna Mountains skipper is estimated to be fewer than 100 individuals (Murphy 1990; Brown 1991; J. Brown, *in litt.*, 1992). The Laguna Mountains population is restricted to a relatively small fenced area where cattle cannot reach the larval host plant (G. Pratt, as cited *in* Murphy 1990; Dave Hogan, San Diego Biodiversity Project, pers. comm., 1993). The Laguna Mountains skipper was sighted and collected on Mount Palomar in 1991 by D. Lindsley (J. Brown, *in litt.*, 1992; Dr. John Brown, pers. comm., 1993). The Mount Palomar population is extremely small where only five specimens have been reported in this century (J. Brown, *in litt.*, 1992).

Horkelia clevelandi (Cleveland's horkelia) is the larval host plant of the Laguna Mountains skipper. Cleveland's horkelia occurs along the margins of pine meadows in the Laguna, Cuyamaca, Palomar, and San Jacinto Mountains of southwestern California and northwestern Baja California, Mexico at 1200 to 2500 meters (m) (4000 to 8000 feet) in elevation. Although a butterfly's distribution is generally defined by the presence of its larval host plant, it may be further restricted by other physiological or ecological constraints. The Laguna Mountains skipper is currently found in a few open meadows of yellow pine forest between 1500 to 2000 m (5000 and 6000 feet) in elevation; historically, this species was found at elevations between 1200 and 2500 m (4000 to 6000 feet). It may have occurred throughout the higher elevations of San Diego County (Murphy 1990; Brown 1991; J. Brown, *in litt.*, 1992; and references cited therein). Murphy (1990) reported that there were at least six populations of this species in the Laguna Mountains in the 1950's and 1960's (at Big Laguna, Little Laguna, East Laguna, Laguna Lake, Boiling Springs, and Horse Heaven) (see also J. Brown, *in litt.*, 1992). Most specimens of the Laguna Mountains skipper were collected from Horse Heaven Springs near Mount Laguna (Murphy 1990). Until rediscovery in 1983 by J. Emmel, the last known sightings of the skipper in the Laguna Mountains were from 1972. Until specimens were collected in 1991, the last known sightings from Mount Palomar were from 1980 and, prior to that, from 1939 (Brown 1991; J. Brown, *in litt.*, 1992).

The Laguna Mountains skipper is apparently bivoltine (two generations per year). The adult flight season occurs from April to May with a complete or partial second brood flight in late June to late July. A partial second brood indicates that this butterfly may have a flexible or variable diapause (state of suspended activity). The Laguna Mountains skipper may have evolved a unique mechanism for coping with the low diurnal temperatures it encounters during its spring flight, which is unusually early for butterflies in the Laguna Mountains (Brown 1991). It is assumed that the life history of the Laguna Mountains skipper is similar to that of the nominate subspecies (*Pyrgus ruralis ruralis*), which diapauses as a full grown larvae and adults live 10 to 20 days (J. Brown, *in litt.*, 1992).

The quino checkerspot, *Euphydryas* (= *Occidryas*) *editha quino* (Behr) is a small member of the brush-footed

butterfly family (Nymphalidae). It is about 3 cm (1 inch) in length and checkered with dark brown, reddish, and yellowish spots. It is one of 12 recognized subspecies of *Euphydryas editha* (editha checkerspot) (Garth and Tilden 1986). The quino checkerspot can be distinguished from other subspecies of *Euphydryas editha* by its wing coloration pattern and overall body size. The quino checkerspot tends to be larger with redder wings. The light spots on the wings tend to be fewer and more disjunct than in the other subspecies (Garth and Tilden 1986). *Euphydryas editha quino* is geographically disjunct from them. This taxon is also phenotypically similar to two other species of butterfly that occur within its range. The Chalcedon checkerspot (*E. chalcedona*) is more yellow and is slightly larger than the quino checkerspot. Gabb's checkerspot (*Chlosyne gabbii*) is smaller than the quino checkerspot and has orange instead of red markings (Orsak 1977).

The quino checkerspot was first described in 1863 by Hans Herman Behr, an entomologist with the California Academy of Sciences in San Francisco, as *Melitaea quino* based on a specimen from coastal San Diego County, California. It was subsequently recognized by Comstock (1927) as a race of *Euphydryas editha* (Boisduval). For many years, *E. e. quino* was inappropriately recognized as *E. e. wrightii*. This error was rectified by J. Emmel based on a study of Behr's notes and available specimens (D. Murphy, Center for Conservation Biology, Stanford University, *in litt.*, 1988; Allen 1990). The genus *Euphydryas*, which is widely represented throughout North America, has been subdivided into closely related species groups (Scott 1986). The genus *Euphydryas* is also referred to as *Occidryas*, but many authors retain the former name (e.g., Scott 1986; Harrison *et al* 1988; Murphy 1990; Brown 1991).

The quino checkerspot is restricted to sunny openings on clay soils formed from gabbro parent materials within shrubland habitats of the interior foothills of southwestern California and northwestern Baja California, Mexico (G. Ballmer, *in litt.*, 1991). Similar to the Laguna Mountains skipper and butterflies in general, its distribution is defined primarily by that of its larval host plant but is further restricted by other factors. The primary larval food plant of the quino checkerspot is *Plantago erecta* (dwarf plantain, family Plantaginaceae). However, the larvae may also use *Plantago insularis* and *Orthocarpus purpurescens* (owl's clover, family Scrophulariaceae) (White 1974; Greg Ballmer, University of California at Riverside, pers. comm., 1993). These plants grow in or near meadows, vernal pools, and lake margins in upland shrub communities including sparse chaparral, and chaparral mixed with coastal sage scrub. This butterfly is generally found at sites where high densities of the host plant occur (J. Johnson, *in litt.*, 1989; D. Hawks, University of California at Riverside, *in litt.*, 1992) and was found at a variety of elevations from about sea level to about 1200 m (4000 feet). Within these areas, the quino checkerspot may be preferentially selecting sites where exposure to winter sun is greatest (Allen 1990). These habitats, like the quino checkerspot butterfly, were once commonly found along coastal bluffs, mesas, and inland foothills (Brown and Faulkner 1984).

The quino checkerspot may have been one of the most abundant butterflies in San Diego, Orange, and western Riverside Counties during the early part of the 20th century (Murphy 1990). The original range of the quino checkerspot extended as far south as Valle de la Trinidad in northwestern Baja California, Mexico, and as far north as Point Dume in Los Angeles County (Allen 1990). Currently, only six to seven small populations are known within the United States. Five to six populations occur near Vail Lake in southwestern Riverside and north-central San Diego Counties (G. Ballmer, *in litt.*, 1990 and 1991; David Hawks, entomologist, University of California at Riverside, pers. comm., 1993). One other population is known to occur (as of 1991) near Upper Otay Lake in San Diego County (Murphy, *in litt.*, 1991). Although the latter population has likely been extirpated (Murphy, pers. comm., 1994). At least one population exists in Mexico, in the Sierra Juarez near Tecate (Murphy, *in litt.*, 1991). Adult quino checkerspot butterflies were not seen at several historically occupied sites in Mexico during a survey in the spring of 1993 (unpubl. Service data). No estimates of population size for the quino checkerspot are currently available.

Adult quino checkerspot butterflies live from 4 to 8 weeks. The flight season occurs from mid-January to late April, and peaks between March and April. The eggs hatch in about 10 days, and the larvae begin to feed immediately. Fourth instar (development stage) larvae enter an obligatory diapause, as summer approaches and their larval food plant senesces. Extended periods of diapause may occur during times of drought (G. Ballmer, *in litt.*, 1990). Post-diapause larvae develop through four more instars and then pupate to emerge as adults in the early spring (Murphy and White 1984).

Previous Federal Action

On June 3, 1991, the Service received a petition dated May 27, 1991, from Mr. David Hogan of the San Diego Biodiversity Project, to list four butterfly species as endangered under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*): the Laguna Mountains skipper (*Pyrgus ruralis lagunae*), Hermes copper (*Lycaena hermes*), Thorne's hairstreak (*Mitoura thornei*), and Harbison's dun skipper (*Euphyes vestris harbisoni*). The petition cited loss and degradation of habitat, through various causes, as the major threat to these butterflies. On July 12, 1993, the Service found that the petition contained substantial information indicating that the requested action may be warranted for the Laguna Mountains skipper, but not for the other three butterflies listed above. The latter finding was made because sufficient information was not available regarding the threats to and biological vulnerability of these taxa. An announcement of these findings were published in the **Federal Register** on July 19, 1993 (58 FR 38549). The Laguna Mountains skipper, Hermes copper, Thorne's hairstreak, and Harbison's dun skipper are currently classified as category 2 candidates for Federal listing (November 21, 1991; 56 FR 58804). Category 2 includes taxa for which information in the Service's possession indicates that listing is possibly appropriate but for which the Service lacks substantial information upon which to base a proposal to list as endangered or threatened.

On September 30, 1988, the Service received a petition dated September 26, 1988, from Dr. Dennis Murphy of the Stanford University Center for Conservation Biology, to list the quino checkerspot butterfly (*Euphydryas editha quino*) as endangered under the Act. At the time this petition was submitted, this taxon had not been seen for several years and was thought to be extinct. Extant populations of the quino checkerspot were reported by Dr. Murphy in a letter dated August 1, 1991, which again requested the Service to consider the petitioned action. The status of the quino checkerspot has been under review by the Service since 1984 when it was classified as a category 2 candidate for Federal Listing (May 22, 1984; 50 FR 37958). This taxon is currently classified as a category 1 candidate (November 21, 1991; 56 FR 58804), meaning that information in the Service's possession is sufficient to

support a proposal to list as endangered or threatened.

This proposed rule constitutes the final finding for the petitioned action to list the Laguna Mountains skipper as warranted. In addition, this proposed rule constitutes the 90-day finding that the petition for the quino checkerspot butterfly presented substantial information that the action may be warranted and the final 12-month finding for this petition that the action is warranted.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the Act set forth criteria and procedures for adding species to the Federal Lists. A species may be listed due to any one or a combination of the five factors listed in section 4(a)(1) of the Act. These factors and their application to the Laguna Mountains skipper (*Pyrgus ruralis lagunae*) and the quino checkerspot (*Euphydryas editha quino*) are as follows.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The habitats and the ranges of the two species considered herein have been substantially reduced by urban and agricultural development and recreational activities and are further threatened with destruction, modification, and curtailment. The Laguna Mountains skipper and the quino checkerspot currently occur within very restricted ranges and are extremely localized in their present distributions.

The habitat requirements for these two butterflies are primarily defined by their larval host plants. The removal or degradation of these plants, as well as that of nectar sources for adults, leads to the elimination of the affected population.

In the case of the Laguna Mountains skipper, habitat destruction and degradation from overgrazing and trampling of its larval host plant by domestic cattle is considered to be the primary factor responsible for its decline (Murphy 1990; D. Hogan, *in litt.*, 1991; J. Brown, *in litt.*, 1992). The larval host plant (Cleveland's horkelia) is itself a rare species and only found in the Laguna, Cuyamaca, and San Jacinto Mountains of southwestern California, and northwestern Baja California, Mexico. The only known extant skipper population in the Laguna Mountains is found in the El Prado campground area of the Cleveland National Forest (Murphy 1990; D. Hogan, pers. comm., 1993). This area is protected from grazing cattle by a fence. Although the larval host plant is found throughout the campground, it is subject to trampling by people (D. Hogan, pers. comm., 1993).

Sunny openings within chaparral and coastal sage scrub occupied by the quino checkerspot butterfly have been degraded by grazing and (to a small degree) destroyed by urban development. Fifty to seventy-five percent of the known range of the quino checkerspot has been lost since 1900 due to habitat degradation or destruction (Brown 1991). The primary larval food plant, *Plantago erecta*, can be displaced by exotic plants, which invade once the ground is disturbed by discing, grading, and/or grazing (J. Johnson, *in litt.*, 1989; G. Ballmer, *in litt.*, 1990). The food plant then recolonizes in sites where grass does not grow well, like cattle trails and road edges, where quino checkerspot larvae are subject to trampling (D. Hawks, pers. comm., 1993).

The encroachment of urban development in rural Riverside County potentially threatens one of the quino checkerspot populations near Vail Lake. This area is growing rapidly and is projected to be fully developed within the decade (Monroe et al. 1992). The Vail Lake area is included in a Community Plan that provides for subdivision of parcels into 20-acre (9 hectare (ha)) lots (M. Freitas, *in litt.*, 1993). Additional development in this area is expected to further reduce and degrade habitat of the quino checkerspot through construction of homes and roads, and increases in cattle and horse grazing, fire frequencies, and the distribution and abundance of exotic plants. An existing recreational vehicle park and marina at Vail Lake attracts unauthorized use of all terrain vehicles (ATV's) within natural habitat areas. ATV's increase the fire hazard and destroy habitat through creation of trails. Evidence of ATV use is apparent at one of the quino checkerspot localities near Vail Lake, where a recently created dirt road bisects the center of the habitat (G. Ballmer, *in litt.*, 1991). Quino checkerspot habitat at this locality has been disced in part; these disturbed areas no longer support this species, while the surrounding undisturbed areas do (G. Ballmer, *in litt.*, 1991).

Bureau of Land Management-administered lands and Forest Service Wilderness Areas are currently contiguous with privately-owned quino checkerspot habitat near Vail Lake. As Riverside County becomes more densely populated, fragmentation and degradation of this contiguous habitat is expected.

Any residual individuals remaining near the last known population of the quino checkerspot in San Diego County would be threatened by a proposed urban development project on Otay Mesa. The preferred alternative for the Otay Ranch New Town Plan (the largest planned community in the southwestern United States) would result in the loss of 5,600 ha (14,000 acres) of upland shrub communities, or about 52 percent of their extent within the project area. The effects of this project on the quino checkerspot are not known at this time but may be significant. Habitat loss due to grazing and clay mining are the primary threats to the quino checkerspot butterfly in Mexico.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overcollection is a potential threat to both the Laguna Mountains skipper and the quino checkerspot because they are rare butterflies. Johnson (*in litt.*, 1989) has noted that the number of quino checkerspot colonies has been reduced since lepidopterists, eager to include rare species in their collections and to obtain surplus specimens for exchange or sale to other lepidopterists, have visited the few remaining colonies steadily throughout the flight season. "Where the populations may already be small, this depredation by collectors may so weaken the colonies as to end their existence. I have witnessed examples of this with other species of Lepidoptera whose loss of habitat has restricted the species to isolated colonies. These have then been wiped out by intensive collection by lepidopterists." (J. Johnson, *in litt.*, 1989). The remaining populations of the quino checkerspot butterfly near Vail Lake are threatened by overcollection. In the spring of 1993, these populations were the subject of scientific collections for voucher specimens and captive-rearing (D. Hawks, pers. comm., 1993). In addition, at least two collections of about six specimens each have been made by private collectors for non-scientific purposes (unpubl. Service data).

A significant threat to the survival of both species considered herein is the potential for vandalism by landowners who may view the presence of sensitive species as an obstacle to development. The habitat of the largest and most dense quino checkerspot population in the Gavilan Hills of Riverside County was deliberately disced, in 1984 or

1985, to eliminate this population (J. Johnson, *in litt.*, 1989).

C. Disease or Predation

Disease is not known to be a factor affecting the species considered herein. There are no known predators of the Laguna Mountains skipper. However, there is evidence that predation is a threat to the quino checkerspot. Studies conducted by David Hawks (pers. comm., 1993) indicate that predation has contributed to the decline of the quino checkerspot at sites where habitat has been invaded by non-native plant species, which may also harbor predatory arthropods. Historical quino checkerspot habitat sites that have been heavily invaded by Mediterranean plant species also have high sowbug (*Oniscus* sp.) and earwig (*Forficula* sp.) densities. Sowbugs and earwigs prey upon butterfly eggs. These predators, as well as the non-native plant species that support them, are absent from natural sites currently occupied by the quino checkerspot butterfly (D. Hawks, pers. comm., 1993).

Although specific parasites are unknown for the Laguna Mountains skipper and the quino checkerspot, Johnson (*in litt.*, 1989) speculates that parasitism can eliminate a butterfly colony. "* * * butterfly or moth populations will build up on the food plants for three or four years, then one will begin to find examples of larvae or pupae with parasites. The parasitism increases for two or three seasons, when nearly all of the larvae or pupae are affected, the moth or butterfly population disappears completely from the observed area, remains absent for some years, then the cycle is repeated" (J. Johnson, *in litt.*, 1989). This cycle can only continue if the affected area is recolonized, which is difficult when the host-butterfly population is small, fragmented, and isolated. In general, however, outbreaks of disease or parasitism are more likely to occur under conditions of high population densities. The Laguna Mountains skipper occurs in low population densities; most populations of the Quino checkerspot also occur at low densities.

D. The Inadequacy of Existing Regulatory Mechanisms

Existing regulatory mechanisms that could provide some protection for both the Laguna Mountains skipper and the quino checkerspot include: (1) Listing under the California Endangered Species Act; (2) adequate consideration under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA); (3) local laws and regulations; (4) occurrence with other species protected by the Federal Endangered Species Act; and (5) land acquisition and management by Federal, State, or local agencies, or by private groups and organizations for the conservation of these species.

Neither of the species discussed herein is under consideration for listing under the California Endangered Species Act.

The status of and threats to the Laguna Mountains skipper and the quino checkerspot, as discussed under Factor A above, reflect the failure of CEQA, NEPA, and local laws and regulations to protect and provide for the conservation of these species. Although there are several regional conservation planning efforts underway within the range of the Laguna Mountains skipper and the quino checkerspot, none have been completed, approved, funded, or implemented.

The Service is not aware of any overlap in distribution between the Laguna Mountains skipper and any State or Federally listed species. At some localities, the quino checkerspot co-occurs with the coastal California gnatcatcher (*Polioptila californica californica*), a Federally listed threatened species. However, the habitat requirements for the quino checkerspot are different than for the gnatcatcher.

Some protection is afforded to the Laguna Mountains skipper on Forest Service land. However, this protection is limited to a campground area that is subject to human disturbance. Considering the small population size and extremely limited distribution of the Laguna Mountains skipper, this protection is insufficient to conserve the species. In the case of the quino checkerspot, some protection may be provided to one population by its occurrence, in part, on Bureau of Land Management land near Vail Lake in Riverside County. However, this Federal land is currently subject to off-road vehicle activity (G. Ballmer, *in litt.*, 1991).

The Service is not aware of any regulatory mechanisms that protect the quino checkerspot in Mexico.

E. Other Natural or Man-Made Factors Affecting Its Continued Existence

The extremely restricted range and localized distribution, and small population size of the Laguna Mountains skipper and the quino checkerspot makes them vulnerable to the effects of fragmentation, especially with regard to stochastic events (e.g., see Gilpin and Soule 1986). For example, the Mount Palomar population of the Laguna Mountains skipper is known from one site, where five specimens were taken. A chance event could easily extirpate this population of the skipper.

Although both butterflies occur in fire adapted ecosystems, a single fire event could eliminate affected populations. Orsak (1977) reported that a quino checkerspot population near Hidden Ranch, Black Star Canyon, in the Santa Ana Mountains of Orange County was apparently destroyed by a fire in 1967. (As discussed in the Background section above, the quino checkerspot is now extirpated from Orange County.) The only site known to be occupied by the Laguna Mountains skipper in the Laguna Mountains is subject to cattle grazing and trampling by both cattle and people.

Interconnected populations can act as reservoirs to maintain populations that may be subject to periodic extirpation (Murphy and White 1984, Harrison et. al 1988). If a stochastic event eliminates a population of either species (due to factors discussed in this rule), few (if any) neighboring populations are available to recolonize the area. No information is available regarding the vagility of the Laguna Mountains skipper. The sedentary behavior of the quino checkerspot diminishes the probability that natural, long distance dispersal could reestablish most extirpated local populations.

Periodic droughts (like those recently occurring in southwestern California) can adversely affect both of the species considered herein. Drought is known to decrease numbers of butterflies (Thorne 1963). Drought conditions may cause loss or early senescence of the larval host plant prior to completion of larval development, or lower the nutritional quality of the host plant (e.g., water content). Drought can also reduce the quantity and quality of adult nectar sources. Larval starvation and extirpation of local populations during periods of drought have been documented for *Euphydryas editha* (White 1974, Ehrlich et al. 1980).

Habitat fragmentation can affect the genetic heterogeneity of small isolated populations like those of the Laguna Mountains skipper and the quino checkerspot. Small, fragmented populations are subject to a higher frequency of genetic drift and inbreeding. As a consequence, genetic variation of the population and individual heterozygosity is decreased. That can lead to inbreeding depression and lowered fitness of individuals. Low genetic diversity may decrease the ability of a species to adapt to changing environmental conditions. Genetically homogenous populations may be at a

greater risk of extinction from environmental or demographic stochasticity (e.g., from fire or drought events) than are large, diverse populations that can more readily recover from such events. For example, variation in the length of diapause among butterfly offspring requires genetic heterogeneity (see Seger and Brockman 1987). If a population is variable in diapause length, it has a lower risk of losing an entire cohort to adverse environmental conditions during any given season. Individuals with prolonged diapause may survive if drought causes high mortality during the next season. A large population or metapopulation can maintain the genetic heterogeneity needed to maintain the population during these kinds of events.

The quino checkerspot is somewhat adapted to unpredictable weather patterns but requires sufficient patches of suitable habitat to respond to this environmental stochasticity. The quino checkerspot's dispersal capabilities vary considerably depending upon rainfall patterns and the resulting availability of adult nectar sources and larval food plants. For example, a San Diego County population of the quino checkerspot exhibited an increase in numbers as a result of favorable weather (Murphy and White 1984). The greater number of larvae defoliated the larval food plants. This central core area was left without sufficient egg-laying sites for females, and adults went for greater dispersal distances in search of additional suitable habitat. Ideally these dispersing adults would have found marginally suitable areas, and in subsequent generations would have returned to a central core area. In this case, the mass dispersal failed to restore populations in previously occupied habitat, and the butterflies have not re-colonized the original site (Murphy and White 1984; Murphy, pers. comm. 1994).

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these two taxa in determining to propose this rule. Based on this evaluation, the Service finds that the preferred action is to list the Laguna Mountains skipper and the quino checkerspot as endangered. The range and habitat of these species has been substantially reduced by historical activities associated with urban and agricultural development and recreational activities. These two taxa are threatened by one or more of the following factors: Habitat alteration and destruction resulting from urban and agricultural development, grazing, overcollection, recreational activities, inadequate regulatory mechanisms, and displacement of the larval host plant by exotic species. The extremely restricted range, localized distribution, and small population size of both butterflies makes them very vulnerable to extinction by the factors listed above as well as by stochastic events such as fire and drought. For these reasons, the Service finds that the Laguna Mountains skipper and the quino checkerspot are in imminent danger of extinction throughout all or a significant portion of their ranges. Threatened status would not accurately reflect the diminished status and threats to these species. Other alternatives to this action were considered but not preferred because not listing these species would not provide adequate protection and would be inconsistent with the purposes of the Act. Critical habitat is not being proposed for these taxa for the reasons discussed below.

Critical Habitat

Critical habitat, as defined by section 3(5)(A) of the Act, means: (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4(a)(3) of the Act requires that critical habitat be designated to the maximum extent prudent and determinable concurrently with the determination that a species is endangered or threatened. The Service's regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist: (1) 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 (2) such designation of critical habitat would not be beneficial to the species.

The Service finds that designation of critical habitat is not prudent at this time for the Laguna Mountains skipper and the quino checkerspot. The quino checkerspot, mostly occurs on privately owned lands with little or no Federal involvement, although the Bureau of Land Management owns a portion of one site. The additional protection provided by the designation of critical habitat to a species is only achieved through section 7. Therefore, the designation of critical habitat would not appreciably benefit the quino checkerspot. Publication of precise maps and descriptions of critical habitat for the quino checkerspot and the Laguna Mountains skipper could result in additional habitat destruction through trampling, discing, and grading as well as collection. As discussed under Factor B in the "Summary of Factors Affecting the Species" section of this proposal, habitat for the one of the largest quino checkerspot colonies was graded in Riverside County to deliberately eliminate that population, and a number of quino checkerspot colonies have been subject to collection by lepidopterists for trading and similar purposes.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, 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 destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agencies expected to have involvement with the Laguna Mountains skipper and the quino checkerspot include the Forest Service and Bureau of Land Management due to the presence of habitat and populations within their jurisdiction. The Immigration and Naturalization Service may need to evaluate the effects of its activities on the quino checkerspot, which is known to occur near the international border in San Diego County.

The Act and its implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, 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 to attempt any of these), 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 listed species. It is also 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 wildlife species under certain circumstances. Regulations governing such permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. In some instances involving trade, permits may be issued for a specified time to relieve undue economic hardship that would be suffered if such relief were not available. The Laguna Mountains skipper and quino checkerspot are not involved in trade, and such permit requests are not expected.

Requests for copies of the regulations on listed wildlife and plants and inquiries regarding them should be addressed to the U.S. Fish and Wildlife Service, Ecological Services—Endangered Species Permits, 911 Northeast 11th Ave, Portland, Oregon 97232–4181 (telephone 503/231–6241).

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 these taxa;

(2) The location of any additional populations of these species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of these taxa; and

(4) Current or planned activities in the subject area and their possible impacts on these species.

The 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 a final regulation that differs from this proposal.

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 the proposal. Such requests must be made in writing and addressed to the Field Supervisor of the Carlsbad Field Office (see **ADDRESSES** section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment or 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 Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein are available upon request from the Carlsbad Field Office (see **ADDRESSES** section).

Author

The primary author of this proposed rule is Marjorie Nelson of the Carlsbad 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

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 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. It is proposed to amend § 17.11(h) by adding the following, in alphabetical order under INSECTS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
INSECTS							
*	*	*	*	*	*	*	*
Butterfly, Laguna Mountains skipper.	*Pyrgus ruralis lagunae.*	U.S.A. (CA)	NA	E		NA	NA
*	*	*	*	*	*	*	*
Butterfly, quino checkerspot.	*Euphydryas (=Occidryas) editha quino.*	U.S.A. (CA), Mexico	NA	E		NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*

Dated: July 24, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–18932 Filed 8–1–94; 8:45 am]

BILLING CODE 4310–55–P

50 CFR Part 17

RIN 1018–AC83

Endangered and Threatened Wildlife and Plants; Proposed Rule to List the San Diego Fairy Shrimp as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (Service) proposes to list the San Diego fairy shrimp (*Branchinecta sandiegoensis*) as endangered throughout its range in southwestern California and northwestern Baja California, Mexico, pursuant to the Endangered Species Act of 1973, as amended (Act). This species occurs in vernal pools and is threatened by a variety of factors including: Habitat destruction and fragmentation from agricultural and urban development, alterations of wetland hydrology by draining, off-road vehicle activity, and cattle and sheep grazing. This proposed rule, if made final, would extend the Act's protection to the San Diego fairy shrimp.

DATES: Comments from all interested parties must be received by October 3, 1994. Public hearing requests must be received by September 19, 1994.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Field Office, 2730 Loker Avenue West, Carlsbad, California 92008. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Fred M. Roberts, at the above address (telephone 619/431–9440).

SUPPLEMENTARY INFORMATION:

Background

The San Diego fairy shrimp (*Branchinecta sandiegoensis*) is a member of Branchinectidae, a freshwater crustacean family in the Order Anostraca (fairy shrimp). The species was first described by Michael Fugate (1993) based on collections made at Del Mar Mesa in San Diego County in 1990 by himself and M. Simovich. The San Diego fairy shrimp is closely allied with, and has historically been misidentified as, *B. lindahli*, a species widely distributed in western North America. The San Diego fairy shrimp was first collected (but then identified as *B. lindahli*) in Poway and Ramona, San Diego County, in 1962; additional collections were made on Kearny Mesa in 1979 (Simovich and Fugate 1992).

The San Diego fairy shrimp is restricted to vernal pools, which occur in areas with shallow depressions that have a clay hardpan soil layer that inhibits water percolation. This results in a perched water table during the winter rainy season and the following spring. Vernal pools retain water only long enough to support relatively few species of aquatic emergent plants and invertebrates. As the pools dry and the surface water recedes toward the center of the pool, a unique and dynamic flora develops in its place. Vernal pools typically occur on mesa tops or valley floors and are surrounded by very low hills, usually referred to as mima mounds (Zedler 1987).

The San Diego fairy shrimp is a small and delicate animal with large stalked compound eyes, no carapace, and 11 pairs of swimming legs. Mature males are from 9 to 16 mm (0.4 to 0.6 in) in length and females are 8 to 14 mm (0.4 to 0.5 in) in length. They swim or glide upside down by means of complex beating movements of the legs that pass in a wave-like anterior to posterior direction. The second pair of antennae on the adult female are cylindrical and elongate, but in the male are greatly enlarged and specialized for clasping the female during copulation. The female carries the eggs in an oval or elongate ventral brood sac. The eggs are either released or remain attached to the female until she dies and sinks. The thick-shelled eggs are capable of withstanding high heat, cold, and prolonged desiccation.

The San Diego fairy shrimp occurs in San Diego County from San Marcos and Ramona south to Otay Mesa and at Valle de Palmas in northwestern Baja California, Mexico. All known localities are below 700 meters (2,300 feet) and within 50 kilometers (30 miles) of the Pacific coast. Five other branchinectid fairy shrimp occur in southern California. Only one of these species, *Branchinecta lindahli*, is known from San Diego County (Simovich and Fugate 1992). *B. lindahli* is a habitat generalist and may occur in ponds or ditches. The only other branchinectid fairy shrimp in southern California that is similar in appearance to the San Diego fairy shrimp is the vernal pool fairy shrimp (*B. lynchi*), which occurs in adjacent Riverside County. Male San Diego fairy shrimp may be separated from males of other species within the genus by the shape of the second antenna. Female San Diego fairy shrimp are distinguishable by the shape and length of the ovisac and egg and by the presence of paired dorsolateral spines (Fugate 1993).

The San Diego fairy shrimp is a habitat specialist and is restricted to vernal pools. This species occasionally occurs in ditches and road ruts, but only if these depressions are in degraded vernal pool habitat (D. Hogan, San Diego Biodiversity Project, *in litt.*, 1992; Marie Simovich, University of San Diego, pers. comm., 1993). This species appears to prefer cool water temperatures ranging from 10 to 23 degrees centigrade (Fugate and Simovich 1992).

The prehistorical distribution of this species is uncertain. The majority of the vernal pools in this region were lost prior to 1990. However, based on historical collections (some originally identified as *B. lindahli*) the San Diego fairy shrimp was known from at least 15 locales within San Diego County (Balko and Ebert 1987, Fugate 1993). The fairy shrimp presently occurs in fewer than 70 vernal pools within 11 vernal pool complexes in coastal San Diego County (Hogan 1992). Three of the San Diego County populations of this species are on Federal land (all on Miramar Naval Air Station). Two others are, in part, on public land (Del Mar Mesa Vernal Pool Preserve and Mission Trails Regional Park).

The San Diego fairy shrimp has also been reported from Isla Vista in Santa Barbara County, California, but the identification of the single female individual is unconfirmed (Michael Fugate, University of Oregon, pers.

comm., 1993). Directed surveys of vernal pools in Isla Vista for fairy shrimp have not located any additional San Diego fairy shrimp individuals (Marie Simovich, pers. comm., 1994). The vernal pools in south coastal Santa Barbara County have been significantly reduced in number by the same factors that have reduced the number of vernal pools in San Diego County (Ferren and Pritchett 1988). The Santa Barbara County vernal pools are now isolated from those in San Diego County by agricultural and urban development in Ventura, Los Angeles, and Orange Counties.

Previous Federal Action

On March 24, 1992, the Service received a petition to list the San Diego fairy shrimp as endangered. Petitioners were Dave Hogan of the San Diego Biodiversity Project in Julian, California, and Denton Belk of Our Lady of the Lake University in San Antonio, Texas. The Service finds that substantial information was presented in the petition to indicate that the requested action may be warranted. This finding is based on a detailed narrative justification in the petition for the recommended action, including information about the distribution, decline, and threats to this species over a significant portion of its range. This proposed rule is the first Federal action on the San Diego fairy shrimp and constitutes the final 1-year finding on the petitioned action that the action is warranted, as required by section 4(b)(3)(B) of the Act.

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 an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to the San Diego fairy shrimp (*Branchinecta sandiegoensis* Fugate) are discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The natural plant communities of coastal San Diego County and northwestern Baja California, Mexico, have undergone significant changes as a result of both direct and indirect human-caused activities. The rapid urbanization of this region has already eliminated a significant proportion of the vernal pool habitat for this taxon. The remaining patches of habitat are frequently isolated, degraded, and/or fragmented by agricultural practices, streambed channelization and other hydrological alterations, and grazing.

Vernal pools have undergone an extraordinary reduction in number and have nearly been eliminated in southern California. In San Diego County, over 97 percent of vernal pool habitat had been lost by 1986 (Bauder 1986). While it is uncertain how many of these pools were occupied by the San Diego fairy shrimp, the species was known to occupy a number of vernal pools that have since been disturbed, destroyed or lost (Bauder 1986, Balko and Ebert 1987, Fugate 1993).

In San Diego County, the San Diego fairy shrimp occurs within vernal pool complexes that have been and continue to be impacted by urbanization and agricultural conversion (Bauder 1986, Hogan and Belk 1992, Nancy Gilbert and Ellen Berryman, U.S. Fish and Wildlife Service, pers. comm., 1993). Nine of the 11 known populations of San Diego fairy shrimp in San Diego County are declining because of vernal pool destruction (Bauder 1986; D. Hogan, *in litt.* 1992; Marie Simovich, pers. comm., 1993).

At least two populations of the San Diego fairy shrimp occur on Otay Mesa in San Diego County. A minimum of 37 proposed Precise Plans and Tentative Maps for development have been filed pursuant to the California Environmental Quality Act for this area. These plans encompass about 80 percent of the undeveloped portion of the mesa within the jurisdiction of the city of San Diego and virtually all but four of the remaining vernal pool complexes. Several of these projects will impact the San Diego fairy shrimp. At least one major transportation project has been proposed for Otay Mesa and could potentially impact vernal pools that are occupied by the San Diego fairy shrimp.

The San Diego fairy shrimp is found on Federal lands managed by the Navy. The species occurs on Miramar Naval Air Station. These lands are used, in part, for military training activities that involve off-road vehicle maneuvers that adversely impact the species (Hogan and Belk 1992).

Trash dumping has also degraded vernal pools in San Diego County. Discarded chunks of concrete, tires, refrigerators, furniture, and other pieces of garbage or debris have been found in pools containing the San Diego fairy shrimp. This trash crushes or shades vernal pool plants, disrupts the hydrologic functions of the pool, and in some cases, may release toxic substances.

Vernal pools in San Diego County have also been degraded by off-road vehicles. These vehicles compact soils, crush plants when water is present, cause turbidity, and leave deep ruts. This type of damage may alter the microhydrology of the pools. Dirt roads that go through or adjacent to pools are widened as motorists try to avoid mud puddles and in this way, the pools are gradually destroyed.

The San Diego fairy shrimp's vernal pool habitat is also vulnerable to indirect destruction due to the alteration of the supporting watershed. An increase in water due to urban run-off leads to increased inundation and makes pools vulnerable to invasion by marshy plant species resulting in decreased abundance of obligate vernal pool taxa. At the other extreme, some pools have been drained or blocked from their source of water and have shown an increased domination by upland plant species. The San Diego fairy shrimp is especially vulnerable to alterations in hydrology.

Development projects adjacent to vernal pools are often responsible for adverse alterations in drainage. Hydrological alterations are sometimes a result of agricultural development, or a combination of urban development and agriculture.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization is not currently a known threat factor for the San Diego fairy shrimp.

C. Disease or Predation

As vernal pools mature, there is a gradual increase in numbers and size of predaceous aquatic insects, known to consume fairy shrimp (Zedler 1987).

D. The Inadequacy of Existing Regulatory Mechanisms

Existing regulatory mechanisms that could provide some protection for the San Diego fairy shrimp include: (1) Consideration under the California Environmental Quality Act (CEQA); (2) implementation of conservation plans pursuant to the State of California's Natural Community Conservation Planning Act of 1991 (NCCP), the San Diego Multiple Species Conservation Plan (MSCP), and the San Diego County Multiple Habitat Conservation Plan (MHCP); (3) section 404 of the Federal Clean Water Act; (4) occurrence with other species protected by the Federal Endangered Species Act; (5) land acquisition and management by Federal, State, or local agencies, or by private groups and organizations; (6) local laws and regulations; and (7) Mexican law.

Most of the known populations of the taxon occur on privately owned land. Local lead agencies empowered to uphold and enforce the regulations of the CEQA have made determinations that have or will adversely affect the San Diego fairy shrimp. Required biological surveys are often inadequate and project proponents may ignore the results of surveys if occurrences of sensitive species are viewed as a constraint on project design. Mitigation measures used to condition project approvals are essentially experimental and fail to adequately guarantee protection of sustainable populations.

For example, in San Diego County, vernal pools containing the San Diego fairy shrimp and the Federal- and State-listed *Pogogyne abramsii* (San Diego mesa mint) were destroyed without adequate environmental documentation or coordination with the Service and the California Department of Fish and Game. In this case, the project proponent was a school district.

Section 15380 of CEQA requires that impacts to any taxon that meets the criteria for listing under the California Endangered Species Act be treated as significant regardless of its current listing status. The San Diego fairy shrimp has been recognized as a distinct taxon by the scientific and local conservation communities since 1990. Impacts to this species would qualify as significant under section 15380 of CEQA even though this species was not formally recognized until 1993 (Fugate 1993). However, this taxon has only been considered in a limited number of environmental impact reports since 1990.

In 1991, the State of California established the NCCP program to address the conservation needs of natural ecosystems throughout the State. The initial focus of this program was the coastal sage scrub community. The San Diego fairy shrimp is found in vernal pools and not coastal sage scrub. The San Diego fairy shrimp is being considered under the MSCP and MHCP programs. These programs, under development by the County of San Diego and its coastal cities, are being integrated as components of the NCCP program. However, these programs are still in the developmental phase, and it is uncertain as to what degree they will be successful in providing protection for this species. For example, two alternatives of the MSCP (coastal sage scrub and public lands) would not provide adequate preservation for the San Diego fairy shrimp because much of the shrimp's habitat (vernal pools) would be excluded.

Under section 404 of the Clean Water Act, the U.S. Army Corps of Engineers (Corps) regulates the discharge of fill into waters of the United States, including navigable waters, wetlands (e.g., vernal pools), and other waters. The Clean Water Act requires project proponents to obtain a permit from the Corps prior to undertaking many activities (e.g., grading, discharge of soil or other fill material, etc.) that would result in the fill of wetlands under the Corps' jurisdiction. The Corps promulgated Nationwide Permit Number 26 (see 33 CFR 330.5(a)(26)) to address fill of isolated or headwater wetlands totalling less than 10 acres. Under Nationwide Permit 26, proposals that involve the fill of wetlands less than one acre are considered authorized. Where fill would adversely modify between 1 to 10 acres of wetland, the Corps circulates a predischarge notification to the Service and other interested parties for comment to determine whether or not an individual permit should be required for a proposed fill activity and associated impacts.

Individual permits are required for the discharge of fill material that would fill or adversely modify greater than 10 acres of wetlands. The review process for the issuance of individual permits is more rigorous than for nationwide permits. Unlike nationwide permits, an analysis of cumulative wetland impacts is required for individual permit applications. Resulting permits may include special conditions that require the avoidance or mitigation of environmental impacts. On nationwide permits, the Corps has discretionary authority to require an applicant to seek an individual permit if the Corps believes that the resources are sufficiently important, regardless of the wetland's size. In practice, the Corps rarely requires an individual permit when a project would qualify for a nationwide permit, unless when a threatened or endangered species or other significant resources would be adversely affected by the proposed activity.

The San Diego fairy shrimp could potentially be affected by projects requiring a permit from the Corps under section 404 of the Clean Water Act. Although the objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Pub. L. 92–500), which include navigable and isolated waters, headwaters, and adjacent wetlands, no specific provisions adequately address the need to conserve candidate species such as the San Diego fairy shrimp.

Even if the Corps establishes jurisdiction under the Clean Water Act over vernal pools, this does not ensure their protection. At least two vernal pool complexes under Corps jurisdiction in San Diego County have been destroyed or degraded without a section 404 permit (Jim Dice, Calif. Department of Fish and Game, pers. comm., 1993; U.S. Fish and Wildlife Service data files).

The Act can incidentally afford protection to the San Diego fairy shrimp if they co-exist with species already listed as threatened or endangered. *Pogogyne abramsii* (San Diego mesa mint), *Pogogyne nudiscula* (Otay Mesa mint), *Orcuttia californica* (California orcutt grass), *Eryngium aristulatum* var. *parishii* (San Diego button celery), and the Riverside fairy shrimp (*Streptocephalus wootoni*) are listed as endangered under the Act and occur in the same habitat as the San Diego fairy shrimp. However, these species are generally not found in the same vernal pool complexes as the San Diego fairy shrimp. The Riverside fairy shrimp and San Diego fairy shrimp co-exist in only three vernal pool complexes in San Diego County. Within a vernal pool complex, the San Diego fairy shrimp does not often occur in the same pools as listed species.

Land acquisition and management by Federal, State, or local agencies, or by private groups and organizations has contributed to the protection of some localities inhabited by this taxon. However, as discussed below, these efforts are often directed at other species and are inadequate to assure the long-term survival of the San Diego fairy shrimp.

The San Diego fairy shrimp occurs within the California Department of Transportation Vernal Pool Preserve. Although these pools are managed for the long-term protection of vernal pool flora and fauna, off-road vehicle activity, development proposals immediately adjacent to the preserve, and proposed restoration actions threaten the San Diego fairy shrimp at this locality (Hogan and Belk 1992; M. Simovich, pers. comm., 1993).

The San Diego fairy shrimp also occurs in northwestern Baja California, Mexico. The Service is not aware of any existing regulatory mechanisms in Mexico that would protect the San Diego fairy shrimp or its habitat.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Cattle grazing occurs on Otay Mesa in areas where several vernal pool complexes contain the San Diego fairy shrimp. Livestock grazing typically

changes the composition of native plant communities by reducing or eliminating those species that can not withstand trampling and by enabling more resistant (usually non-native) species to increase in abundance. Taxa that were not previously part of the native flora may be introduced and flourish under a grazing regime and may reduce or replace native species through competition for resources.

Disturbance of vernal pools in San Diego County increases the potential for other fairy shrimp species (such as the widespread *Branchinecta lindahli*) to replace the San Diego fairy shrimp, which is unable to persist under disturbed conditions (M. Simovich, *in litt.*, University of San Diego, 1992).

San Diego fairy shrimp are highly reliant on seasonal rainfall. Drier conditions, such as those that prevailed from 1986 to 1992, reduce the number of individuals in populations. Climatic conditions stress species. Negative effects of habitat loss and degradation from other factors including development, discing, and grazing, when combined with climatic conditions, increase the level of threat to the San Diego fairy shrimp.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the San Diego fairy shrimp in determining to propose this rule. Based on this evaluation, the Service finds that the preferred action is to list the San Diego fairy shrimp as endangered. The San Diego fairy shrimp is threatened by one or more of the following factors: Habitat alteration and destruction resulting from urban and agricultural development; alteration of hydrology; off-road vehicle use/recreational activities; inadequate regulatory mechanisms; and grazing.

The San Diego fairy shrimp is in imminent danger of extinction throughout all or a significant portion of its range. Critical habitat is not being proposed for this taxon for the reasons discussed below.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the taxon is listed. Critical habitat is not determinable if insufficient information exists to perform an economic impact analysis of designating a particular area as critical habitat, or if the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat (50 CFR 424.12(a)(2)).

The Service is in the process of defining critical habitat and determining more clearly what the ecological requirements and constituent elements are for the San Diego fairy shrimp. The Service may find that determination of critical habitat is not prudent for this taxon, however, at this time designation of critical habitat is not determinable.

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. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants and animals 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) requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, 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 destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agencies expected to have involvement with the San Diego fairy shrimp include the Army Corps of Engineers and the Environmental Protection Agency due to their permit authority under section 404 of the Clean Water Act. The San Diego fairy shrimp occurs on the U.S. Navy's Miramar Air Station. This base will likely be involved through military activities or potential excessing of Federal lands.

The Act and its implementing regulations found at 50 CFR 17.21 set forth a series of prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, 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 to attempt any of these), 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 listed species of wildlife. It is also 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 wildlife species under certain circumstances. Regulations governing such permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. In some instances involving trade, permits may be issued for a specified time to relieve undue economic hardship that would be suffered if such relief were not available. The San Diego fairy shrimp is not involved in trade, and such permit requests are not expected.

Requests for copies of the requirements and regulations on permits or trade in wildlife and plants and inquiries regarding them should be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181 (503/231–2063; 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 taxon;

(2) The location of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical

habitat as provided by section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of this taxon; and

(4) Current or planned activities in the subject area and their possible impacts on this species.

The 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 a final regulation that differs from this proposal.

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 the proposal. Such requests must be made in writing and addressed to the Field Supervisor of the Carlsbad Field Office (see **ADDRESSES** section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment or 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 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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Author

The primary author of this proposed rule is Fred M. Roberts, Jr., Carlsbad 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 Regulation Promulgation

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 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. It is proposed to amend § 17.11(h) by adding the following, in alphabetical order under CRUSTACEANS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
Crustaceans							
*	*	*	*	*	*	*	*
Shrimp, San Diego fairy.	Branchinecta sandiegoensis.	U.S.A. (CA), Mexico	NA	E		NA	NA
*	*	*	*	*	*	*	*

Dated: July 27, 1994.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 94–18931 Filed 8–1–94; 8:45 am]

BILLING CODE 4310–55–P

50 CFR Part 17

RIN 1018–AC65

Endangered and Threatened Wildlife and Plants; Proposed Rule to List Two Plants From Southwestern California as Endangered and Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (Service) proposes to list *Downingia concolor* var. *brevior* (Cuyamaca Lake downingia) as endangered and *Limnanthes gracilis* ssp. *parishii* (Parish's meadowfoam) as threatened throughout their respective ranges in southwestern California pursuant to the Endangered Species Act of 1973, as amended (Act). These species occur in vernally moist soils of montane wet meadows, near springs and seeps, or vernal pools within the Peninsular Ranges of southwestern California. These plants are imperiled by a variety of factors including alteration of wetland hydrology, cattle grazing, recreational activities, recreational development, off-road vehicle activity, and competition from exotic plant species. This proposed rule, if made final, would extend protection under the Act to these two plants. Critical habitat is not being proposed at this time. Additional data and information, which may assist the Service in making a final decision on this proposed action, is solicited on the status of these species.

DATES: Comments from all interested parties must be received by October 3, 1994. Public hearing requests must be received by September 19, 1994.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Field Office, 2730 Loker Avenue West, Carlsbad, California 92008. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Debbie Kinsinger, Botanist, at the above address (telephone 619/431–9440).

SUPPLEMENTARY INFORMATION:

Background

Downingia concolor var. *brevior* (Cuyamaca Lake downingia) and *Limnanthes gracilis* ssp. *parishii* (Parish's meadowfoam) occur in association with meadows and drainages of the Peninsular Ranges of southwestern California from the Santa Ana Mountains of extreme southwestern Riverside County, south to the Laguna Mountains of southern San Diego County, California. Both plant taxa are restricted to grassy meadows that are vernally wet (wet during the rainy season) with saturated soil conditions and shallow pools for several weeks at a time. Between the ponded areas are drier mounds, called mima mounds. This type of physiography is referred to as a montane meadow-vernal pool association.

The largest populations of both taxa are located within the Cuyamaca Valley in the Cuyamaca Mountains of central San Diego County, California. Although the vernal pool and mima mound topography is mostly obliterated, much of the unique, montane, vernal pool flora remains. This flora includes a number of disjunct species that are more frequently associated with vernal pools of coastal San Diego County or central California (e.g., *Deschampsia danthonioides* (annual hairgrass), *Blennosperma nanum* (common blennosperma), and *Delphinium hesperium* ssp. *cuyamacae* (Cuyamaca larkspur) (Beauchamp 1986a, Winter 1991)).

Historically, a depression at the southwestern end of the Cuyamaca Valley formed a small lake that dried up in the summer. This area was referred to as "Laguna Que Se Seca" (the lake that dries up) (Allen and Curto 1987). This area and the rest of the valley supported a complex of vernal pools and mima mounds. A dam was built in 1886 at the Boulder Creek outlet of Cuyamaca Lake. The dam created a permanent reservoir known as Cuyamaca Lake. A dike built in 1967 allowed water to be pumped from the reservoir so that the valley could be kept in a flooded condition throughout the summer (Ball et al., unpub. man.). In wet years, the reservoir and dike system allows the entire valley to remain flooded for extended periods (Bauder 1992). Many areas supporting these taxa have been moderately to heavily grazed in the past and some areas continue to be adversely affected by livestock and horses. For example, heavy grazing in the Laguna Mountains since the 1880's has resulted in the increased abundance of introduced annual grasses and forbs, the scarcity of organic matter, and severe gullying and erosion (Sproul 1979).

Downingia concolor var. *brevior* (Cuyamaca Lake downingia) was described by R. McVaugh (1941) based on a collection by L. Abrams at Cuyamaca Lake, Cuyamaca Mountains, San Diego County, California. Beauchamp (1986b) elevated the plant to a subspecies following the suggestions of Thorne (1978). However, Ayers (1993) also recognized this plant as *D. c.* var. *brevior* following McVaugh's (1941) treatment of this taxon.

Downingia concolor var. *brevior* is a member of the bellflower family (Campanulaceae). This plant is a low, slightly succulent annual herb, with stems 5 to 20 centimeters (cm) (2 to 8 inches (in)) long. The flowers are blue and white with a 4-sided purple spot at the base of the united petals. The fruit is 12 to 15 mm (0.5 in) long and the seeds have linear striations (lines). *D. concolor* var. *brevior* blooms from May to July and sets seed from June to August. The seeds are dispersed by flooding and require brief inundation for germination (Munz 1974, Bauder 1992).

Downingia concolor var. *brevior* can be distinguished from the only other member of this genus that occurs in southern California, *D. cuspidata*, by the form of the striations on the seed and by the color of the flower. It can be distinguished from the more northern *D. concolor* var. *concolor* by the size of the fruit and how rapidly the fruit splits open when the seeds are mature (Ayers 1993).

Downingia concolor var. *brevior* is restricted to a single population at Cuyamaca Lake in the Cuyamaca Valley of San Diego County, California on land owned by the Lake Cuyamaca Recreation and Park District. Historically, the population of *D. concolor* var. *brevior* was located throughout much of the valley floor. This population has now been largely restricted to the shore of the lake, penetrating into the valley floor during dry years. From 1988 to 1992 one population existed in the vicinity of Cuyamaca Lake, consisting of between 9 and 24 stands. Combined, these stands occupied less than 200 acres and frequently occupied less than 100 acres. The number of individuals within these stands, and the location and size of these stands vary in any given year in response to rainfall, the extent of winter flooding, and temperature (Bauder 1992).

Limnanthes gracilis ssp. *parishii* (Parish's meadowfoam) was first

described by W.L. Jepson (1936) as *Limnanthes versicolor* var. parishii. The description was based on specimens collected by S.B. Parish at the Stonewall Mine on the southern edge of the Cuyamaca Valley, San Diego County, California. Mason (1952) recognized *L. versicolor* var. *parishii* as *L. gracilis* var. *parishii*, based on flower and fruit morphology. Beauchamp (1986b) elevated the plant to a subspecies based on consistency with other treatments of this genus, and the geographic separation (over 1,200 kilometers (km) (800 miles (mi)) from *L.g.* ssp. gracilis, which is found in southern Oregon.

Limnanthes gracilis ssp. *parishii* is a member of the meadowfoam family (Limnanthaceae), a small family of wetland species found primarily along the Pacific coast of North America. The plant is a low, widely branching annual with stems 10 to 20 cm (4 to 8 in) long. The leaves are 2 to 6 cm (0.5 to 2 in) long and divided. The flowers are bowl-shaped, the petals are 8 to 10 mm (0.25 to 0.5 in) long with a white or occasionally with a cream-colored base that becomes pink (Ornduff 1993). The fruit is rough textured. *L. gracilis* ssp. *parishii* blooms from April through May, setting seed in the late spring and early summer. Germination requires saturated soils or inundation (Munz 1974, Bauder 1992).

The range of *Limnanthes gracilis* ssp. *parishii* is separated by over 480 km (300 mi) from any other species of *Limnanthes*. *L.g.* ssp. *parishii* is distinguished morphologically from *L.g.* ssp. *gracilis* by its smaller flowers, broader sepals, and smooth nutlets (Abrams 1951, Mason 1952).

Limnanthes gracilis ssp. *parishii* is restricted to moist montane meadows, mudflats, and along stream courses in the Palomar, Cuyamaca, and Laguna mountains of San Diego County, California. Fewer than 20 populations of this taxon exist. The largest population occurs in the Cuyamaca Valley in the vicinity of Cuyamaca Lake and Stonewall Creek and is restricted to the shore of Cuyamaca Lake at maximum inundation. The majority of this population is on private lands but extends onto California State Parks and Recreation lands.

Historically, the Cuyamaca Valley population of *Limnanthes gracilis* ssp. *parishii* occurred throughout much of the valley floor. Recently, the Cuyamaca Valley population of *L. gracilis* ssp. *parishii* was described as consisting of 100 stands by Bauder (1992), and 8 small populations by the California Natural Diversity Data Base (CNDDB) (1992). However, these smaller groupings are contiguous, separated by less than 1.5 km (1 mi), and concentrated within a 9 square km (4 square mi) area. Approximately 120 hectares (ha) (300 acres (ac)) of a potential 800 ha (2,000 ac) of the Cuyamaca Valley and Stonewall Creek area are occupied by *L. gracilis* ssp. *parishii*. The number of individuals and the location and size of stands within this area varies in any given year in response to rainfall, the extent of winter flooding, and temperature (Bauder 1992). Under favorable conditions, *L. gracilis* ssp. *parishii* can be a conspicuous element of the Cuyamaca Valley during the spring bloom (Craig Rieser, Pacific Southwest Biological Services, pers. comm., 1993).

Other populations of *Limnanthes gracilis* ssp. *parishii* are considerably smaller, both in number of individuals and the extent of occupied habitat relative to the Cuyamaca Valley population. They range in size from less than 2 ha (5 ac) to as much as 40 ha (100 ac) in extent, and most populations contain fewer than 1000 individuals. At least five of these other populations occur on National Forest lands. A single isolated population is located in vernal pools on the Santa Rosa Plateau of southwestern Riverside County, California. This area of approximately 2 ha (5 ac) is managed by The Nature Conservancy (TNC). One additional population has been introduced to National Forest lands in the Laguna Mountains from seeds gathered from the Cuyamaca Valley population (Winter 1991, CNDDB 1992).

Previous Federal Action

Federal government action on the two plant taxa considered in this rule began as a result of section 12 of the Endangered Species Act of 1973, which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. This report, designated as House Document No. 94–51, and presented to Congress on January 9, 1975, recommended *Limnanthes gracilis* var. *parishii* (= *L.g.* ssp. *parishii*) for endangered status. The Service published a notice in the July 1, 1975, **Federal Register** (40 FR 27823), of its acceptance of the report as a petition within the context of section 4(c)(2) (now section 4(b)(3)(A)) of the Act, and of the Service's intention to review the status of the plant taxa named therein, including *L.g.* ssp. *parishii*. The Service published a proposal in the June 16, 1976, **Federal Register** (42 FR 24523) to determine approximately 1,700 vascular plants to be endangered species pursuant to section 4 of the Act. *Limnanthes gracilis* ssp. *parishii* was included in this **Federal Register** notice.

General comments received in response to the 1976 proposal were summarized in an April 26, 1978, **Federal Register** notice (43 FR 17909). The Endangered Species Act amendments of 1978 required all proposals over 2 years old to be withdrawn, although a 1-year grace period was given to those proposals. In the December 10, 1979, **Federal Register** (44 FR 70796), the Service published a notice of withdrawal for that portion of the June 6, 1976, proposal that had not been made final and which included *L. g.* ssp. *parishii*.

The Service published an updated Notice of Review of Plants in the **Federal Register** on December 15, 1980 (45 FR 82480). This notice included *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii* as category 1 candidate taxa (species for which data in the Service's possession are sufficient to support a proposal for listing). On November 28, 1983, the Service published a supplement to the Notice of Review of Plants in the **Federal Register** (48 FR 53640). This notice was again revised on September 27, 1985 (50 FR 39526). Both plant taxa were included in 1983 and 1985 supplements to the Notice of Review of Plants as category 2 candidate taxa (species for which data in the Service's possession indicate listing may be appropriate, but for which additional biological information is needed to support a proposed rule). The Notice of Review of Plants was again revised on February 21, 1990 (55 FR 6184), and again on September 30, 1993 (58 FR 51144). *Downingia concolor* var. *brevior* was included as a category 1 candidate taxon, and *Limnanthes gracilis* ssp. *parishii* as a category 2 candidate taxon in both notices.

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended in 1982, requires the Secretary to make findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982 be treated as having been newly submitted on that date. This was the case for *Limnanthes gracilis* ssp. *parishii* because the 1975 Smithsonian report had been accepted as a petition. On October 13, 1983, the Service found that the petitioned listing of this species was warranted but precluded by other pending listing proposals of higher priority, pursuant to section 4(b)(3)(B)(iii) of the Act. Notification of this finding was published in the **Federal Register** on January 20, 1984 (49 FR 2485). Such a finding requires

the petition to be recycled, pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed in October of 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, and 1992.

The Service made a final "not warranted" finding on the 1975 petition with respect to *L. g.* ssp. *parishii* and 864 other species in the December 9, 1993, Federal Register (58 FR 64828–45). One reason was cited as the basis for this finding on this species that was based upon data not then available to the Service in late summer 1993: current threats (i.e., the five factors described below under 50 CFR 424.11) throughout a significant portion of the species' range. The species was retained in Category 2 on the basis that it may be subject to extinction or endangerment from uncontrolled loss of habitat or from other man-caused changes to its environment (58 FR 64840). Since the summer of 1993, the Service has completed or obtained survey and other data that adequately describe those factors that are placing *L. g.* ssp. *parishii* at risk of extinction. The Service has proceeded to propose this species along with the Lake Cuyamaca downingia that occupies the same general part of southern California.

On December 14, 1990, the Service received a petition dated December 5, 1990, from Mr. David Hogan of the San Diego Biodiversity Project, to list *Downingia concolor* ssp. *brevior* (=*D. c.* var. *brevior*) as an endangered species. The petitioner also requested the designation of critical habitat for this species. The Service evaluated the petitioner's requested action for *D. c.* var. *brevior* and published a 90-day finding on August 30, 1991 (56 FR 42968) that substantial information existed indicating that the requested action may be warranted. Publication of this proposal constitutes the final finding that the petitioned action is warranted for this species.

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 an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) and 50 CFR 424.11. These factors and their application to *Downingia concolor* E. Greene var. *brevior* McVaugh (Cuyamaca Lake downingia) and *Limnanthes gracilis* Howell ssp. *parishii* (Jepson) Beauch (Parish's meadowfoam) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

Impacts that result in the loss, degradation, and fragmentation of vernally moist wet meadows are contributing to the decline of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*. The habitat for both these taxa is threatened by recreational developments, off-road vehicle use, trampling, alterations of hydrology and the introduction of exotic plants.

Historically, montane wet meadow and vernal pool habitats were much more abundant in the Peninsular Ranges of San Diego County (Winter 1991). The wet meadows surrounding Cuyamaca Lake reservoir support the most significant populations of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*. The entire Cuyamaca Valley was originally a montane meadow-vernal pool complex. Dredging during dam construction in 1886 altered the natural topography of the valley and its vernal pools. Mima mounds were likely excavated since "much of the earth used for the dam was taken from the meadow north of the dam and from the valley floor" (Allen and Curto 1987). Later, 160 ha (400 ac) of the valley outside the reservoir was leased from Helix Water District and planted in grain.

Loss of wet meadow habitat continues as a result of excessive water inundation at Cuyamaca Lake reservoir and within Cuyamaca Valley above the dike. Studies of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*, conducted between 1988 and 1992, have demonstrated that extended inundation at Cuyamaca Lake caused extirpation of stands for these two species (Bauder 1992). The reservoir provides domestic water, flood control, and recreational activities such as fishing and duck hunting. These uses are administered through agreements between the Helix Water District, the City of San Diego's El Capitan Reservoir, and Lake Cuyamaca Recreation and Park District (Bauder 1992). Approximately 81 ha (150 ac) of potential meadow habitat are permanently inundated. The system of dikes built in 1967 allows an additional 273 ha (675 ac) to be inundated for extended periods of time during periods of high precipitation; that occurred as recently as 1993 (Hugh Marks, Cuyamaca Lake Recreation and Parks District Manager, pers. comm., 1993). *L. gracilis* ssp. *parishii* is less able to recover from excessive inundation than *D. concolor* var. *brevior, as shown by the lack of re-establishment in areas of previous inundation (Bauder 1992).*

A variety of indirect impacts are associated with the diversion of water entering the Cuyamaca Lake reservoir basin. Diversion often results in the alteration of small drainages by down cutting and streambank erosion, which contributes to the loss of potentially suitable habitat upstream of Cuyamaca Lake. Fluctuating lake levels also increase channel erosion by changing the gradient and velocity of surrounding drainages. Erosion is further intensified by the decrease in groundwater levels caused by numerous wells in the area. When streamflow velocities are high, *Downingia* and *Limnanthes* seeds and plants can be buried or washed away. In dry years, meadows exposed by the receding shoreline dry prematurely as the groundwater level falls. Roads without adequate culverts also divert water flow. Road maintenance and herbicidal weed abatement often preclude the re-establishment of seeds in areas of suitable habitat (Bauder 1992). In addition, the alteration of hydrology in Cuyamaca Valley promotes the invasion of exotic species (e.g., Lolium perenne (ryegrass) and *Poa pratensis* (Kentucky bluegrass)) known to displace native plant species. These indirect effects can have significant, long-term impacts on the meadow habitats and associated sensitive plant species.

Direct loss of both species' habitat at the reservoir is substantial. For example, a parking lot and a campground on the south end of Cuyamaca Lake reservoir at Los Caballos have displaced habitat (Bauder 1992). The Prado campground on the Cleveland National Forest also displaced *Limnanthes gracilis* ssp. *parishii* (Devoree Volgarino, Cleveland National Forest, pers. comm., 1993). The construction of a Boy Scout trail in 1976 destroyed a population of *L. g.* ssp. *parishii* in Canebrake Canyon, north of Cuyamaca Lake (CNDDB 1992). A trail around the perimeter of Cuyamaca Lake bisects several populations of both species (Ellen Bauder, Ph.D., Department of Biology, San Diego State University, pers. comm., 1993).

Several large wet meadows in the Laguna Mountains of the Cleveland National Forest support *Limnanthes gracilis* ssp. *parishii*. However, the creation of two shallow reservoirs in these meadows have resulted in year round inundation of potential *L.g.* ssp. *parishii* habitat (Winter 1991).

Traffic from off-road vehicles, horses, and hikers in the Laguna Mountain meadows indirectly impacts *Limnanthes gracilis* ssp. *parishii* by

altering the composition of the plant community over time. Such damage frequently occurs in spring when the soils are saturated and subject to compaction (Winter 1991). Loss and modification of *L. gracilis* ssp. *parishii* habitat has been documented as a result of trampling, erosion, and alteration of hydrology at most of the locations occupied by this species (Bauder 1992). *L. gracilis* ssp. *parishii* may be more subject to trampling than *Downingia concolor* var. *brevior* because it grows around the drier periphery of meadows. Some equestrian camps in Laguna Mountain meadows have displaced habitat of *L. g.* ssp. *parishii*, and its proximity to other camps has resulted in trampling (Bauder 1992).

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization is not known to be a threat to the two plant taxa under consideration in this proposed rule. Vandalism or collection are not known to threaten these species.

C. Disease or Predation

Disease is not known to be a factor affecting the taxa under consideration in this rule. Consumption of individual plants by grazing animals has been known to impact the reproduction of these annual plants and has had other affects, such as trampling, erosion (see Factor A) and the introduction of non-native species (see Factor E). Grazing was discontinued on Helix Water District-owned lands at Cuyamaca Lake in 1986 when *Downingia concolor* var. *brevior* was believed to be extinct as a result of grazing (David Hogan, San Diego Biodiversity Project, *in litt.*, 1990; Joseph Young, Helix Water District, pers. comm., 1993). The plant re-established itself the following season (Bauder 1992). Livestock grazing was terminated in Cuyamaca State Park in 1956, with the exception of a 16 ha (40 ac) parcel that was grazed until 1980 when it was acquired by the State Park. Grazing still continues on privately owned pastures east of the reservoir. The Cleveland National Forest still allows grazing in these sensitive meadows but recently adopted late season grazing regimes to avoid loss of individual plants due to actual consumption (Volgarino, pers. comm., 1993).

D. The Inadequacy of Existing Regulatory Mechanisms

Existing regulatory mechanisms that could provide some protection for these species include: (1) listing under the California Endangered Species Act (CESA); (2) the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA); (3) conservation provisions under section 404 of the Federal Clean Water Act (CWA) and section 1603 of the California Fish and Game Code, (4) occurrence with other species protected by the Federal Endangered Species Act; (5) land acquisition and management by Federal, State, or local agencies, or by private groups and organizations, and (6) local laws and regulations.

The California Fish and Game Commission has listed *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii* as endangered under the Native Plant Protection Act (NPPA) (Div. 2, chapter 10, section 1900 *et seq.* of the California Fish and Game Code) and the California Endangered Species Act (CESA) (Div. 3, chapter 1.5 section 2050 *et seq.*). After the California Department of Fish and Game notifies a landowner that a State-listed plant occurs on his or her property, the Fish and Game Code requires only that the landowner notify the agency "at least 10 days in advance of changing the land use to allow salvage of such plant" (Chapter 10, section 1913, California Fish and Game Code). Therefore, although NPPA and CESA both prohibit the "take" of State-listed plants (Chapter 10, sections 1908 and Chapter 1.5, section 2080, California Fish and Game Code), these statutes are not adequate to protect the taking of such plants via habitat modification or land use change by the landowner.

The California Environmental Quality Act (CEQA) (Public Resources Code, section 21000 *et seq.*) requires full disclosure of the potential environmental impacts of proposed projects. The public agency with primary authority or jurisdiction over the project is designated as the lead agency and is responsible for conducting a review of the project and for consulting with the other agencies concerned with the resources affected by the project. CEQA documentation is often inadequate or incomplete, and compliance with CEQA is not monitored. Section 15065 of the CEQA Guidelines requires a finding of significance if a project has the potential to "reduce the number or restrict the range of a rare or endangered plant or animal." However, even if significant effects are identified, the lead agency has the option to require mitigation through changes in the project or to decide that "overriding social and economic considerations" make mitigation infeasible (California Public Resources Code, Guidelines, section 15093). In the latter case, projects may be approved that cause significant environmental damage, such as destruction of endangered plant species. Protection of listed plant species under CEQA is therefore dependent upon the discretion of the lead agency, hence, this is not adequate to ensure the survival of a species.

The Cuyamaca Recreation and Park District is the lead agency that is empowered to uphold and enforce CEQA regulations at Cuyamaca Lake reservoir. However, unresolved conflicts exist regarding the use of this area for recreation and habitat protection for state endangered species. The Cuyamaca Recreation and Park District receives funding from CDFG, State Bonds, California Division of Parks and Recreation, U.S. National Park Service Land and Water Grants, and other sources, which have been used to stock the reservoir with fish, build duck blinds, a boat ramp, picnic facilities and a fishing trail around the western portion of the reservoir between the dam and the dike. Projects that use state money must comply with CEQA on each project or funding can be withdrawn. Impacts to *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* occur during implementation of these projects and may continue to occur as a result of maintenance and use of these facilities. The Cuyamaca Recreation and Park District, acting as the state lead agency, has issued negative declarations for its improvement and maintenance activities, which exempts them from the requirement for a full environmental analysis. Other signatory state agencies have not monitored CEQA compliance by the Cuyamaca Recreation and Park District (Jack Shu, California State Parks Department, pers. comm., 1993). These factors have resulted in removal of plants and habitat loss as discussed in factor A above.

While CEQA pertains to projects on non-Federal land, the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 to 4347) requires disclosure of the environmental effects of projects within Federal jurisdiction. Species that are listed by the State, but not proposed or listed as threatened or endangered by the Federal government, are not protected when a proposed Federal action meets the criterion for a "categorical exclusion". NEPA requires that each of the project alternatives recommend ways to "protect, restore and enhance the environment" and "avoid and minimize any possible adverse effects" when implementation poses significant adverse impacts. However, it does not require that the lead agency select an alternative with

the least significant impacts to the environment (40 CFR 1500 *et seq.*). Federal actions that may affect Federal threatened or endangered species require consultation with the Fish and Wildlife Service under section 7 of the Endangered Species Act and must avoid jeopardizing the continued existence of a listed plant species and destruction or adverse modification of critical habitat.

The Cuyamaca Recreation and Park District is also subject to NEPA because projects for recreational improvements may be funded through the Federal Land and Water Grant program that is administered by the National Park Service through the California Department of Parks and Recreation. These projects would require NEPA review. Land-use planning decisions at the local level are made on the basis of environmental review documents prepared in accordance with CEQA or NEPA that often do not adequately address "cumulative" impacts to non-listed species and their habitat. State listed species that are candidates for Federal listing receive no special consideration under NEPA.

Section 1603 of the California Fish and Game Code authorizes the Department of Fish and Game to regulate streambed alteration. The Department must be notified and approve any work that diverts, alters, or obstructs the natural flow or changes the bed, channel, or banks of any river, stream, or lake. If the Department does not respond within 30 days of the notification, the applicant may proceed with the work. All waterways of the State, including streams, intermittent streams, rivers, and lakes are subject to the Department's jurisdiction. However, the Department of Fish and Game does not consider the creation of wetlands for duck habitat to be regulated under section 1603. Thus, a Streambed Alteration Agreement was not required for flooding the streambed above Cuyamaca Lake reservoir for that purpose. Because the dam has been used continuously since its construction in 1886, justification of its continued use for recreation has been grandfathered into law (William D. Smith, Lake Cuyamaca Recreation and Park District, *in litt.*, 1993). Therefore, *Limnanthes gracilis* ssp. *parishii and Downingia concolor* var. *brevior* receive no protection under section 1603.

Section 404 of the Clean Water Act authorizes the Army Corps of Engineers (Corps) to regulate discharge of dredge or fill materials into waters of the United States, including wetlands. The objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Pub. L. 92–500), which include navigable and isolated waters, headwaters, and adjacent wetlands. However, no specific provisions exist that adequately address the need to conserve candidate species. Therefore, *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* currently receive no special consideration under section 404.

Even though some of the areas surrounding Cuyamaca Lake reservoir are wetlands, water management activities are not regulated under section 404 of the Clean Water Act, and these activities have the potential to adversely affect the two taxa under consideration in this proposed rule. Several small water impoundments in streams around Cuyamaca Lake reservoir may qualify for authorization under Nationwide Permit (NWP) No. 26 of the Clean Water Act if they are less than one acre (0.4 ha) in size. Because projects affecting such streams or wetlands may proceed without notifying the Corps, evaluation of their impacts under section 404 is precluded. An individual permit may be required by the Corps if projects otherwise qualifying under NWP 26 are likely to have significant environmental impacts. However, the Corps is generally reluctant to withhold authorization under NWP 26 unless the existence of a Federally listed species is likely to be jeopardized or if the action impacts a vernal pool (Bruce Henderson, Army Corps of Engineers, pers. comm., 1993).

Section 404 of the Clean Water Act regulates clearing of vegetation by mechanical means (e.g., bulldozing) but does not currently regulate any method of clearing that does not disturb the soil or channel bottom. Thus, the ongoing use of herbicides to remove vegetation from Cuyamaca Lake reservoir is not regulated under section 404, although water quality certification must be obtained from the Regional Water Quality Control Board under section 401 of the Clean Water Act (Bruce Henderson, pers. comm., 1993).

Limnanthes gracilis ssp. *parishii* and *Downingia concolor* var. *brevior* have been exposed to artificial flooding and draining of their habitat, herbicides, and trampling from maintenance vehicles and recreational activities. For these reasons, the Service finds that these species currently receive inadequate protection under section 404 of the Clean Water Act and section 1603 of the California Fish and Game Code.

No federally listed species inhabit vernally wet meadows in the Peninsular Ranges of southern California. Therefore, these two species proposed for listing receive no federal regulatory protection resulting from sympatry with listed species.

Limnanthes gracilis ssp. *parishii* is recognized by the Cleveland National Forest as a "sensitive species" (Winter 1991). The Cleveland National Forest has policies to protect sensitive plant taxa under its jurisdiction, including attempting to establish these species in unoccupied but suitable or historic habitat, encouraging land ownership adjustments to acquire and protect sensitive plant habitat, conserving meadow water tables, and protecting montane meadow habitats (Winter 1991). However, these guidelines have not been entirely effective. For example, implementation of plans to supply an equestrian campground with water from a well at Filaree Flat in the Laguna Mountains may alter meadow hydrology (Volgarino, pers. comm., 1993). The Cleveland National Forest has addressed trampling impacts to *L.g.* ssp. *parishii* by placing interpretive signs and fencing around populations at the Shrine Camp, Prado campgrounds, and Morris Ranch meadow. In addition, an alternative location for a proposed campground at Filaree Flat is being considered to avoid impacts to *L.g.* ssp. *parishii*. A late season grazing regime has been enacted at several of these meadows (Winter 1991; Volgarino, pers. comm., 1993). Fencing sensitive habitat areas minimizes impacts but does not prevent entry by hikers or mountain bikers. In some cases, plants that remain unprotected within campgrounds are severely trampled by campers. While Forest Service management practices have reduced impacts in certain areas, the majority of *L.g.* ssp. *parishii* populations are located on private lands that currently do not receive adequate protection. No populations of *Downingia concolor* var. *brevior* occur on lands under Forest Service jurisdiction.

The California Department of Parks and Recreation has eliminated grazing from meadows containing *Limnanthes gracilis* ssp. *parishii* at Cuyamaca State Park. However, other impacts to these species and their habitat continue to occur in this area, including trampling by horses, unauthorized trails, vehicle parking, off-road vehicle use, diversion of water flow, erosion, channelization, and water impoundment. No habitat has been set aside exclusively for the protection of *D. concolor* var. *brevior* (Bauder 1992).

The Santa Rosa Plateau Preserve is managed by The Nature Conservancy for the long-term protection of sensitive species. However, only a single, small population of *Limnanthes gracilis* ssp. *parishii* is located within the preserve.

Local laws and regulations are insufficient to protect habitat for *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii*. For example, the County of San Diego generally does not provide protection for sensitive plant species unless they are actually Federally listed (Hogan, pers. comm., 1993).

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Stochastic extinction threatens both *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii* by virtue of their small population size and restricted distribution. The likelihood of finding a normal distribution of genetic variability is reduced in small populations (Jensen 1987). Reduced genetic variability may lower the ability of these populations to survive. The potential for local extirpation due to small population size can be exacerbated by environmental conditions such as drought, flooding, or fire (Gilpin and Soule 1986, Falk and Holsinger 1991).

Due to their accessibility, populations of these two taxa are particularly vulnerable to trampling. As discussed under factor A above, trampling from cattle occurs in meadows occupied by *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* in the National Forest and private land holdings. As discussed under factor D above, several measures were initiated during the past decade to protect the vernally wet meadow ecosystem and associated sensitive plant species at Cuyamaca State Park and the Cleveland National Forest. However, these measures have not prevented trampling by hikers and horses.

Introduced species of grasses and forbs have invaded many of California's plant communities. Such weedy species can displace the native flora by out competing them for nutrients, water, light, and space. Weedy plant invasions are facilitated by disturbances such as grazing, urban and residential developments, and various recreational activities. Introduced weeds have become established in many portions of the Laguna Mountains thereby reducing the amount of suitable habitat for native plant species (Sproul 1979). For example, the invasion of exotic species including *Lolium perenne* (ryegrass) and *Poa pratensis* (Kentucky bluegrass) has altered the composition of habitats supporting the two plant taxa under consideration in this proposed rule (Sproul 1979).

Trampling by livestock typically changes the composition of native plant communities by reducing or eliminating those species that cannot withstand trampling and predation (see Factors A and C), and enabling more resistant (usually exotic) species to increase in abundance. Introduction of seed from non-sterile hay and animal feces increases the likelihood of invasion of exotic species and prevents re-establishment of native plants. Taxa that were not previously part of the native flora may be introduced and flourish under a grazing regime and may reduce or eliminate native plant species through competition for resources. Grazing is considered to be a threat to all populations of *Limnanthes gracilis* ssp. *parishii* within the Cleveland National Forest, primarily as a result of trampling and the invasion of non-native species into sensitive plant habitats (Winter 1991).

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to propose this rule. Based on this evaluation, the Service finds that *Downingia concolor* var. *brevior* is in imminent danger of extinction throughout all or a significant portion of its range due to habitat destruction and degradation resulting from hydrologic alterations, grazing, trampling by recreational activities, the inadequacy of existing regulatory mechanisms, an increased probability of stochastic extinction, and competition from exotic plant species. The Service considered threatened status for this species, but determined that it such status would not be in keeping with the purposes of the Act because the single remaining population consists of only 8 to 23 stands within a restricted range, and is at risk of extirpation due to stochastic events such as water inundation. Therefore, the preferred action is to list *Downingia concolor* var. *brevior* as endangered.

For the reasons discussed below, the Service finds that *Limnanthes gracilis* ssp. *parishii* is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Threats to this taxon include the following: habitat destruction and degradation resulting from hydrologic alterations, grazing, trampling by recreational activities, the inadequacy of existing regulatory mechanisms, stochastic extinction, and competition from exotic plant species. The Service has determined that threatened rather than endangered status is appropriate for *L.g.* ssp. *parishii* primarily because the California Department of Parks and Recreation, the Cleveland National Forest, and The Nature Conservancy have initiated some measures to protect this species. Within these areas, management activities have included fencing, signing, and monitoring of habitat supporting *L.g.* ssp. *parishii*. However, most localities containing this taxon remain vulnerable to trespass and trampling and to hydrologic alterations. The largest population of this species occurs mostly on private lands that are not protected. For these reasons, the Service finds that *L.g.* ssp. *parishii* is likely to become endangered in the foreseeable future if present threats and declines continue. The alternative of not listing these species would result in inadequate protection for these species, and would be inconsistent with the purposes of the Act. For the reasons discussed below, the Service is not proposing to designate critical habitat for these species at this time.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary propose designation of critical habitat at the time a species is proposed for listing as endangered or threatened. Section 4(b)(6)(C) further indicates that a concurrent critical habitat designation is not required if the Service finds that a prompt determination of endangered or threatened status is essential to the conservation of the involved species, or that critical habitat is not then determinable. The Service finds that designation of critical habitat for *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* is prudent but not presently determinable. Within 2 years of the publication date of this rule the Service will designate critical habitat unless the designation is found to be not prudent.

The Service intends to propose designation of critical habitat for those populations of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* that would not likely be imperiled by the threat of vandalism, collecting, or other human activities. Section 7(a)(2) of the Act requires Federal agencies to insure that their actions are not likely to destroy or adversely modify critical habitat, or jeopardize the continued existence of a listed species. On lands subject to Federal funding, authorization, or licensing, critical habitat would provide an added benefit to the conservation of these species. The populations of *L. gracilis* ssp. *parishii* and *D. concolor* var. *brevior* on land owned by the Cuyamaca Recreation and Park District, land subject to funding through the National Park Service and the five populations of *L. gracilis* ssp. *parishii*

on National Forest land would receive this added benefit from critical habitat designation. On non-federal land, additional protection may be provided as a result of the increased public awareness afforded by the critical habitat designation. In addition, the designation of critical habitat could be useful for State landowners and local regulatory agencies to identify areas of special concern and to establish priorities for land management and acquisition. Designation of critical habitat would be likely to result in more attention and hence protection by the State and county agencies (J. Shu, pers. comm., 1994).

Section 4(b)(2) of the Act requires the Service to consider economic and other impacts of designating a particular area as critical habitat. The Service must evaluate the effects of activities that occur within the ranges of these plants, and gather data on precise habitat requirements and ownership boundaries in order to precisely define the critical habitat of these two plant taxa. In addition, the Service must analyze the economics impacts that could result from the designation of particular areas as critical habitat. Designation of critical habitat for *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* is currently not determinable due to the need for this type of information. A proposal to designate critical habitat at this time would delay this proposed rule to list the species as threatened or endangered. The Service finds that a prompt determination of endangered or threatened status for these species is essential to ensure the full benefits of conservation measures under the Act. The Service intends to propose a critical habitat designation at a later date. After receiving additional information, the Service may determine that designation of critical habitat is not prudent for *L. gracilis* ssp. *parishii* or *D. concolor* var. *brevior*.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants 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) 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 listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agencies expected to have involvement with *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* include the Forest Service, Army Corps of Engineers, and National Park Service. These agencies either administer lands containing these species or authorize, fund, or otherwise conduct activities that may affect these species. In addition, the allocation of funding through the Federal Emergency Management Act, Housing and Urban Development, Federal mortgage programs, and the Veteran's Administration may be involved with these species.

The Act and its implementing regulations found at 50 CFR section 17.61, 17.62, and 17.63 for endangered, and 17.71 and 17.72 for threatened species, set forth a series of general prohibitions and exceptions that apply to all endangered or threatened plants. With respect to *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii*, all trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 or 17.71, would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale any such species in interstate or foreign commerce, or to remove and reduce to possession any such species from areas under Federal jurisdiction.

Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. In addition, for listed plants, the 1988 amendments (Pub. L. 100–478) to the Act prohibit the malicious damage or destruction on Federal lands and the removal, cutting, digging up, or damaging or destroying of listed plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62, 17.63, and 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered or threatened species under certain circumstances.

Permits may be issued to carry out otherwise prohibited activities involving endangered or threatened plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62 and 17.63. Such permits are available for scientific purposes, to enhance the propagation or survival of the species. Trade permits will not likely be sought or issued for any of the plant species considered herein because they are not in cultivation.

Requests for copies of the regulations on plants and inquiries regarding them should be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon, 97232–4181 (telephone 503/231–6241).

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 *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*.

(2) The location of any additional populations of these species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of these species; and

(4) Current or planned activities in the subject area and their possible impacts on these species.

The 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 a final regulation that differs from this proposal.

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 the proposal. Such requests must be made in writing and addressed to the Field Supervisor of the Carlsbad Field Office (see ADDRESSES section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available upon request from the U.S. Fish and Wildlife Service, Carlsbad Field Office (see ADDRESSES above).

Author

This rule was prepared by the staff of the Carlsbad 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 Regulation Promulgation

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for Part 17 continues to read as follows:

Authority: 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. It is proposed to amend § 17.12(h) by adding the following, in alphabetical order under the families indicated, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
*	*	*	*	*	*	*
Campanulaceae—Bellflower family:						
*	*	*	*	*	*	*
Downingia concolor var. *brevior.*	Cuyamaca Lake downingia	U.S.A. (CA)	E		NA	NA
*	*	*	*	*	*	*
Limnanthaceae—False mermaid family:						
*	*	*	*	*	*	*
Limnanthes gracilis ssp. *parishii.*	Parish's meadowfoam	U.S.A. (CA)	T		NA	NA
*	*	*	*	*	*	*

Dated: July 26, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–18930 Filed 8–1–94; 8:45 am]

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Thursday
August 4, 1994

Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Ch. I

Food and Safety Assurance Program; Development of Hazard Analysis Critical Control Points; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Ch. I

[Docket No. 93N–0325]

Development of Hazard Analysis Critical Control Points for the Food Industry; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is asking for public comment about whether and how the agency should develop regulations that would establish requirements for a new comprehensive food safety assurance program for both domestically produced and imported foods. Such regulations, if promulgated, would enhance FDA's ability to ensure the safety of the U.S. food supply. In this document, FDA is proposing that this program be based upon the principles of Hazard Analysis Critical Control Points (HACCP). FDA is requesting comments on a number of specific issues, as well as on all aspects of such a food safety program.

DATES: Written comments by December 2, 1994.

ADDRESSES: Written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, 301–443–1751.

FOR FURTHER INFORMATION CONTACT: John E. Kvenberg, Center for Food Safety and Applied Nutrition (HFS–10), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–4010.

SUPPLEMENTARY INFORMATION:

I. Background

A. Status of the Food Safety Assurance Program in the United States

FDA's mandate to ensure the safety of the nation's food supply is derived principally from the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321 *et seq*). Under the act, FDA has authority to ensure that all foods in interstate commerce, or that have been shipped in interstate commerce, are not contaminated or otherwise adulterated, are produced under sanitary conditions, and are not misbranded or deceptively packaged [1]. The agency also has authority to ensure food safety under the Public Health Service Act (the PHS act) (42 U.S.C. 264), which relates to the control of the spread of communicable diseases from one State, territory, or possession to another, or from outside the United States into this country.

To carry out its mandate to ensure the safety of the U.S. food supply, FDA conducts periodic inspections of food processors, shippers, food packers and repackers, food labelers and relabelers, and food warehouses. Some inspections are carried out by the States, under contract with FDA. In addition, although subject to FDA jurisdiction, the many hundreds of thousands of retail food outlets and restaurants in the United States are inspected by State and local health departments with technical assistance and training from FDA. FDA's program to ensure the safety of the U.S. food supply also includes sample analyses of food offered for import, research into rapid detection methodologies for potential hazards, enforcement activities, and education and information sharing programs. The goal of all of these regulatory and enforcement activities is to ensure that the food supply is, and remains, safe.

Although the current food safety assurance program has generally functioned effectively, it currently faces new stresses and challenges. New food processing and packaging technologies, new food distribution and consumption patterns, increasing public health concerns about low levels of certain chemical contaminants, and new microbial pathogens all contribute to today's food safety challenge. For example, the composition of the food supply has changed dramatically in the 55 years since passage of the act. More people consume commercially processed or commercially prepared foods than ever before, and there is increased consumer demand for "fresh" foods in convenient, ready-to-cook forms, which has fostered the development of sophisticated processing and packaging systems that can significantly extend the shelf life of a variety of foods. However, new food safety risks can be associated with these new food products, new packages, and new patterns of distribution and consumption.

One of the most important challenges to FDA's current food safety assurance program is the increasing number of new food pathogens. Although food borne illness has always been a public health problem, such illness appears to be on the rise, and new pathogens are appearing (Ref. 1). In addition, because foods are more extensively processed and handled, there is now a greater opportunity for food to be contaminated.

Food borne illness is a major cause of morbidity in the United States; estimates of the yearly incidence of food borne illness vary greatly, ranging from 6.5 million (Ref. 1) to 12.6 million cases per year (Ref. 2), and from 24 to 81 million cases per year (Ref. 3). In the 15 years between 1973 and 1988, the number of recognized food borne pathogens broadened considerably. During that period, bacteria not previously recognized as important food borne pathogens emerged, including *Campylobacter jejuni, Escherichia coli Listeria monocytogenes, Yersinia enterocolitica*, and a variety of *Vibrio* spp. During that same period, experts recognized that certain food borne illnesses may be followed by serious complications, such as arthritis, kidney damage, heart disease, and neurological damage (Ref. 3).

Pathogens are not the only potential contaminants of food, however. The extensive use of industrial chemicals, coupled with past failures to deal adequately with chemical waste, have resulted in significant chemical pollution of the environment in some regions. Many of these chemicals have found their way into the food chain. The legal use of pesticides in agriculture may also result in residues in food. Naturally occurring chemicals, such as toxic elements and mycotoxins, can also be found in food at levels of concern. The sheer number of these potential contaminants, the concerns about their toxicity even at very low levels, and the difficulty and expense associated with many of the analytical methods used to quantify their levels in food, make exhaustive endpoint monitoring of the food supply virtually impossible.

The size and diversity of the food industry adds to the stress on the current food safety assurance program. FDA's current inventory lists over 30,000 food manufacturers and processors, and in excess of 20,000 food warehouses. The number of foreign manufacturers and processors shipping food products to the United States continues to increase. In 1992, there were well over 1 million food import entries into the United States. In addition, the diversity of food imports

[1] Two other Federal agencies share with FDA the responsibility for regulating the safety of the food supply. The U.S. Department of Agriculture (USDA) has authority under the Meat Inspection Act (21 U.S.C. 601), the Poultry Inspection Act (21 U.S.C. 451), and the Egg Products Inspection Act (21 U.S.C. 1031) to inspect facilities in which meat, poultry, and eggs, respectively, are processed, and to regulate such products. The U.S. Environmental Protection Agency has authority, under provisions of the act, to establish legal limits (tolerances) for residues of pesticides on foods. FDA and USDA enforce such tolerances.

continues to increase, with a rising volume of foods entering the United States in processed forms.

Finally, the current food safety program is under stress internally. It is unlikely that FDA will ever have sufficient resources to inspect, sample, and analyze more than a small percentage of imported food shipments. State and local governments, on which FDA relies heavily for surveillance of the growing retail food sector, are also under severe resource constraints. Indeed, some States are considering proposals to reduce their food safety programs.

FDA's current regulatory strategy for ensuring food safety, with its emphasis on periodic visual inspection of food facilities and end-product testing, was designed to control the problems that were known to exist when the act was established in 1938. The agency has struggled to keep up with the enormous growth and changes in the food industry and the resulting new food safety challenges. FDA's current regulatory approach is relatively resource intensive and inefficient compared to other ways of ensuring food safety. Inspections that FDA conducts under the current system can determine the adequacy of conditions in a food plant at the time of the inspection but not whether the company has in place a food safety assurance program that is operating reliably and consistently to produce safe food at all times. Furthermore, the current inspectional approach is generally reactive, not preventive. It is effective in detecting and correcting problems after they occur, but, except in certain limited areas such as the regulation of infant formula and low acid canned foods, it is not currently based on a system of preventive controls.

For all of these reasons, FDA believes that it is appropriate at this time for the agency to consider improvements to its food safety assurance program to focus the program on prevention of food safety risks and problems. FDA's goals in establishing additional food safety regulations would be to: (1) Make the food supply safer through prevention of food safety problems; (2) enable FDA and its State and local counterparts to make more efficient use of the existing resources devoted to ensuring food safety, and (3) enhance the ability of the Federal Government to provide consumers with the assurance they seek that the U.S. food supply is safe.

FDA recognizes that risks vary across the food supply and that measures to make food safer should focus on the potential of particular foods or possible contaminants in those foods to cause illness. The agency also recognizes that there is no proven method or approach for ensuring the safety of food that will eliminate risk in all circumstances. Indeed, one purpose of this notice is to seek public comment on the degree of potential risks posed by those microorganisms, chemicals, and physical hazards (e.g., broken glass) that can get into food and be passed on to the consumer, if appropriate care is not exercised. FDA also desires comments on the consequences of these risks if they occur. In addition, the agency seeks comment on how these risks can best be controlled and which systems of quality control can best protect consumers from potentially unsafe food.

Although the agency has reached no final conclusions about how its regulatory programs should be revised to make food as safe as possible, FDA has tentatively concluded that the improvements in the agency's current food safety assurance program should be based on a state-of-the-art, preventive approach known as HACCP. HACCP was developed approximately 30 years ago by the U.S. food industry, and it is currently used in a number of domestic food processing facilities. HACCP is internationally regarded as the most effective system for producing safe food. FDA is considering HACCP as the foundation for revision of the U.S. food safety assurance program because, although simple in its basic concepts, HACCP is a sophisticated and powerful tool for ensuring food safety. HACCP is a science based, systematic approach to preventing food safety problems by anticipating how such problems are most likely to occur and by installing effective measures to prevent them from occurring. HACCP thus requires that the processor and the regulatory authority be aware of the state-of-the-art science relative to food safety and processing technology. HACCP appropriately affirms that the food industry has primary responsibility for producing safe food, and it provides an important opportunity to link the food industry's system for producing safe food with the Government's system of regulatory oversight. A more in-depth discussion of the HACCP concept follows.

B. The HACCP System

The HACCP concept (Ref. 4) is a systematic approach to the identification, assessment of risk (likelihood of occurrence and severity), and control of the biological, chemical, and physical hazards associated with a particular food production process or practice. HACCP is a preventive strategy. It is based on development by the food producer of a plan that anticipates food safety hazards and identifies the points in the production process where a failure would likely result in a hazard being created or allowed to persist; these points are referred to as critical control points (CCP's). Under HACCP, identified CCP's are systematically monitored, and records kept of that monitoring. Corrective actions are taken when control of a CCP is lost, including proper disposition of the food produced during that period, and these actions are documented.

Use of the HACCP system for the food industry will underscore the industry's role in continuous problem prevention and problem solving, rather than relying solely on traditional facility inspections by regulatory agencies to detect loss of control. HACCP provides for real time monitoring procedures to assess the effectiveness of control. Each HACCP plan would reflect the uniqueness of a food, its method of processing, and the facility in which it is prepared.

HACCP has been endorsed by the National Advisory Committee on Microbiological Criteria for Foods (NACMCF) as an effective and rational means of ensuring food safety from harvest to table. The NACMCF was established in 1988 by USDA in conjunction with FDA to fulfill a recommendation of the National Academy of Sciences, and includes officials from FDA, USDA, the National Oceanic and Atmospheric Administration, and the Department of Defense, as well as experts from academia and the food industry. HACCP is also recognized in the international food safety community as the state-of-the-art means to ensure the safety and integrity of food. In particular, the Committee on Food Hygiene of the United Nations' Codex Alimentarius Commission (Codex) has endorsed the HACCP concept as a world wide guideline. Indeed, the European Union (EU) and other countries around the world have begun to require that foods produced within their borders be processed under HACCP requirements.

The NACMCF has developed the following seven principles that describe the HACCP concept:

1. Hazard Analysis

The first step in the establishment of a HACCP system for a food process or practice is the identification of the hazards associated with the product. The NACMCF defines a hazard as a biological, chemical, or physical property that may cause a food to be unsafe for consumption. The hazard analysis step should include an assessment of both the likelihood that

such a hazard will occur and its severity if it does occur. This analysis should also involve the establishment of preventive measures to control identified hazards.

2. Identification of CCP's

A CCP is a point, step, or procedure at which control can be applied, the result being that a potential food safety hazard can be prevented, eliminated, or reduced to acceptable levels. Points in the manufacturing process that may be CCP's include cooking, chilling, specific sanitation procedures, product formulation control, prevention of cross contamination, and certain aspects of employee and environmental hygiene.

3. Establishment of Critical Limits for Preventive Measures Associated With Each Identified CCP

This step involves establishing a criterion that must be met for each preventive measure associated with a CCP. Critical limits can be thought of as boundaries of safety for each CCP and may be set for preventive measures such as temperature, time, physical dimensions, moisture level, water activity, pH, and available chlorine.

4. Establishment of Procedures to Monitor CCP's

Monitoring is a planned sequence of observations or measurements to assess whether a CCP is under control and to produce an accurate record for use in future verification procedures. Continuous monitoring is possible with many types of physical and chemical methods. When it is not possible to monitor a critical limit on a continuous basis, monitoring intervals must be frequent enough to permit the manufacturer to determine whether the step/process/procedure designed to control the hazard is under control.

5. Establishment of Corrective Actions To Be Taken When Monitoring Shows That a Critical Limit Has Been Exceeded

While the HACCP system is intended to prevent deviations in a planned process from occurring, total prevention can rarely, if ever, be achieved. Therefore, there must be a corrective action plan in place to ensure appropriate disposition of any food produced during a deviation, to fix or correct the cause of noncompliance to ensure that the CCP is once again under control, and to maintain records of corrective actions taken.

6. Establishment of Effective Recordkeeping Systems That Document the HACCP System

This principle requires the preparation and maintenance of a written HACCP plan that lists the hazards, CCP's, and critical limits identified by the firm, as well as the monitoring, recordkeeping, and other procedures that the firm intends to use to implement the plan. This principle also requires the maintenance of records generated during the operation of the plan.

7. Establishment of Procedures to Verify That the HACCP System is Working

This process involves verifying that the critical limits are adequate to control the hazards identified, ensuring that the HACCP plan is working properly and verifying that there is documented, periodic revalidation of the plan to confirm that the plan is still performing its intended function under existing plant conditions at any point in time.

C. FDA's Authority to Mandate HACCP

In the **Federal Register** of January 28, 1994 (59 FR 4142), FDA proposed regulations that would require HACCP controls in the seafood industry. The agency believes that it is now appropriate to explore the application of HACCP to segments of the industry other than seafood. At this time the agency would plan to proceed in a stepwise fashion with those segments of the industry that are suitable candidates for adoption of HACCP principles. This document is intended to explore how the agency should pursue that broader HACCP program. FDA is doing so because the agency believes that such a program would be an effective and efficient way to ensure that food meets the act's safety standards and to implement section 402(a)(4) of the act (21 U.S.C. 342(a)(4)). As explained below, if FDA proceeds with a HACCP proposal covering additional segments of the food industry, such proposal would be made pursuant to the authority of sections 402 and 701(a) of the act (21 U.S.C. 371(a)).

Section 201 of the act defines the term "food" as "articles used for food or drink for man or other animals." Under section 402(a)(4) of the act, a food is deemed adulterated if it has been "prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health." Proof that a food is actually contaminated or otherwise hazardous is not required to establish that a food is adulterated under section 402(a)(4) of the act. (See *United States* v. *H. B. Greggory Co.*, 502 F.2d 700, 704 (7th Cir. 1974), cert. denied, 422 U.S. 1007 (1975).) Instead, such adulteration requires only a showing that the conditions under which food is prepared, packed, or held create a "reasonable possibility" of contamination. (See *Berger* v. *United States*, 200 F.2d 818, 821 (8th Cir. 1952).)

In its enforcement of section 402(a)(4) of the act, FDA has considered, among other things, prevailing industry standards and the technical state-of-the-art in determining, on a case-by-case basis, whether the conditions under which a company is processing or otherwise handling food violate the standard of section 402 (a)(4). FDA's current intention is to propose to codify, in a future rulemaking, a state-of-the-art standard based upon HACCP principles. This standard would establish those conditions of food manufacturing, packing, and holding that are consistent with section 402(a)(4) of the act. Such regulations would thus ensure the agency's efficient enforcement of section 402(a)(4) and the other food safety provisions of the act, as authorized by section 701(a) of the act.

At this juncture, the regulations that FDA is considering for proposal would specify the requirements that the agency believes are the minimum necessary to ensure that food products under FDA's jurisdiction are not adulterated under section 402(a)(4) of the act. Under the program that FDA is considering, if a food purveyor covered by the program does not adopt and implement a HACCP plan that complies with the program's requirements or does not operate the plan in accordance with the program, food prepared, packed, or held in that facility would be adulterated under section 402(a) (4) of the act and potentially subject to regulatory action by FDA.

D. Rationale for a HACCP Approach

FDA expects that adoption of HACCP by some or all segments of the food industry, coupled with Government verification through inspections of the HACCP system, will more effectively and efficiently ensure the safety of the American food supply. The agency has tentatively chosen a HACCP approach because HACCP addresses the root causes of food safety problems in production, storage, transportation, etc., and is preventive. Two principal alternatives to HACCP exist; end-product testing and comprehensive current good manufacturing practice (CGMP) regulations. End-product testing does not address the root causes of food

safety problems; it is not preventive by design and requires that a large number of samples be analyzed to ensure product integrity. Similarly, CGMP's are not a practical approach because of the breadth and diversity of the food industry, the limited resources available within FDA to prepare the many specific CGMP regulations that would be needed to cover effectively such a diverse industry, and the time required to implement such regulations. However, FDA may consider the promulgation of CGMP's for certain food processes or types if such regulations would be more effective than a HACCP system for such processes. For example, some of the comments have suggested that sanitation would be better addressed through CGMP's than through a HACCP plan.

A HACCP system for food safety assurance has numerous distinct advantages including the following: (1) HACCP focuses on prevention and is designed to prevent hazards from entering food; (2) HACCP permits more effective and efficient Government oversight; (3) HACCP places primary responsibility for ensuring food safety appropriately on the food manufacturer/distributor; and (4) HACCP assists food companies in competing more effectively in the world market.

The primary purpose of any HACCP system is to prevent problems through the systematic analysis and control of the production system by industry. This analysis and control would be confirmed by Government verification of the industry's monitoring. As such, a HACCP approach provides an appropriate balance between the responsibilities of industry and Government in ensuring food safety. A HACCP based program will also allow FDA and its State and local government counterparts to conduct more efficient and focused inspections of food facilities.

In addition to being preventive in nature and more efficient, a HACCP approach offers two additional benefits over conventional inspection techniques. First, in contrast to FDA's current regulatory approach, a HACCP approach requires industry to analyze, in a rational, scientific manner, its production processes in order to identify CCP's and to establish critical limits and monitoring procedures. An essential part of the industry's role under HACCP is to establish and maintain records to document adherence to the critical limits relating to the identified CCP's, which will result in continuous self inspection.

Second, HACCP allows the regulator to monitor more effectively a firm's compliance with food safety laws. With its current system of inspection, FDA can determine the conditions at a food plant only during the period of inspection. The agency must therefore make assumptions about conditions before and after the inspection based on a snapshot of plant conditions and practices at the time of the inspection.

With an HACCP-based program in place, an investigator can determine and evaluate both current and past conditions critical to ensuring the safety of food produced by the facility. As discussed above, an essential part of a HACCP system is maintenance of monitoring records. By examining such records, the Government inspector can, in effect, look back through time at the conditions of a facility. Under the proposal that FDA currently envisions, the agency would have access to CCP monitoring records to verify that the HACCP plan is working. Government monitoring under a HACCP system would provide assurance that systems of preventive controls are in place and functioning properly and thus afford greater public assurance of food safety.

Current Federal inspection and surveillance strategies attempt to gauge the industry's knowledge of hazards and preventive control measures largely by inference, i.e., whether a company's products are in fact adulterated, or whether conditions in a plant are in compliance with CGMP's. Consequently, the current inspection system places a great deal of responsibility on Government regulators to uncover problems and to take regulatory action to address those problems. Under a HACCP-based inspection system, it would be the responsibility of the company to develop a plan for producing safe food, and the role of Government inspectors would be to verify that the company is carrying out its plan.

Finally, adopting a HACCP system could potentially enhance international trade opportunities for the United States. Although enhancing trade has no direct effect on public health, participation in international trade in food products is critical to the U.S. economy. The United States is by far the world's major food exporter, with exports of raw agricultural and processed food products of over $40 billion per year. The United States also imports a substantial quantity of food products each year from many countries around the world. HACCP will improve FDA's ability to monitor such imports and thus ensure confidence in their safety. Also, HACCP is becoming the world-wide standard to ensure the safety of food and will thus serve as basis for harmonizing U.S. food safety regulations with those of other nations.

The Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) has resulted in further focus on this area. The Agreement on the Application of Sanitary and Phytosanitary Measures states the desire of member countries, including the United States, to further "* * * the use of harmonized sanitary and phytosanitary measures between members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission * * *" (Ref. 5). This trend toward harmonization, coupled with the current recommendations of the Codex Alimentarius Commission encouraging the international use of HACCP, provide further support for FDA's serious consideration of a HACCP program for all or part of the food industry.

E. How the Agency Intends to Proceed

FDA began its initiative to mandate HACCP with a proposal covering the seafood industry due in large part to the fact that a substantial amount of work on the application of HACCP to seafood processing and importation, including the development of specific HACCP models, has already been done by the Federal Government, some States, academia, and by the seafood industry itself. Thus, there is a considerable body of literature and expertise, which can facilitate the development of HACCP systems by seafood processors and importers. Moreover, seafood industry representatives have been urging the Federal Government to adopt a mandatory HACCP program. The National Fisheries Institute, the largest seafood industry trade association, has testified repeatedly at congressional hearings in support of legislation that would mandate such a system. The agency recommends that interested persons refer to the seafood proposal to understand how the HACCP approach might work with respect to one category of food product.

The body of knowledge and experience on the application of HACCP to food production has not, as far as the agency is aware, been developed for other commodities to the extent that it has for seafood. (One possible exception is the low acid canned food industry, where much work has been done in HACCP's application due to FDA's long standing regulatory program for this industry.) Moreover, the food industry is extremely diverse and complex. For these reasons, FDA has decided to issue this advance notice of proposed

rulemaking to request comments on various aspects of the implementation of a mandatory HACCP program for some or all other sectors of the food industry. Those comments may suggest that an industry-wide HACCP requirement is appropriate or may indicate that such a program should be phased-in as data on individual commodities is compiled. FDA is open to any other suggestions. Specific issues on which FDA is particularly interested in receiving comments are set out below.

The agency believes that it could benefit from experience with the application of HACCP to selected commodities outside the seafood area. To gain this experience the agency has announced a voluntary pilot HACCP program and invited interested food producers to participate.

Some of the objectives of this pilot program are to obtain data on the hazards associated with particular types of food, and to develop and implement HACCP plans to control those hazards in conjunction with the participating firms. The pilot program could provide the agency and the industry with the practical knowledge and experience that would assist in the development and implementation of a HACCP program for particular segments of the food industry.

FDA recognizes that an ongoing exchange of scientific, technical, and operational information between the agency, the food industry, trade associations, consumer groups, FDA's State and local counterparts, and other affected parties is essential for the successful implementation of HACCP in the food industry. Consequently, FDA intends to maintain a dialogue with all affected parties during the process of developing its proposed regulations. In particular, FDA will meet with the food industry, consumer groups, and other interested parties during the comment period on this advance notice of proposed rulemaking.

FDA anticipates that it will receive a substantial number of comments in response to this document. The agency will review these comments and have further dialogue with industry and consumer representatives, as well as other groups and organizations knowledgeable in food safety, as part of its process for determining the appropriate regulatory approach prior to publication of a proposed rule.

FDA intends to work closely with USDA, as it considers development of its own HACCP regulations for meat and poultry products, to ensure that the two regulatory bodies have a consistent approach in applying HACCP principles to the food industry, while recognizing that inherent differences may exist between food commodity groups that will necessitate different approaches.

FDA also intends to work closely with its State and local counterparts that regulate the retail segment of the food industry. One principal way FDA conveys its recommended food regulatory policy to the nation's State and local food control agencies is through FDA's model Food Code. A notice of availability of the latest revision of the Food Code, which incorporates certain HACCP principles and terminology, was published in the **Federal Register** of January 28, 1994 (59 FR 4085).

II. Request for Comments

Under the act, the food industry has the primary responsibility for ensuring the safety of the food it produces and distributes. In its simplest terms, the role of Government is to verify that the industry is carrying out its responsibility and to initiate regulatory or other appropriate action when the industry fails to do so. FDA believes that establishing a HACCP program throughout the food industry could enable both the industry and FDA to carry out their respective responsibilities far more efficiently and effectively. FDA invites comments on this point, as well as on specific issues relating to the application of HACCP to foods other than seafood, as set out below.

A. Scope of a HACCP Regulation

NACMCF supports the adoption of HACCP throughout the food industry ((Ref. 4). Additionally, the Codex Ailmentarius Committee on Food Hygiene considers HACCP to be the most efficient and cost effective means to manage food safety (Ref. 4). FDA recognizes, however, that not all foods pose the same inherent risks. The agency intends to work with the Centers for Disease Control and Prevention and other Federal and State agencies as well as health professionals, industry, and consumer groups to access and evaluate data on the relative risks associated with various foods. FDA has concluded that HACCP has great potential to improve food safety and can be successfully used beyond seafood. However, specific HACCP requirements established for the various segments of the industry may be different because of differences in risk as well as differences in processes, etc. The agency encourages the food industry generally to begin using HACCP more widely.

FDA specifically requests comments on the scope of any mandatory HACCP program proposed by the agency. Should FDA mandate HACCP for all segments of the food industry? Or should HACCP be required only for certain segments of the food industry? In deciding whether to cover all or some segments of the food industry by a mandatory HACCP rule, what criteria should FDA use? In particular, should any exclusions from a HACCP requirement be determined on any basis other than the risk presented by the particular activity? Are there categories of activities, such as the warehousing of certain types of foodstuffs, that deserve exclusion?

The agency also requests comment on how a mandatory HACCP rule should apply to those in the chain of distribution of imported foods. How should the agency ensure that imported foods are produced and handled safely? In the seafood proposal, FDA is proposing that all domestic and foreign processors and importers adopt HACCP controls, and FDA is proposing to take steps to ensure that the HACCP controls are in fact implemented by foreign processors. The seafood proposal broadly defines "processor" to include packers, repackers, wholesalers, and warehousers. Should the agency adopt the same approach with respect to foreign processors, handlers, and importers of all other foods?

FDA also solicits comments on whether and how a mandatory HACCP rule should apply to food retailers. The agency's seafood proposal specifically excludes retailers from the definition of "processor." Should a similar exclusion be made for retailers of all other foods as well? The agency notes that its updated Food Code, which serves as guidance to the States as part of an ongoing cooperative program for regulating the retail sector, incorporates several HACCP elements. The agency requests comment on this cooperative program for the retail sector and on how governments at all levels can best collaborate to ensure the safety of food from farm or fishery to the dinner table, including food sold ready-to-eat at the retail level. Should HACCP be required in restaurants and other retail outlets? Should HACCP requirements be applied directly to raw material suppliers and transportation companies? Or should such requirements be imposed indirectly through the HACCP plans of processors and others who receive food (e.g., by using purchase specifications)?

FDA also specifically requests comment on how small firms should be covered by any mandatory HACCP regulations. In the seafood proposal, FDA has made no distinctions in the application of proposed requirements based on firm size. If small firms should

be exempt, on what basis should the exemption be made?

B. Focus of HACCP

NACMCF believes that HACCP and HACCP plans should address food safety, including all biological, chemical, and physical hazards that would affect a particular food. Consistent with this view, FDA has limited the scope of the HACCP requirements in the seafood proposal to safety concerns and has not included food quality and labeling standards and requirements. Although the agency believes that the primary focus of a HACCP program should be safety, FDA is aware that food quality is also important to consumers and is an issue in international trade.

Should FDA's HACCP program for the broader food industry be limited to food safety and the hazards presented by a particular activity? If so, how broadly should hazard be defined? What level of risk warrants HACCP-type control? Should different levels of control be required in HACCP plans for different levels of risk? Or should FDA's proposal mandate that food quality issues be included in HACCP plans? Should sanitation practices within the plant be required to be included in HACCP plans?

C. Implementation of HACCP

FDA recognizes that, because of the size and diversity of the overall food industry, any mandatory HACCP program would likely be costly for some segments of the food industry and need to be phased in gradually. Development of HACCP plans would require at least some segments of the industry to adopt new ways of thinking and operating. Review by FDA of HACCP plans and monitoring records as part of its plant inspections would necessitate additional training of FDA, State, and local investigators.

In view of the scope of the task, what would be a reasonable time period for the implementation of HACCP? In the seafood proposal, FDA is proposing a 1-year period for implementation, measured from the date of the final regulations. This proposed lead time takes into account the fact that a considerable amount of developmental work has already been done on the application of HACCP to seafood processing. Are there special considerations for other types of foods that could affect implementation time? Are there circumstances that would require some industry segments to need an implementation period longer than 1 year after final rule promulgation?

If implementation of HACCP is to be phased in (i.e., certain segments would gradually be subject to the HACCP requirements established), how should this be accomplished? How should firms or segments of the food industry be differentiated for purposes of such a phased in implementation? What would be appropriate time intervals between each implementation phase? What criteria should be used to decide the order of implementation for the various segments of the food industry? For example, should potential food safety risks associated with the product be considered in determining an implementation schedule, and if so, what factors should be used in ranking foods with respect to potential risk? Likewise, for example, should firm size be considered in determining the order of implementation?

The agency is interested in learning about the experiences that food manufacturers have had with the implementation of HACCP and therefore requests comments from firms who have had actual experience in the application of HACCP concepts to food production, both on what has worked and on what has not worked. In particular, FDA seeks information on: (1) How long it took to implement a HACCP program; (2) the start-up and maintenance costs; and (3) the impact of implementing HACCP on the safety of the product, the efficiency of the firm's operation, and any long-term savings (cost effectiveness). The agency is also interested in any measures that have been, or could be, used to measure the effectiveness of HACCP to improve product safety. The agency is particularly interested in the experiences of small food firms on all of the above.

D. Evaluation of the HACCP System

FDA believes that implementation of HACCP beyond the seafood industry, whether voluntary or mandatory, will more effectively and efficiently ensure the safety of the American food supply. The agency recognizes, however, that there may be alternatives to the HACCP approach and invites comment on such alternatives and their effectiveness.

The agency also invites comment on whether there are factors that would limit the effectiveness of the HACCP approach. What information is needed in order to judge the effectiveness of a HACCP program? Should HACCP programs be pilot tested before implementation? Should there be a minimum level of certainty that a HACCP plan would be effective in controlling hazards prior to implementation?

What should be the qualifications of individuals responsible for developing HACCP plans? What should be the qualifications of individuals responsible for verification of HACCP plans? Is the current state of knowledge sufficient to make adequate hazard analyses? Is there a need for microbiological criteria in HACCP plans? Will end-product microbiological testing be necessary?

How should the appropriate frequency of monitoring CCP's be determined? Should a processing plant be required to submit a report to FDA each time a process is found to be out of control? What, if any, circumstances should trigger mandatory reporting to FDA? Is it necessary to require that a food processor have a reliable and well-tested method of recall as part of its HACCP plan?

E. Roles of FDA, the States, and the Food Industry

FDA's interest in institutionalizing HACCP for the food industry is based on the agency's recognition of the need to revise the current regulatory approach and make it more effective and comprehensive. This revision must coordinate and maximize the efforts of all levels of Government and the food industry to provide effective coverage of food from farm or fishery to table. The respective roles of industry, State and local authorities, and FDA must be clearly articulated, and they must be integrated and coordinated. FDA's preliminary thinking on the nature of these respective roles follows.

If FDA decides to make HACCP mandatory for some or all segments of the food industry, firms would be required to develop, implement, and maintain an effective HACCP system in their facility, and to verify that the system is adequate to ensure a safe product. The HACCP system developed by the firm would have to include all relevant critical limits (such as tolerances) contained in existing FDA regulations and guidelines, as well as other CCP's judged necessary by the firm to ensure the safety of the food. Firms would also be responsible for taking appropriate corrective actions whenever a CCP deviation has occurred. The system would be considered out of compliance when a critical limit of a CCP has been exceeded and corrective actions are not taken or are ineffective.

Regulated industry segments would also be responsible for providing appropriate training for personnel involved in implementing HACCP in each facility. Each facility would have to maintain an accurate, up-to-date HACCP plan, which would be available for review by FDA investigators during

an inspection. Records pertinent to the monitoring of the CCP's in the HACCP plan would also have to be available for review by FDA.

FDA is seeking comment on the appropriateness of imposing these obligations on the food industry under a mandatory HACCP system. The agency is especially interested in receiving comments on records access, including:

(1) What records should be considered HACCP records, and therefore be accessible to FDA (and State and local) investigators? Under FDA's proposed HACCP regulations for seafood, HACCP records include the HACCP plan itself, records of the monitoring of critical control points, and records of corrective actions. In the case of seafood, FDA tentatively concluded that the agency should have access to all records deemed to be HACCP records, because without such access, the regulatory requirements would not be meaningful.

(2) How should consumer complaint files relating to CCP failures be utilized in a HACCP system? In FDA's proposed HACCP regulations for seafood, the agency tentatively concluded that each HACCP system should take advantage of consumer complaints as they relate to the operation of CCP's. The agency proposed that procedures for monitoring CCP's include procedures for monitoring relevant consumer complaints, and that consumer complaints that potentially relate to the performance of critical control points be considered HACCP records. FDA invites comment on this approach for foods generally. Should FDA have access to consumer complaint files relating to CCP failures? What criteria should be used to determine whether a consumer complaint is linked to a CCP failure?

(3) How long should HACCP records be kept? The proposed HACCP regulations for seafood mandate 1 year for fresh products and 2 years for frozen and preserved products.

As an additional matter, FDA is aware that there is substantial public interest in the extent to which industry-generated HACCP records could or should be publicly available. FDA invites comment on the general question of public disclosure of HACCP records and on the agency's preliminary analysis of the availability of such records, which follows.

FDA has long had explicit statutory authority to obtain access to certain industry records during inspections involving infant formula, drugs, and devices (21 U.S.C. 374), and has had access by virtue of agency regulations to certain processing records during inspections of low acid canned food processors and manufacturers of infant formula. The agency has the right to copy and take possession of these records, but does not routinely do so. FDA typically copies and takes possession of records only when they may be needed for regulatory purposes. As a preliminary matter, FDA expects to continue this practice with regard to HACCP records.

The public availability of those HACCP documents that would become part of FDA's official records as a result of copying during an inspection would be governed by section 301(j) of the act and by the Freedom of Information Act (FOIA) and regulations issued under the FOIA by the Department of Health and Human Services (HHS) and by FDA. Section 301(j) of the act expressly prohibits any person from disclosing trade secret information obtained during the course of an inspection. The agency's FOIA regulations also state that FDA will not disclose either trade secret or confidential commercial information. FDA's preliminary view is that HACCP plans and monitoring records fall within these two categories of protected records. As a consequence, FDA may have little discretion to disclose such records. Moreover, under HHS FOIA regulations, processors may be entitled to challenge in court a pending disclosure of records on the ground that the records to be disclosed are confidential commercial or trade secret.

Additionally, there are significant legal and practical questions as to whether FDA has the authority to require disclosure of industry records that are not in FDA's possession.

The agency is also seeking comments on whether there should be a standardized format (structure and organization) for written HACCP plans. If so, how should this standard format be developed and who should develop it?

As is the case today, the overall goal of FDA's inspection program would be to ensure that foods are safely prepared, packed, and held. To achieve this goal under a HACCP system, FDA's inspection would seek to verify that a HACCP plan is adequate to ensure food safety and that it is being implemented and maintained properly. The agency is seeking comments on the appropriate frequency of agency inspections under a mandatory HACCP program to achieve its goal of ensuring food safety.

The agency is also interested in receiving comments on the possible role that FDA could play to assist the food industry in developing and establishing HACCP programs. This assistance could take the form of agency guidelines for developing HACCP plans and generic HACCP plans developed in cooperation with the industry. FDA could also promote and participate in educational programs to encourage the use of HACCP and FDA could continue to represent the United States at international meetings on HACCP. The agency could work with interested groups to identify new food safety hazards and to develop new strategies for their control.

The agency expects that the States would play a major role in enhancing FDA's enforcement coverage. State authorities could participate in HACCP inspections both as part of their own enforcement activities and under FDA contract. State and local authorities could also be involved in actively promoting the use of HACCP at the retail level.

The agency is seeking comments on what its role should be relative to the review, verification, monitoring, and certification of HACCP plans. In the seafood proposal, FDA is not proposing to require that HACCP plans be submitted to FDA in advance, or that preapproval by FDA be a condition of the adoption or implementation of these plans. If FDA proposes to make HACCP mandatory for other portions of the food industry, should it adopt this approach? Should FDA indentify CCP's and establish critical limits in its HACCP regulation, or should it defer to firms to develop these themselves? What role should FDA serve in overseeing the corrective actions taken when a deviation has occurred? Can any HACCP oversight function, including review of plans and monitoring, be performed by certified third parties? If so, how should they be certified and by whom?

For implementation of HACCP for fish and fishery products, FDA is developing guidelines for processors. These guidelines inventory and describe the likely hazards associated with both products and processes, and provide advice on how these hazards can be controlled. These guidelines also include a fill-in-the-blank HACCP plan to serve as an example of how a basic HACCP plan could be developed. Are such guidelines necessary for other commodities and, if so, who should develop them? What specifically should be included? What role should the food industry play in the development of these materials? What other forms of assistance should FDA provide? To what extent, if any, should any of this additional guidance be made mandatory?

F. Training and Education

The agency's experience with low acid canned foods established that appropriate training is critical to the successful implementation of HACCP in the food industry. The industry will need training on how to develop HACCP plans, i.e., how to identify hazards and establish critical limits, control measures, corrective actions, and recordkeeping procedures. Investigators employed by regulatory agencies, including FDA, will need training to understand how to review HACCP plans as well as industry records pertaining to implementation and operation of such plans.

Based upon its low acid canned food experience, FDA believes that employee training is an essential element of an effective HACCP program. Should FDA mandate training for plant personnel responsible for developing and maintaining the HACCP program? In the seafood proposal, FDA is proposing to require that each processor and importer employ at least one individual who has successfully completed a training course on the application of HACCP to fish and fishery products processing. Moreover, the regulations propose to require that those at each establishment who have received training be responsible for reviewing records of CCP monitoring, recognizing critical limit deficiencies, and assessing the need for corrective actions relative to the product in question and the HACCP plan itself. FDA seeks comment on the question of training. Are there reasons why such training should not be mandated? If such training is required, as FDA currently believes it should be, who should conduct these training courses? Who should be required to attend? What role, if any, should FDA have regarding course materials and instructors? Should a third party be certified by FDA to review and approve the training courses? Should one, some, or all responsible plant employees be certified?

G. International Harmonization

As the international community moves toward HACCP, FDA believes an opportunity exists to improve the safety of the U.S. food supply by working toward harmonized approaches that would elevate FDA's confidence that food entering the United States meets U.S. safety standards. Such harmonization would also support U.S. exports. For example, after January 1, 1995, unless seafood products for import into the EU are produced under HACCP, the EU will carry out extensive end-product testing, and the competitiveness of importers will be significantly affected. How should FDA approach any effort to harmonize HACCP standards with those of other countries? What role should the Codex play?

H. Potential Costs and Benefits

The agency is also requesting relevant economic information. In particular, FDA seeks estimates of the following costs: (1) The initial costs of developing a HACCP plan and the frequency and costs of altering the plan; (2) costs of monitoring and recordkeeping by type of process, product, and packaging, and the costs of reviewing records before shipment; (3) costs of necessary training of employees, and rate of turnover of employees; (4) administrative costs to oversee all phases of HACCP implementation and operation; (5) the cost of monitoring equipment and other types of equipment needed to implement a HACCP program; (6) the cost and frequency of corrective actions when critical limits are exceeded; (7) the potential cost to the industry of FDA inspections of HACCP programs; (8) cost of testing for chemical and contaminant residues as a component of HACCP; (9) cost of process redesign; (10) cost of new product design; and (11) the costs of any consultants that might be required under a HACCP approach. FDA also seeks comments about the costs of expanding HACCP to elements of the food industry other than manufacturers and processors, such as retail supermarkets and restaurants, food transporters, and raw material suppliers. FDA is particularly interested in the cost experience of small firms who have implemented HACCP, and how HACCP implementation by these firms is different from that of large firms.

FDA is also announcing its intention to survey the food processing industry (except for seafood) to estimate the costs of complying with mandatory HACCP requirements and requests comments on how such a survey should be designed and implemented.

FDA is also interested in receiving comments on benefits of mandating HACCP for particular products, processes, and packaging. Thus, FDA is seeking information about the existing risk levels presented by various foods, including risk from microorganisms, contaminants, and chemical residues from all interested parties, including State and other Federal agencies. FDA is also interested in receiving information concerning any quantitative reductions in risk that have been documented by firms now using HACCP, or other evidence that would document that illness or other food borne risks have been reduced through use of HACCP. FDA also is interested in receiving information that documents savings in production costs or indirect benefits, such as increased quality, that firms using HACCP have experienced. Because many risks are the result of consumer mishandling, FDA requests comments on the extent of this source of illness or other food borne risks, and how this information should be used to target HACCP efforts. Finally, FDA requests comments on the benefits of extending HACCP to the other areas of the food industry that are mentioned above.

I. Potential Environmental Effects

The agency is also requesting relevant environmental information because, under the National Environmental Policy Act, FDA must consider the environmental impact of its actions. The agency does not currently possess the data that would permit detailed analysis of the environmental impact of the action under consideration by the agency, as described in this document.

Therefore, the agency is requesting information on the potential environmental impact including: (1) Potential for increased energy consumption, (2) potential for increased disposal of defective foods, (3) potential for new or increased disposal of sanitizing products, (4) a description of measures that could be taken to avoid or mitigate adverse environmental impacts that might result from this action, and (5) potential for increased paper consumption.

III. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Bennett, J. V., S. D., Holmberg, M. F., Rogers, and S. L., Solomon, "Infectious and Parasitic Diseases," in "Closing the Gap: The Burden of Unnecessary Illness," Amlet, R. W. and H. B., Dull, ed., Oxford University Press, pp. 102–114, New York, 1987.

2. Todd, E. C. D., "Preliminary Estimates of the Costs of Food borne Disease in the United States," *Journal of Food Protection*, 52:595–601.

3. Archer, D. L., and J. E., Kvenberg, "Incidence and Cost of Food borne Diarrheal Disease in the United States," *Journal of Food Protection*, 48:887–894.

4. NACMCF, "National Advisory Committee on Microbiological Criteria for Foods, Hazard Analysis and Critical Control Point System Adopted March 20, 1992," "HACCP: Principles and Applications," Van Nostrand Reinhold, 1992.

5. GATT Secretariat, "Final Act Embodying the Results of the Uruguay Round of

Multilateral Trade Negotiations," December 15, 1993.

IV. Comments

Interested persons may, on or before December 2, 1994, submit to the Dockets Management Branch (address above) written comments regarding this document. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This document is issued under sections 402, 404, 701, and 704 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342, 344, 371, and 374).

Dated: July 29, 1994

David A. Kessler,

Commissioner of Food and Drugs.

Donna E. Shalala,

Secretary of Health and Human Services.

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Thursday
August 4, 1994

Part V

Department of Justice

Equal Employment Opportunity Commission

28 CFR Part 37
29 CFR Part 1640

Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 37

[A.G. Order No. 1899–94]

RIN 1190–AA29

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1640

RIN 3046–AA42

Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973

AGENCIES: Department of Justice and Equal Employment Opportunity Commission.

ACTION: Joint final rule.

SUMMARY: Section 107(b) of the Americans with Disabilities Act of 1990 (ADA) requires that the Department of Justice (the Department), the Equal Employment Opportunity Commission (the Commission or the EEOC), and the Department of Labor's Office of Federal Contract Compliance Programs issue regulations setting forth procedures to coordinate the processing of complaints that fall within the overlapping jurisdiction of title I of the ADA and the Rehabilitation Act of 1973, to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. Pursuant to this mandate, the Department of Justice and the EEOC are publishing a joint final rule implementing section 107(b) as it pertains to title I of the ADA and section 504 of the Rehabilitation Act of 1973. In addition, this regulation describes the existing procedures for processing: Employment complaints that fall within the overlapping jurisdiction of title II of the ADA and either title I or section 504 of the Rehabilitation Act, or both; and employment complaints that arise solely under title I or section 504. A joint final rule developed by the EEOC and the Department of Labor implementing section 107(b) as it pertains to title I and section 503 of the Rehabilitation Act has been published separately in the **Federal Register** of January 24, 1992.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Merrily A. Friedlander, Acting Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, D.C. 20035–6118. She can also be contacted through the Division's ADA Information Line at (202) 514–0301 or (800) 514–0301 (voice), or (202) 514–0383 or (800) 514–0383 (TDD).

Elizabeth M. Thornton, Deputy Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street NW., Washington, DC 20507, (202) 663–4638 (voice), (202) 663–7026 (TDD). Only the 800 numbers listed above are toll-free numbers.

Copies of this rule are available in the following alternate formats: large print, Braille, electronic file or computer disk, and audio tape. Copies may be obtained by calling (800) 669–3362 (voice) or (800) 800–3302 (TDD).

SUPPLEMENTARY INFORMATION:

Background

Title I of the ADA, 42 U.S.C. 12111–12117, prohibits discrimination against qualified individuals with disabilities in all aspects of employment. Title I of the ADA became effective on July 26, 1992, with respect to employers with 25 or more employees. 42 U.S.C. 12111(5)(A). On July 26, 1994, this coverage will be extended to employers with 15 or more employees. *Id.* The EEOC is authorized to investigate and attempt to resolve charges of employment discrimination under title I.

Subtitle A of title II of the ADA, 42 U.S.C. 12131–12134, prohibits discrimination against qualified individuals with disabilities on the basis of disability by State and local governmental entities in their services, programs, and activities, including employment. As of January 26, 1992, the effective date of title II, all State and local governmental entities, regardless of the number of persons they employ, were prohibited from discriminating on the basis of disability in employment. The Department of Justice has issued a regulation implementing title II, which provides that eight designated Federal agencies shall investigate and attempt to resolve complaints of discrimination under title II. Complaints that arise solely under title II are investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. See 28 CFR part 35 (56 FR 35694, July 26, 1991).

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, prohibits discrimination on the basis of disability (formerly, "handicap") in programs and activities receiving Federal financial assistance or conducted by any Executive agency. The nondiscrimination requirements of section 504 are applicable to employment in Federally-assisted programs. Each Federal agency that extends Federal financial assistance is responsible for compliance with section 504 in the programs it funds. More than twenty-five Federal agencies have issued regulations implementing section 504 for their Federally-assisted programs. These agencies are referred to in this rule as section 504 agencies.

The substantive prohibitions and coverage of title I, title II, and section 504 overlap to a significant extent. There is, therefore, a potential for duplicative efforts by the many Federal agencies responsible for ensuring compliance with these laws in their processing of complaints. Thus, pursuant to section 107(b) of the ADA, the Department and the Commission are promulgating this joint final rule to establish procedures for coordinating the processing of complaints that fall within the overlapping jurisdiction of section 504 and title I of the ADA. For convenience and clarity in processing complaints, this rule also incorporates the provisions established by the Department's title II rule at 28 CFR 35.171(b)(2)–(3) for coordinating the processing of complaints against public entities: (i) that fall within the jurisdiction of title II and title I (but are not covered by section 504); and (ii) that are covered by title II, but not title I (whether or not they are also covered by section 504). This reiteration of title II procedures does not amend or change the title II regulation as previously published. The Commission does not express an opinion on the title II procedures set forth herein, since they merely repeat a previously published regulation over which the Commission has no direct authority. The Commission and the Department of Labor also have published joint rules implementing section 107(b) of the ADA as it pertains to title I and section 503 of the Rehabilitation Act. See 29 CFR part 1641, 41 CFR part 60–742 (57 FR 2960, January 24, 1992).

Analysis of Comments and Revisions

Overview

The Commission received ten comments in response to a notice of proposed rulemaking (NPRM) published jointly with the Department of Justice on April 21, 1992. 57 FR 14630. In addition, the Commission received comments from various affected Federal agencies on both the proposed regulation and on the draft final regulation, pursuant to interagency coordination under Executive Order 12067. The Commission and the Department of Justice have carefully

considered all of the comments and made various revisions in response to them. A number of commenters expressed reservations about the feasibility of the procedures set forth in the NPRM and suggested various alternative procedures. Several commenters strongly urged that procedures similar to those set forth in the regulation promulgated to coordinate processing of complaints of employment discrimination filed against recipients of federal financial assistance be adopted. See 28 CFR part 42; 29 CFR part 1691 (hereinafter, the title VI/title VII regulation). The title VI/title VII regulation established procedures for handling complaints of employment discrimination filed against recipients of Federal financial assistance subject to title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and other provisions of Federal law that prohibit discrimination on grounds of race, color, religion, sex, or national origin, in programs or activities receiving Federal financial assistance, when there is overlapping jurisdiction under title VII of the Civil Rights Act of 1964.

Under the NPRM's "first filed approach," the EEOC and any section 504 agency with jurisdiction over a charge or complaint would process those charges or complaints that were actually filed with it, pursuant to title I of the ADA or section 504, respectively. In the case of a charge or complaint that was physically filed with both the EEOC and a section 504 agency with jurisdiction, the agency that first received the complaint or charge would process it, absent special circumstances, while the second agency would defer processing pending the conclusion of the first agency's investigation. Numerous section 504 agencies expressed concern about the practical difficulties inherent in the NPRM's approach, including ascertaining which agency actually received a charge or complaint first in the case of a charge or complaint filed with both the EEOC and a section 504 agency. Accordingly, as suggested by a number of commenters, the final regulation adopts an approach similar to that of the title VI/title VII regulation. Under the final rule, a complaint solely alleging employment discrimination against a single individual (hereinafter, an individual complaint) that is filed with a section 504 agency with jurisdiction over the complaint will ordinarily be transferred to the EEOC for processing, unless the complainant specifically requests processing by the section 504 agency. Section 504 agencies, however, will retain for processing any complaints that allege: (i) a pattern or practice of discrimination in employment; or (ii) discrimination both in employment and in other services or practices of a respondent that are covered by section 504. For a comprehensive analysis of the new procedures, see the discussion of § ____.6, below.

The NPRM presented two options regarding the legal standard to be applied by section 504 agencies, and the preamble to the NPRM discussed the rationale for each option. Although numerous comments on these options were received in response to the NPRM, recent amendments to the Rehabilitation Act have resolved this issue. See section 506 of the Rehabilitation Act Amendments of 1992, Pub. L. 102–569, 106 Stat. 4344. Therefore, as provided in that amendment, the final regulation directs section 504 agencies to apply the standards of title I of the ADA. See the discussion of § ____.12, below.

Commenters also requested that time frames for the processing of complaints be added to the final regulation. Because, in certain cases, individual agencies may have requirements that preclude meeting fixed time frames for certain stages of the complaint investigation process, this suggestion has not been adopted. For example, when disclosure of the complainant's identity is necessary for the investigation of a section 504 or title II complaint, the Department requires receipt of a signed consent form from the complainant prior to notifying a respondent that the Department has received a complaint of discrimination. Therefore, the final regulation retains the more general requirement that agencies act promptly and in accordance with applicable law.

Various commenters also noted the inefficiency of the requirement that a section 504 agency refer a complaint to the Civil Rights Division for a determination of jurisdiction when the agency does not have section 504 jurisdiction, but does have title II jurisdiction. In response, the regulation has been revised to require that a complaint be referred to the Civil Rights Division only when the section 504 agency that initially receives the complaint has neither section 504 nor title II jurisdiction.

Section-by-Section Analysis

Section ____.1 Purpose and Application

Section ____.1 of the final rule, "Purpose and application," explains that the rule establishes the coordination procedures to be followed by the Federal agencies responsible for processing complaints of employment discrimination filed against recipients of Federal financial assistance and arising under section 504 and title I of the ADA. In addition to establishing those new procedures, the rule also restates and integrates into one comprehensive regulation those provisions of the Department's existing title II regulation that established the procedures for coordinating the processing of complaints covered by title II of the ADA and either title I or section 504, or both. The rule does not amend the title II regulation, but simply locates all of the applicable regulations regarding coordination in a single source.

Section ____.2 Definitions

Section ____.2 defines a number of terms used in the rule. A definition of the term "due weight" has been added, supplementing the discussion in the preamble.

The definitions of *Federal financial assistance* and *program or activity*, both of which relate to the determination of whether jurisdiction exists under section 504, have been revised from those contained in the NPRM. The NPRM originally contained a detailed definition of *Federal financial assistance*. However, in recognition of the fact that this definition may vary among section 504 agency regulations due to the nature of financial assistance provided by each agency, the new definition simply refers to the definitions adopted by each section 504 agency in its regulation implementing section 504 for Federally-assisted programs.

The definition of *program or activity* under section 504 was modified by the Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 29, for all section 504 agencies. Therefore, to avoid any inconsistency between this rule and any agency regulations implementing section 504 that may not have been amended to reflect this change to the Rehabilitation Act, the new definition references the statutory definition.

Section ____.3 Exchange of Information

Section ____.3 requires the agencies responsible for enforcing the ADA and section 504 to share information.

Section ____.4 Confidentiality

Section ____.4(a) states that the confidentiality obligations applicable to the EEOC under the ADA also apply to section 504 agencies and designated agencies when information obtained by the EEOC is transmitted to such agencies, except when the agency

receives the same information from a source other than the EEOC. Section ____.4(b) states that when the EEOC receives information from section 504 or designated agencies, the EEOC shall comply with any confidentiality requirements applicable to that information.

Section ____.5 Date of Receipt

Section ____.5 states that a complaint or charge of employment discrimination is deemed to be filed, for purposes of determining timeliness, on the date the complaint or charge is first received by a Federal agency with jurisdiction under section 504 or the ADA, regardless of whether it is subsequently transferred to another agency for processing.

Section ____.6 Processing of Complaints of Employment Discrimination Filed With an Agency Other Than the EEOC

Section ____.6 describes the basic procedures that section 504 agencies and the agencies designated to process complaints under the Department's title II regulation will follow in determining whether to process an employment complaint or to refer it to another agency. The primary purpose of the rule is to establish procedures for coordinating the processing of complaints or charges of employment discrimination arising under section 504 and title I of the ADA. However, the procedures for coordinating the processing of complaints or charges of employment discrimination against public entities: (i) that fall under the jurisdiction of title II and title I (but not section 504); and (ii) that fall under the jurisdiction of title II, but not title I (whether or not covered by section 504) established by § 35.171 of the Department's title II regulation, have been restated here and integrated with the section 504 processing procedures for clarity and ease in processing by the affected agencies.

Section ____.6 has been revised to eliminate the requirement that the initial receiving agency, or the Civil Rights Division, when a complaint is forwarded to it for a determination of jurisdiction, provide notice to the affected parties. As previously written, the regulation required notification by any agency that came into contact with a complaint or charge even if the complaint or charge was immediately forwarded to another agency. Instead of multiple notifications, the final rule now provides for a more efficient single notification at such time as the appropriate processing agency receives the complaint or charge, in accordance with agency policy and applicable law.

Paragraph (b) of § ____.6 has been revised to provide that, if an agency determines pursuant to paragraph (a) that it does not have jurisdiction under section 504 or title II, and that the EEOC does not have jurisdiction under title I, the agency shall promptly refer the complaint to the Civil Rights Division. This is a change from the procedure set forth in the NPRM, which required a section 504 agency to refer all title II complaints to the Civil Rights Division. The revision was made in response to various comments pointing out that this was an inefficient procedure when the section 504 agency was certain that it was the designated agency under title II, and that the complaint would be referred back to it by the Civil Rights Division.

Upon receipt of a referred complaint, the Civil Rights Division will determine whether another Federal agency may have jurisdiction over the complaint under section 504 (that is, a Federal agency may be providing financial assistance to the respondent) or under title II (that is, the entity that is the subject of the complaint may be a public entity). When the Civil Rights Division finds such jurisdiction, it shall promptly refer the complaint to the appropriate agency.

Paragraph (c) of § ____.6 sets forth the circumstances under which an agency that is a section 504 agency, a designated agency, or both, will promptly refer a complaint to the EEOC for investigation and processing. In addition to: (i) revising the regulation to reflect the procedures of the title VI/title VII regulation (which generally results in individual complaints being referred for processing to the EEOC); and (ii) incorporating the procedures already established by the title II regulation, paragraph (c) and the balance of § ____.6 more specifically set forth the requirements for either referral or retention applicable to each type of agency. Unlike the procedural scheme set forth in the NPRM, under which a complaint or charge could only be dual filed if it were actually filed with both a section 504 agency and the EEOC, a complaint or charge filed with one agency will now be deemed to be dual filed under both title I and section 504 under certain circumstances, as set forth in this section and in § ____.7.

Paragraph (c)(1) of § ____.6 describes the rule applicable to an agency that receives a complaint of employment discrimination under section 504 or title II and determines that it does not have jurisdiction over the complaint. If the agency determines that the EEOC may have jurisdiction, the agency is required to promptly forward the complaint to the EEOC for processing. In certain instances this may require consultation with the EEOC. This paragraph establishes the requirements for section 504 and other agencies and includes the requirements established by § 35.171(b)(2) of the title II regulation with respect to designated agencies.

Paragraph (c)(2) establishes the referral requirements applicable to section 504 agencies and requires a section 504 agency that otherwise has jurisdiction over a complaint of employment discrimination to refer the complaint to the EEOC when the complaint solely alleges discrimination against an individual, unless the EEOC lacks jurisdiction over the complaint under title I, or the complainant requests that the section 504 agency retain jurisdiction, either independently, or following receipt of the notice letter described in paragraphs (c)(2)(ii)(A) and (c)(2)(ii)(B).

The referral to the EEOC of complaints solely alleging employment discrimination against individuals is a significant change in procedure from the NPRM. The revision was made in response to numerous comments urging this approach, which is consistent with the title VI/title VII regulation. This approach will serve to minimize duplicative efforts because the EEOC, in general, will be the primary agency investigating individual complaints of disability discrimination in employment. An individual's private right of action under title I of the ADA will also be preserved under this approach, since these section 504 complaints also will be deemed to be dual filed under title I. However, in order to preserve an individual's right to have his or her complaint processed by the section 504 agency, paragraph (c)(2)(i)(B) requires the section 504 agency to retain the complaint for investigation if the complainant so requests.

Paragraphs (c)(2)(ii)(A) and (c)(2)(ii)(B) describe the notice letter a section 504 agency is required to send promptly to each complainant before the agency refers a complaint solely alleging employment discrimination against an individual to the EEOC. The purpose of the letter is to inform an individual who has initially filed his or her complaint with the appropriate section 504 agency of the basic implications of a referral of that complaint to the EEOC. It is anticipated that the vast majority of individual complaints will be referred to the EEOC, with the section 504 agency deferring its review and processing until the conclusion of the EEOC's processing. However, because an automatic referral

to the EEOC of a complaint filed with a section 504 agency may be contrary to the complainant's expectations, complainants will be given the choice of having the EEOC or the section 504 agency investigate the complaint.

Each agency will develop its own letter informing the complainant that the agency will refer the complaint to the EEOC for investigation and processing, unless the agency receives a written request to the contrary from the complainant within twenty days of the date of the notice letter. The agency notice letter shall explain: (i) that agency's procedures for processing section 504 complaints; and (ii) the EEOC's procedures for processing complaints under title I. The agency notice letter shall also inform individuals of the potential for differing remedies under each statute.

Paragraph (c)(3) describes the procedure for referral by designated agencies, as established by § 35.171(b)(2) of the title II regulation. If a designated agency does not have section 504 jurisdiction, and determines that the EEOC may have title I jurisdiction, it shall promptly refer the complaint to the EEOC.

Paragraph (c)(4)(i) provides that complaints referred to the EEOC by an agency with section 504 jurisdiction will be deemed to be dual filed under both section 504 and title I. As a consequence, the section 504 agency, although required to defer its processing of the complaint, will have an opportunity to review the EEOC's findings and take any further action it deems appropriate, as provided in §____.10. Paragraph (c)(4)(ii) further provides that a complaint referred to the EEOC by an agency that has jurisdiction over the complaint under title II only (and not under section 504) will be treated as a complaint filed under title I only. See 28 CFR 35.171(b)(2).

The distinction between the treatment of these two types of complaints, those falling within the province of section 504 and those arising only under the ADA, is based on the ADA's statutory mandate to preserve the rights, remedies, and procedures of any Federal law that provides greater or equal protection to individuals with disabilities than are afforded by the ADA. Permitting section 504 agencies to review complaints originally filed with those agencies preserves section 504 remedies, including an agency's prerogative to terminate the federal funding of the respondent. It is anticipated that the fact that fund termination is ultimately available as an administrative remedy will encourage respondents to resolve valid claims through negotiation with the EEOC rather than through litigation. Because §____.10(c) requires the reviewing section 504 agency to give due weight to the EEOC's findings and conclusions, it is also anticipated that, in most instances, further action by the section 504 agency will not be necessary.

Paragraph (c)(4)(iii) states that any complaint referred to the EEOC shall be processed pursuant to title I procedures. Specifically, the EEOC will notify respondents of its receipt of a complaint in accordance with its usual procedures for notification following receipt of a charge.

Paragraph (d) of §____.6 describes the circumstances under which an agency shall retain a complaint for investigation (rather than referring it to the EEOC or the Civil Rights Division). The general rule applicable to section 504 agencies, as stated in paragraph (d)(1), is that a section 504 agency shall retain a complaint when it determines that it has section 504 jurisdiction over the complaint and that any one or more of the following are true: (i) the EEOC does not have jurisdiction over the complaint; (ii) the EEOC has jurisdiction over the complaint, but the complainant requests that the complaint be investigated by the agency rather than being referred; (iii) the complaint alleges discrimination in both employment and in other services or practices of the respondent that are covered by section 504; or (iv) the complaint alleges a pattern or practice of discrimination in employment. Such complaints will not be deemed dual filed under title I of the ADA.

This procedure is consistent with the approach taken in the title VI/title VII regulation. For reasons of efficiency, section 504 agencies will ordinarily process complaints that allege disability discrimination in both employment and other practices of a recipient, because the EEOC has no jurisdiction over the latter. Historically, under both section 504 and other civil rights statutes, agencies have also had a particular interest in the enforcement of pattern or practice cases of employment discrimination against recipients of Federal assistance, and agencies shall continue to investigate such complaints. It should be noted that the term "pattern or practice" of discrimination is intended to mean systemic or class complaints generally. Although the term "pattern or practice" of discrimination is sometimes used in a more narrow sense to refer to intentional discrimination or disparate treatment on a classwide level, the term was used in the title VI/title VII rule to refer to both adverse impact cases and cases of intentional discrimination affecting a class of protected individuals.

The provisions described above only apply when a complaint is filed with a section 504 agency. The EEOC will always process all charges, including class charges, that are solely filed with the EEOC.

Paragraph (d)(2) restates the principle established in the title II regulation that an agency shall retain a complaint for investigation when it determines that: (i) it has jurisdiction over the complaint as a designated agency; and (ii) that the EEOC does not have jurisdiction over the complaint under title I. See 28 CFR 35.171(b)(2).

Paragraph (d)(3) states the rule that complaints retained for investigation under paragraphs (d)(1) and (d)(2) will be investigated and processed under section 504, title II, or both, as applicable, and will not be considered to be dual filed under title I.

Section ____.7 Processing of Charges of Employment Discrimination Filed With the EEOC

Section ____.7 outlines the procedures that the EEOC will take in determining whether to process a charge or to refer it to another agency.

Section .7(a)(1) requires the EEOC, as a first step, to determine whether it has jurisdiction over the charge. If the EEOC has jurisdiction, it shall process the charge in accordance with its customary title I procedures, including notification of the respondent.

Paragraph (a)(2) sets forth the procedures that apply when the EEOC determines that it does not have jurisdiction over the charge. Under such circumstances, the charge will be promptly forwarded to the Civil Rights Division for referral to the appropriate agency, or retention by the Department for processing, as applicable.

Paragraph (b)(1) of §____.7 states the basic rule applicable to charges filed with the EEOC, that is, when the EEOC determines that it has jurisdiction over the charge under title I, it shall retain the charge. Because EEOC processing of a charge filed with the EEOC is consistent with the charging party's expectations when filing the charge, no notice letter to the charging party, similar to the letter required to be sent to complainants under paragraph (c)(2)(ii) of §____.6, is required.

Paragraph (b)(2) has been newly added to the final rule. It provides that the EEOC shall refer to a section 504 agency for further action, as appropriate, any cause finding against a recipient that has failed conciliation and that the EEOC has declined to litigate. By providing for agency review under these

circumstances, paragraph (b)(2) should promote the ADA's statutory goal of preserving section 504 remedies, while the requirement that section 504 agencies give due weight to EEOC findings should eliminate any need for duplicative agency action.

Section ____.8 Processing of Complaints or Charges of Employment Discrimination Filed With Both the EEOC and a Section 504 Agency

Section ____.8 sets forth the procedures that the EEOC and section 504 agencies shall follow in processing complaints or charges of employment discrimination that have been dual filed with both the EEOC and a section 504 agency.

Paragraph (a) of § ____.8 sets forth the procedures applicable to complaints or charges of employment discrimination that are dual filed with both a section 504 agency and the EEOC, both of which have jurisdiction over the complaint or charge.

Under those circumstances, the rule follows the general pattern established by the title VI/title VII regulation, and requires the EEOC to process charges that solely allege employment discrimination against an individual when the individual has not elected section 504 agency processing. Section 504 agencies will process all complaints that allege: (i) discrimination in both employment and other practices or services of the respondent; (ii) a pattern or practice of employment discrimination; or (iii) discrimination solely against an individual, when the individual has elected section 504 agency processing. This allocation of responsibility for complaint processing is the same as the allocation of responsibility for processing complaints originally filed solely with a section 504 agency under § ____.6. However, as discussed below, paragraph (e) of § ____.8 sets forth exceptions to this general scheme for special circumstances.

Paragraph (b) requires complaints or charges to be referred to the Civil Rights Division if both the EEOC and the section 504 agency determine that they do not have jurisdiction over the complaint or charge. The Civil Rights Division is then responsible for making the appropriate referral to a section 504 or designated agency.

Paragraph (c) requires the EEOC and each agency with jurisdiction under section 504 to develop procedures for determining whether complaints or charges of discrimination have been filed with the EEOC and with one or more agencies. It is anticipated that the Department, the Commission, and the section 504 agencies will work together to develop materials, such as a uniform filing form (or uniform portion of a filing form) that will facilitate coordination in processing employment complaints.

Although some commenters requested that these procedures be stated in the final rule, it was decided that this activity is more appropriately conducted at a sub-regulatory level, which will permit more flexibility in developing efficient procedures. In addition, because the rule has been restructured to follow the title VI/title VII regulation rather than the "first-filed" approach, there is less need to determine whether a complaint or charge has been filed with more than one agency. For example, under the title VI/title VII model, the EEOC will become the primary agency processing complaints or charges that solely allege discrimination against an individual. Therefore, there is no need to determine whether these complaints or charges have been dual filed in order to establish responsibility for processing. In addition, the notice letter required to be sent to section 504 complainants prior to such a referral should provide an efficient mechanism for determining whether a charge has also been filed with the EEOC because it could be used to require complainants to reveal whether they had filed a complaint or charge with another agency.

Paragraph (d) requires the agency that will process a dual-filed complaint or charge to notify all concerned parties that the other agencies will be deferring their processing, and of the possibility of further action by such agencies pursuant to §§ ____.10 or ____.11.

Paragraph (e) establishes that, under certain special circumstances where deferral may be inappropriate, the agencies involved may jointly agree to reallocate investigatory responsibilities. For example, if the section 504 agency would normally process the complaint, but the agency does not receive information that another charge has been filed with the EEOC until after an investigation has been started by the EEOC, this exception permits the agencies jointly to decide that the EEOC should continue processing the charge and that the section 504 agency should defer further action. This exception could also be used in connection with subsequent complaints or charges, such as allegations of retaliation, related to the original complaint or charge.

The special circumstances listed in paragraph (e) are illustrative and agencies may agree to reallocate investigatory responsibilities under other appropriate circumstances. In such circumstances a complaint or charge will be treated as a deferred complaint or charge with respect to any right to review under §§ ____.10 and ____.11.

It is not anticipated that most aggrieved individuals will separately file with both a section 504 agency and the EEOC. Since the substantive protections provided by title I and section 504 are now identical, an individual's rights against discrimination on the basis of disability can be vindicated under either statute. However, an individual who files a complaint with a section 504 agency alleging discrimination both in employment and services, a pattern or practice of discrimination, or who requests section 504 processing, will not preserve a private right of action under title I of the ADA, unless the individual also files a charge with the EEOC under title I of the ADA.

Section ____.9 Processing of Complaints or Charges of Employment Discrimination Filed With a Designated Agency and Either a Section 504 Agency, the EEOC, or Both

Section ____.9 adds new procedures to the final rule to address the processing of complaints filed with a designated agency and with either a section 504 agency, the EEOC, or both. Generally, the EEOC and the section 504 agencies have primary responsibility for processing complaints of employment discrimination. Therefore, § ____.9 provides that a designated agency shall investigate and process a complaint only when: (i) it is either the only agency with jurisdiction to process the complaint; or (ii) it also has jurisdiction to process the complaint under section 504. If another agency has sole jurisdiction over the complaint under either section 504 or title I (and the complaint was actually filed with that agency under section 504 or title I), § ____.9 requires the designated agency to forward the complaint to that agency. If a section 504 agency and the EEOC both have jurisdiction over a complaint or charge of employment discrimination, the rule allocates complaint-processing responsibility according to the established pattern of the title VI/title VII rule, that is, individual complaints are forwarded to the EEOC and complaints alleging discrimination in both employment and in other practices or services of the respondent or a pattern or practice of employment discrimination are forwarded to the section 504 agency with jurisdiction.

Section ____.10 Section 504 Agency Review of Deferred Complaints

Section ____.10 describes the steps that shall be taken when the EEOC processes a dual-filed complaint or charge (either an individual complaint that is referred to the EEOC or a dual-filed complaint or charge that the EEOC processes) and a section 504 agency defers its investigation.

Because the rule requires the section 504 agency to defer action until the EEOC resolves the complaint, paragraph (a) outlines the different ways in which any title I charge may be resolved, including litigation by the EEOC. Although the EEOC is the agency primarily responsible for the enforcement of title I, resolution by the Civil Rights Division is also included under paragraphs (a) (3) and (4) because, under title I of the ADA, when there is a cause finding pursuant to 29 CFR 1601.21, the Civil Rights Division has litigation authority for charges against State and local governments, government agencies, and political subdivisions. See 29 CFR 1601.29. The Civil Rights Division is also responsible for issuing right-to-sue letters in such cases. See 29 CFR 1601.28(d).

Paragraph (b) of § ____.10 provides that, upon resolution of the dual-filed complaint or charge, the EEOC or the Civil Rights Division shall inform the section 504 agency of the resolution. Paragraph (d) provides that, upon written request by the section 504 agency, the EEOC or the Civil Rights Division shall provide the section 504 agency with the materials necessary to evaluate its resolution of the case, such as investigative reports.

Paragraph (c) of § ____.10 provides that, upon receipt of notification from the EEOC or the Civil Rights Division, as appropriate, the section 504 agency shall determine what further action is warranted. Because, pursuant to the 1992 amendments to the Rehabilitation Act, the substantive standards to be applied to complaints of employment discrimination are now identical, it is anticipated that, except in rare circumstances, the section 504 agency's findings and conclusions as to whether a violation has occurred will be consistent with those of the EEOC and those of the Civil Rights Division, as applicable. In order to further promote consistency and avoid duplication of effort, the rule requires that the section 504 agency accord due weight to the findings and conclusions of the EEOC and the Civil Rights Division, as applicable. The term "due weight" is adopted from the title VI/title VII regulation, which is referenced in section 107(b) of the ADA. 28 CFR part 42, subpart H; 29 CFR part 1691. In giving due weight to the findings and conclusions of the EEOC or the Civil Rights Division, a section 504 agency shall give such full and careful consideration to the findings and conclusions as is appropriate, taking into account such factors as: (i) the extent to which the underlying investigation is complete and the evidence supports the findings and conclusions; (ii) the nature and results of any subsequent proceedings; (iii) the extent to which the findings, conclusions and any actions taken under title I are consistent with the effective enforcement of section 504; and (iv) the agency's responsibilities under section 504.

Moreover, if the agency proposes to take an action that is inconsistent with such findings and conclusions, the section 504 agency is required to provide written notification of the action that it proposes to take and the basis for that action to the Assistant Attorney General of the Civil Rights Division, the Chairman of the EEOC, and the head of the EEOC office that processed the complaint or charge. This is intended to enable the agencies to identify and resolve any potentially conflicting or inconsistent standards before they are imposed and to prevent duplication of effort.

What further action the section 504 agency will take will depend on the EEOC's (or, as appropriate, the Civil Rights Division's) findings, conclusions, and resolution. This rule contemplates that in most cases the "further action" would be that the section 504 agency would notify the complainant and the respondent that it is closing its file based upon the EEOC's resolution of the charge. For example, closure by the section 504 agency would be the appropriate action when: (i) the EEOC found no cause and issued a right-to-sue letter, and the section 504 agency agreed with the determination that no violation occurred; or (ii) the EEOC found cause and the violation was completely remedied through either a conciliation agreement or litigation, and the section 504 agency agreed that the violation had been remedied.

Section ____.11 EEOC Review of Deferred Charges

Section ____.11 describes the steps that shall be taken when a section 504 agency processes a dual-filed complaint or charge and the EEOC defers its processing of the charge. Paragraph (a) of § ____.11 outlines the different ways in which a section 504 complaint may be resolved. Referral to, and action by, the Civil Rights Division is included in § ____.11(a) because one of the options available to a section 504 agency, when it has found a violation and it has not been able to negotiate a voluntary compliance agreement, is referral to the Civil Rights Division for judicial enforcement.

Paragraphs (b) and (d) of § ____.11 impose the same types of obligations on the section 504 agency to notify the EEOC of its resolution of the complaint and to share with the EEOC any materials related to the resolution of the complaint that would permit the EEOC to evaluate the findings, as paragraphs (b) and (d) of § ____.10 impose on the EEOC.

Paragraph (c) of § ____.11 imposes requirements on the EEOC analogous to those § ____.10(c) imposes on a section 504 agency. This paragraph contemplates that in most cases the appropriate "further action" would be that the EEOC would notify the charging party and the respondent that it is closing its file based upon the resolution of the complaint by the section 504 agency, and, where appropriate, would issue a right-to-sue letter. For example, closure and issuance of a right-to-sue letter by the EEOC would be the appropriate action when the section 504 agency found no violation and the EEOC agreed. Alternatively, closure alone would be appropriate when the section 504 agency found a violation and the EEOC agreed that the violation was completely remedied through either a conciliation agreement, an administrative hearing, or judicial enforcement.

Section ____.12 Standards

In the NPRM, this section addressed the requirement established by section 107(b) of the ADA to "[prevent] imposition of inconsistent or conflicting standards for the same requirements under [title I and section 504]."

As noted earlier, in order to comply with this statutory mandate, the NPRM presented two options for the legal standard to be applied by section 504 agencies in their investigation of complaints that are also subject to title I, and requested comment as to the appropriate standard. However, in the period between the publication of the NPRM and the publication of this final rule, the Rehabilitation Act was specifically amended to provide that the standards of title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA, as such sections relate to employment, shall be the standards applied by section 504 agencies in investigating complaints of employment discrimination. See section

506 of the Rehabilitation Act Amendments of 1992, Public Law 102–569, 106 Stat. 4344, 4428. The final rule tracks the language of the amendment.

Section ____.13 Agency Specific Memoranda of Understanding

This section has been newly added to the final rule, to allow maximum flexibility for the development of agency specific memoranda of understanding (MOU) that would further serve to minimize duplication of effort and fully preserve an aggrieved individual's rights under both statutes. When a section 504 agency amends its regulations to make them consistent with title I of the ADA, the EEOC and the individual section 504 agency may enter into an MOU providing for the investigation and processing by the section 504 agency of complaints or charges dual filed under both section 504 and title I of the ADA by the section 504 agency. Execution of an MOU would be discretionary on the part of both the EEOC and the particular section 504 agency. Section 504 agencies that amend their regulations to make them consistent with title I standards would have, in agreement with the EEOC, the option of acting as the EEOC's agent for investigating and processing under title I all complaints covered by both title I and section 504 that are filed with the section 504 agency. It is contemplated that the terms of the MOU would be similar to the joint rule implementing section 107(b) as it pertains to section 503 of the Rehabilitation Act and title I. 29 CFR part 1641; 41 CFR part 60–742.

Regulatory Process Matters

This rule takes effect immediately, rather than 30 days after publication, because it solely concerns agency procedure and practice.

This final rule has been drafted in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department of Justice and the Equal Employment Opportunity Commission have determined that it is not a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 12875 prohibits executive departments and agencies from promulgating any regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government unless certain conditions are met. Although the procedures for processing complaints or charges of employment discrimination established by this regulation may affect complaints or charges of employment discrimination filed against such entities, the final rule does not create any mandates affecting such entities and may, in fact, reduce any current burden by streamlining the processing of complaints and charges at the Federal level.

The Attorney General and the Chairman of the EEOC have reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and by approving it certify that this regulation will not have a significant economic impact on a substantial number of small entities.

This final rule does not establish reporting or record-keeping requirements that are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR part 1320.

This part will be added to the rules of the Department of Justice at 28 CFR chapter I as a new part 37, and to the rules of the Equal Employment Opportunity Commission at 29 CFR chapter XIV as a new part 1640. Since the parts are identical, the text of the joint final rule is set out only once at the end of the joint preamble. The part heading, list of subjects, table of contents, and authority citation for the parts as they will appear in each CFR title follow the text of the joint rule.

Text of Final Joint Rule

The text of the final joint rule, as adopted by the agencies specified in this document, appears below:

PART ____—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

____.1 Purpose and application.
____.2 Definitions.
____.3 Exchange of information.
____.4 Confidentiality.
____.5 Date of receipt.
____.6 Processing of complaints of employment discrimination filed with an agency other than the EEOC.
____.7 Processing of charges of employment discrimination filed with the EEOC.
____.8 Processing of complaints or charges of employment discrimination filed with both the EEOC and a section 504 agency.
____.9 Processing of complaints or charges of employment discrimination filed with a designated agency and either a section 504 agency, the EEOC, or both.
____.10 Section 504 agency review of deferred complaints.
____.11 EEOC review of deferred charges.
____.12 Standards.
____.13 Agency specific memoranda of understanding.

§ ____.1 Purpose and application.

(a) This part establishes the procedures to be followed by the Federal agencies responsible for processing and resolving complaints or charges of employment discrimination filed against recipients of Federal financial assistance when jurisdiction exists under both section 504 and title I.

(b) This part also repeats the provisions established by 28 CFR 35.171 for determining which Federal agency shall process and resolve complaints or charges of employment discrimination:

(1) That fall within the overlapping jurisdiction of titles I and II (but are not covered by section 504); and

(2) That are covered by title II, but not title I (whether or not they are also covered by section 504).

(c) This part also describes the procedures to be followed when a complaint or charge arising solely under section 504 or title I is filed with a section 504 agency or the EEOC.

(d) This part does not apply to complaints or charges against Federal contractors under section 503 of the Rehabilitation Act.

(e) This part does not create rights in any person or confer agency jurisdiction not created or conferred by the ADA or section 504 over any complaint or charge.

§ ____.2 Definitions.

As used in this part, the term:

Americans with Disabilities Act of 1990 or *ADA* means the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her designee.

Chairman of the Equal Employment Opportunity Commission refers to the Chairman of the United States Equal Employment Opportunity Commission, or his or her designee.

Civil Rights Division means the Civil Rights Division of the United States Department of Justice.

Designated agency means any one of the eight agencies designated under § 35.190 of 28 CFR part 35 (the Department's title II regulation) to implement and enforce title II of the ADA with respect to the functional areas within their jurisdiction.

Dual-filed complaint or charge means a complaint or charge of employment discrimination that:

(1) Arises under both section 504 and title I;

(2) Has been filed with both a section 504 agency that has jurisdiction under section 504 and with the EEOC, which has jurisdiction under title I; and

(3) Alleges the same facts and raises the same issues in both filings.

Due weight shall mean, with respect to the weight a section 504 agency or the EEOC shall give to the other agency's findings and conclusions, such full and careful consideration as is appropriate, taking into account such factors as:

(1) The extent to which the underlying investigation is complete and the evidence is supportive of the findings and conclusions;

(2) The nature and results of any subsequent proceedings;

(3) The extent to which the findings, conclusions and any actions taken:

(i) Under title I are consistent with the effective enforcement of section 504; or

(ii) Under section 504 are consistent with the effective enforcement of title I; and

(4) The section 504 agency's responsibilities under section 504 or the EEOC's responsibilities under title I.

Equal Employment Opportunity Commission or *EEOC* refers to the United States Equal Employment Opportunity Commission, and, when appropriate, to any of its headquarters, district, area, local, or field offices.

Federal financial assistance shall have the meaning, with respect to each section 504 agency, as defined in such agency's regulations implementing section 504 for Federally- assisted programs.

Program or activity shall have the meaning defined in the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 794), as amended.

Public entity means:

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act, 45 U.S.C. 502(8)).

Recipient means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary under such program.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 794), as amended.

Section 504 agency means any Federal department or agency that extends Federal financial assistance to programs or activities of recipients.

Title I means title I of the ADA.

Title II means subtitle A of title II of the ADA.

§ ___.3 Exchange of information.

The EEOC, section 504 agencies, and designated agencies shall share any information relating to the employment policies and practices of a respondent that may assist each agency in carrying out its responsibilities, to the extent permissible by law. Such information shall include, but is not limited to, complaints, charges, investigative files, compliance review reports and files, affirmative action programs, and annual employment reports.

§ ___.4 Confidentiality.

(a) When a section 504 agency or a designated agency receives information obtained by the EEOC, such agency shall observe the confidentiality requirements of section 706(b) and section 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(b) and 2000e-8(e)), as incorporated by section 107(a) of the ADA, to the same extent as these provisions would bind the EEOC, except when the agency receives the same information from a source independent of the EEOC. Agency questions concerning the confidentiality requirements of title I shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel, the EEOC.

(b) When the EEOC receives information from a section 504 or a designated agency, the EEOC shall observe any confidentiality requirements applicable to that information.

§ ___.5 Date of receipt.

A complaint or charge of employment discrimination is deemed to be filed, for purposes of determining timeliness, on the date the complaint or charge is first received by a Federal agency with section 504 or ADA jurisdiction, regardless of whether it is subsequently transferred to another agency for processing.

§ ___.6 Processing of complaints of employment discrimination filed with an agency other than the EEOC.

(a) *Agency determination of jurisdiction.* Upon receipt of a complaint of employment discrimination, an agency other than the EEOC shall:

(1) Determine whether it has jurisdiction over the complaint under section 504 or under title II of the ADA; and

(2) Determine whether the EEOC may have jurisdiction over the complaint under title I of the ADA.

(b) *Referral to the Civil Rights Division.* If the agency determines that it does not have jurisdiction under section 504 or title II, and determines that the EEOC does not have jurisdiction under title I, the agency shall promptly refer the complaint to the Civil Rights Division. The Civil Rights Division shall determine if another Federal agency may have jurisdiction over the complaint under section 504 or title II, and, if so, shall promptly refer the complaint to a section 504 or a designated agency with jurisdiction over the complaint.

(c) *Referral to the EEOC.—(1) Referral by an agency without jurisdiction.* If an agency determines that it does not have jurisdiction over a complaint of employment discrimination under either section 504 or title II and determines that the EEOC may have jurisdiction under title I, the agency shall promptly refer the complaint to the EEOC for investigation and processing under title I of the ADA.

(2) *Referral by a section 504 agency.* (i) A section 504 agency that otherwise has jurisdiction over a complaint of employment discrimination under section 504 shall promptly refer to the EEOC, for investigation and processing under title I of the ADA, any complaint of employment discrimination that solely alleges discrimination against an individual (and that does not allege discrimination in both employment and in other practices or services of the respondent or a pattern or practice of employment discrimination), unless:

(A) The section 504 agency determines that the EEOC does not have jurisdiction over the complaint under title I; or

(B) The EEOC has jurisdiction over the complaint under title I, but the complainant, either independently, or following receipt of the notification letter required to be sent to the complainant pursuant to paragraph (c)(2)(ii) of this section, specifically requests that the complaint be investigated by the section 504 agency.

(ii) Prior to referring an individual complaint of employment discrimination to the EEOC pursuant to paragraph (c)(2)(i) of this section (but not prior to making such a referral pursuant to paragraph (c)(1) of this section), a section 504 agency that otherwise has jurisdiction over the complaint shall promptly notify the complainant, in writing, of its intention to make such a referral. The notice letter shall:

(A) Inform the complainant that, unless the agency receives a written request from the complainant within twenty days of the date of the notice letter requesting that the agency retain the complaint for investigation, the agency will forward the complaint to the EEOC for investigation and processing; and

(B) Describe the basic procedural differences between an investigation under section 504 and an investigation under title I, and inform the complainant of the potential for differing remedies under each statute.

(3) *Referral by a designated agency.* A designated agency that does not have section 504 jurisdiction over a complaint of employment discrimination and that has determined that the EEOC may have jurisdiction over the complaint under title I shall promptly refer the complaint to the EEOC.

(4) *Processing of complaints referred to the EEOC.* (i) A complaint referred to the EEOC in accordance with this section by an agency with jurisdiction over the complaint under section 504 shall be deemed to be a dual-filed complaint under section 504 and title I. When a section 504 agency with jurisdiction over a complaint refers the complaint to the EEOC, the section 504 agency shall defer its processing of the complaint pursuant to § —.10, pending resolution by the EEOC.

(ii) A complaint referred to the EEOC by an agency that has jurisdiction over the complaint solely under title II (and not under section 504) will be treated as a complaint filed under title I only.

(iii) Any complaint referred to the EEOC pursuant to this section shall be processed by the EEOC under its title I procedures.

(d) *Retention by the agency for investigation*—(1) *Retention by a section 504 agency.* A section 504 agency shall retain a complaint for investigation when the agency determines that it has jurisdiction over the complaint under section 504, and one or more of the following conditions are met:

(i) The EEOC does not have jurisdiction over the complaint under title I; or

(ii) The EEOC has jurisdiction over the complaint, but the complainant elects to have the section 504 agency process the complaint and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of the date of the notice letter required to be sent pursuant to paragraph (c)(2)(ii) of this section; or

(iii) The complaint alleges discrimination in both employment and in other practices or services of the respondent that are covered by section 504; or

(iv) The complaint alleges a pattern or practice of employment discrimination.

(2) *Retention by a designated agency.* A designated agency that does not have jurisdiction over the complaint under section 504 shall retain a complaint for investigation when the agency determines that it has jurisdiction over the complaint under title II of the ADA and that the EEOC does not have jurisdiction over the complaint under title I.

(3) *Processing of complaints retained by an agency.* Any complaint retained for investigation and processing by an agency pursuant to paragraphs (d)(1) and (d)(2) of this section will be investigated and processed under section 504, title II, or both, as applicable, and will not be considered to be dual filed under title I.

§ ____.7 Processing of charges of employment discrimination filed with the EEOC.

(a) *EEOC determination of jurisdiction.* Upon receipt of a charge of employment discrimination, the EEOC shall:

(1) Determine whether it has jurisdiction over the charge under title I of the ADA. If it has jurisdiction, except as provided in paragraph (b)(2) of this section, the EEOC shall process the charge pursuant to title I procedures.

(2) If the EEOC determines that it does not have jurisdiction under title I, the EEOC shall promptly refer the charge to the Civil Rights Division. The Civil Rights Division shall determine if a Federal agency may have jurisdiction over the charge under section 504 or title II, and, if so, shall refer the charge to a section 504 agency or to a designated agency with jurisdiction over the complaint.

(b) *Retention by the EEOC for investigation.* (1) The EEOC shall retain a charge for investigation when it determines that it has jurisdiction over the charge under title I.

(2) *Referral to an agency.* Any charge retained by the EEOC for investigation and processing will be investigated and processed under title I only, and will not be deemed dual filed under section 504, except that ADA cause charges (as defined in 29 CFR 1601.21) that also fall within the jurisdiction of a section 504 agency and that the EEOC (or the Civil Rights Division, if such a charge is against a government, governmental agency, or political subdivision) has declined to litigate shall be referred to the appropriate section 504 agency for review of the file and any administrative or other action deemed appropriate under section 504. Such charges shall be deemed complaints, dual filed under section 504, solely for the purposes of the agency review and action described in this paragraph. The date of such dual filing shall be deemed to be the date the complaint was received by the EEOC.

§ ____.8 Processing of complaints or charges of employment discrimination filed with both the EEOC and a section 504 agency.

(a) *Procedures for handling dual-filed complaints or charges.* As between the EEOC and a section 504 agency, except as provided in paragraph (e) of this section, a complaint or charge of employment discrimination that is dual filed with both the EEOC and a section 504 agency shall be processed as follows:

(1) *EEOC processing.* The EEOC shall investigate and process the charge when the EEOC determines that it has jurisdiction over the charge under title I and the charge solely alleges employment discrimination against an individual, unless the charging party elects to have the section 504 agency process the charge and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of the date of the notice letter required to be sent pursuant to § ____.6(c)(2)(ii).

(2) *Section 504 agency processing.* A section 504 agency shall investigate and process the complaint when the agency determines that it has jurisdiction over the complaint under section 504, and:

(i) The complaint alleges discrimination in both employment and in other practices or services of the respondent; or

(ii) The complaint alleges a pattern or practice of discrimination in employment; or

(iii) In the case of a complaint solely alleging employment discrimination against an individual, the complainant elects to have a section 504 agency process the complaint and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of

the date of the notice letter required to be sent pursuant to § ____.6(c)(2)(ii).

(b) *Referral to the Civil Rights Division.* If the EEOC determines that it does not have jurisdiction under title I, and the section 504 agency determines that it does not have jurisdiction under section 504 or title II, the complaint or charge shall be promptly referred to the Civil Rights Division. The Civil Rights Division shall determine if another Federal agency may have jurisdiction over the complaint under section 504 or title II, and, if so, shall promptly refer the complaint to a section 504 or a designated agency with jurisdiction over the complaint.

(c) *Procedures for determining whether a complaint or charge has been dual filed.* The EEOC and each agency with jurisdiction to investigate and process complaints of employment discrimination under section 504 shall jointly develop procedures for determining whether complaints or charges of discrimination have been dual filed with the EEOC and with one or more other agencies.

(d) *Notification of deferral.* The agency required to process a dual-filed complaint or charge under this section shall notify the complainant or charging party and the respondent that the complaint or charge was dual filed with one or more other agencies and that such other agencies have agreed to defer processing and will take no further action except as provided in § ____.10 or § ____.11, as applicable.

(e) *Exceptions.* When special circumstances make deferral as provided in this section inappropriate, the EEOC, and an agency with investigative authority under section 504, may jointly determine to reallocate investigative responsibilities. Special circumstances include, but are not limited to, cases in which the EEOC has already commenced its investigation at the time that the agency discovers that the complaint or charge is a dual-filed complaint or charge in which the complainant has elected section 504 processing, alleged discrimination in both employment and in other practices or services of the respondent, or alleged a pattern or practice of employment discrimination.

§ ____.9 Processing of complaints or charges of employment discrimination filed with a designated agency and either a section 504 agency, the EEOC, or both.

(a) *Designated agency processing.* A designated agency shall investigate and process a complaint that has been filed with it and with the EEOC, a section 504 agency, or both, when either of the following conditions is met:

(1) The designated agency determines that it has jurisdiction over the complaint under title II and that neither the EEOC nor a section 504 agency (other than the designated agency, if the designated agency is also a section 504 agency) has jurisdiction over the complaint; or

(2) The designated agency determines that it has jurisdiction over the complaint under section 504 and the complaint meets the requirements for processing by a section 504 agency set forth in § ____.8(a)(2).

(b) *Referral by a designated agency.* A designated agency that has jurisdiction over a complaint solely under title II (and not under section 504) shall forward a complaint that has been filed with it and with the EEOC, a section 504 agency, or both, to either the EEOC or to a section 504 agency, as follows:

(1) If the designated agency determines that the EEOC is the sole agency, other than the designated agency, with jurisdiction over the complaint, the designated agency shall forward the complaint to the EEOC for processing under title I; or

(2) If the designated agency determines that the section 504 agency is the sole agency, other than the designated agency, with jurisdiction over the complaint, the designated agency shall forward the complaint to the section 504 agency for processing under section 504; or

(3) If the designated agency determines that both the EEOC and a section 504 agency have jurisdiction over the complaint, the designated agency shall forward the complaint to the EEOC if it determines that the complaint solely alleges employment discrimination against an individual, or it shall forward the complaint to the section 504 agency if it determines that the complaint meets the requirements for processing by a section 504 agency set out in § ____.8(a)(2)(i) or (a)(2)(ii).

§ ____.10 Section 504 agency review of deferred complaints.

(a) *Deferral by the section 504 agency.* When a section 504 agency refers a complaint to the EEOC pursuant to § ____.6(c)(2) or when it is determined that, as between the EEOC and a section 504 agency, the EEOC is the agency that shall process a dual-filed complaint or charge under § ____.8(a)(1) or §.____.8(e), the section 504 agency shall defer further action until:

(1) The EEOC issues a no cause finding and a notice of right-to-sue pursuant to 29 CFR 1601.19; or

(2) The EEOC enters into a conciliation agreement; or

(3) The EEOC issues a cause finding and a notice of failure of conciliation pursuant to 29 CFR 1601.21, and:

(i) If the recipient is not a government, governmental agency, or political subdivision, the EEOC completes enforcement proceedings or issues a notice of right-to-sue in accordance with 29 CFR 1601.28; or

(ii) If the recipient is a government, governmental agency, or political subdivision, the EEOC refers the charge to the Civil Rights Division in accordance with 29 CFR 1601.29, and the Civil Rights Division completes enforcement proceedings or issues a notice of right-to-sue in accordance with 29 CFR 1601.28(d); or

(4) The EEOC or, when a case has been referred pursuant to 29 CFR 1601.29, the Civil Rights Division, otherwise resolves the charge.

(b) *Notification of the deferring agency.* The EEOC or the Civil Rights Division, as appropriate, shall notify the agency that has deferred processing of the charge upon resolution of any dual-filed complaint or charge.

(c) *Agency review.* After receipt of notification that the EEOC or the Civil Rights Division, as appropriate, has resolved the complaint or charge, the agency shall promptly determine what further action by the agency is warranted. In reaching that determination, the agency shall give due weight to the findings and conclusions of the EEOC and to those of the Civil Rights Division, as applicable. If the agency proposes to take an action inconsistent with the EEOC's or the Civil Rights Division's findings and conclusions as to whether a violation has occurred, the agency shall notify in writing the Assistant Attorney General, the Chairman of the EEOC, and the head of the EEOC office that processed the complaint. In the written notification, the agency shall state the action that it proposes to take and the basis of its decision to take such action.

(d) *Provision of information.* Upon written request, the EEOC or the Civil Rights Division shall provide the section 504 agency with any materials relating to its resolution of the charge, including its findings and conclusions, investigative reports and files, and any conciliation agreement.

§ ____.11 EEOC review of deferred charges.

(a) *Deferral by the EEOC.* When it is determined that a section 504 agency is the agency that shall process a dual-filed complaint or charge under § ____.8(a)(2) or § ____.8(e), the EEOC shall defer further action until the

section 504 agency takes one of the following actions:

(1) Makes a finding that a violation has not occurred;

(2) Enters into a voluntary compliance agreement;

(3) Following a finding that a violation has occurred, refers the complaint to the Civil Rights Division for judicial enforcement and the Civil Rights Division resolves the complaint;

(4) Following a finding that a violation has occurred, resolves the complaint through final administrative enforcement action; or

(5) Otherwise resolves the charge.

(b) *Notification of the EEOC.* The section 504 agency shall notify the EEOC upon resolution of any dual-filed complaint or charge.

(c) *Agency review.* After receipt of notification that the section 504 agency has resolved the complaint, the EEOC shall promptly determine what further action by the EEOC is warranted. In reaching that determination, the EEOC shall give due weight to the section 504 agency's findings and conclusions. If the EEOC proposes to take an action inconsistent with the section 504 agency's findings and conclusions as to whether a violation has occurred, the EEOC shall notify in writing the Assistant Attorney General, the Chairman of the EEOC, and the head of the section 504 agency that processed the complaint. In the written notification, the EEOC shall state the action that it proposes to take and the basis of its decision to take such action.

(d) *Provision of information.* Upon written request, the section 504 agency shall provide the EEOC with any materials relating to its resolution of the complaint, including its conclusions, investigative reports and files, and any voluntary compliance agreement.

§ ___.12 Standards.

In any investigation, compliance review, hearing or other proceeding, the standards used to determine whether section 504 has been violated in a complaint alleging employment discrimination shall be the standards applied under title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA, as such sections relate to employment. Section 504 agencies shall consider the regulations and appendix implementing title I of the ADA, set forth at 29 CFR part 1630, and case law arising under such regulations, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.

§ ___.13 Agency specific memoranda of understanding.

When a section 504 agency amends its regulations to make them consistent with title I of the ADA, the EEOC and the individual section 504 agency may elect to enter into a memorandum of understanding providing for the investigation and processing of complaints dual filed under both section 504 and title I of the ADA by the section 504 agency.

Adoption of the Joint Final Rule

The agency-specific adoption of the joint final rule, which appears at the end of the joint preamble, appears below:

Title 28—Judicial Administration Department of Justice

28 CFR Part 37

List of Subjects in 28 CFR Part 37

Administrative practice and procedure, Individuals with disabilities, Equal employment opportunity, Intergovernmental relations.

Accordingly, title 28, chapter I of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, D.C. this 26th day of July, 1994.

For the Department:

Janet Reno,

Attorney General.

Part 37 is added to 28 CFR chapter I to read as set forth at the end of the joint preamble.

PART 37—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

37.1 Purpose and application.
37.2 Definitions.
37.3 Exchange of information.
37.4 Confidentiality.
37.5 Date of receipt.
37.6 Processing of complaints of employment discriminationfiled with an agency other than the EEOC.
37.7 Processing of charges of employment discrimination filed with the EEOC.
37.8 Processing of complaints or charges of employment discrimination filed with both the EEOC and a section 504 agency.
37.9 Processing of complaints or charges of employment discrimination filed with a designated agency and either a section 504 agency, the EEOC, or both.
37.10 Section 504 agency review of deferred complaints.
37.11 EEOC review of deferred charges.
37.12 Standards.
37.13 Agency specific memoranda of understanding.

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 29 U.S.C. 794 (d); 42 U.S.C. 12117(b); 28 CFR 0.50(l).

Title 29—Labor

Equal Employment Opportunity Commission

29 CFR Part 1640

List of Subjects in 29 CFR Part 1640

Administrative practice and procedure, Individuals with disabilities, Equal employment opportunity, Intergovernmental relations.

Accordingly, title 29, chapter XIV of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, DC this 27th day of June, 1994.

For the Commission:

Tony E. Gallegos,

Chairman.

Part 1640 is added to 29 CFR chapter XIV to read as set forth at the end of the joint preamble.

PART 1640—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

1640.1 Purpose and application.
1640.2 Definitions.
1640.3 Exchange of information.
1640.4 Confidentiality.
1640.5 Date of receipt.
1640.6 Processing of complaints of employment discrimination filed with an agency other than the EEOC.
1640.7 Processing of charges of employment discrimination filed with the EEOC.
1640.8 Processing of complaints or charges of employment discrimination filed with both the EEOC and a section 504 agency.
1640.9 Processing of complaints or charges of employment discrimination filed with a designated agency and either a section 504 agency, the EEOC, or both.
1640.10 Section 504 agency review of deferred complaints.
1640.11 EEOC review of deferred charges.
1640.12 Standards.
1640.13 Agency specific memoranda of understanding.

Authority: 5 U.S.C. 301; 29 U.S.C. 794(d); 42 U.S.C. 12117(b).

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Part VI

Department of Justice

28 CFR Part 77

Communications With Represented Persons; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 77

[AG Order No. 1903–94]

Communications With Represented Persons

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule governs the circumstances under which attorneys employed by the Department of Justice ("Department") may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.

The purpose of this rule is to impose a comprehensive, clear, and uniform set of regulations on the conduct of government attorneys during criminal and civil investigations and enforcement proceedings. The rule is intended to ensure that government attorneys adhere to the highest ethical standards, while eliminating the uncertainty and confusion arising from the variety of interpretations of state rules, some of which have been incorporated as local court rules in a number of federal district courts.

The rule establishes, prospectively, a general prohibition, subject to limited enumerated exceptions, against contacts with "represented parties" without the consent of counsel. This prohibition derives from the American Bar Association ("ABA") Code of Professional Responsibility and its successor, the ABA Model Rules of Professional Conduct. The rule, on the other hand, generally permits investigative contacts with "represented persons": that is, individuals or organizations that are represented by counsel but that have not yet been named as defendants in a civil or criminal enforcement proceeding or arrested as part of a criminal proceeding. However, the rule does not permit contacts with represented persons without the consent of counsel for the purpose of negotiating plea agreements, settlements, or other similar legal arrangements.

In addition, the Department intends to issue substantial additions to the United States Attorneys' Manual ("Manual") to provide additional direction to Department attorneys when they deal with represented individuals and organizations, in order to accommodate more fully the principles and purposes underlying the state bar rules. Those provisions will further restrict government attorneys when they contact targets of criminal or civil law enforcement investigations who are known to be represented by counsel, and when they communicate with other represented persons.

EFFECTIVE DATE: September 6, 1994.

FOR FURTHER INFORMATION CONTACT: F. Mark Terison, Senior Attorney, Legal Counsel, Executive Office for United States Attorneys, United States Department of Justice, (202) 514-4024. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule on the subject of communications with represented persons culminates a lengthy rulemaking process in which a proposed rule on the same subject was issued three separate times for comment. *See* 59 FR 10086 (Mar. 3, 1994); 58 FR 39976 (July 26, 1993); and 57 FR 54737 (Nov. 20, 1992). Comments received after the publication in November 1992 and in July 1993 of earlier versions of the rule resulted in major substantive changes being made to the rule. As a result, a new proposal reflecting these changes was published on March 3, 1994. During the most recent comment period, the Department received many thoughtful comments from private attorneys, local bar organizations, state courts, federal prosecutors, and others. The Department closely scrutinized all of these comments. After considering those comments, the Department made several relatively minor amendments to the proposed rule. Therefore, the final rule remains in substantially the same form as the proposed rule issued in March 1994.

The final rule reflects the Department's commitment to fostering ethical behavior consistent with the principles informing DR 7–104(A)(1) of the ABA Code of Professional Responsibility and Rule 4.2 of the Model Rules of Professional Conduct, while setting forth clear and uniform national guidelines upon which government attorneys can rely in carrying out their responsibilities to enforce federal laws. (The term "attorney for the government" is defined in paragraph 77.2(a), and where this phrase, or a variant of it, such as "government attorney," is used elsewhere in this commentary, it has the meaning set forth in paragraph 77.2(a), unless the context clearly indicates otherwise, and it is typically used interchangeably with "Department attorney."). In essence, this regulation permits federal prosecutors and agents to continue to conduct legitimate criminal and civil investigations against all individuals, whether or not those persons are represented by counsel. It allows government attorneys to continue to make or direct undercover or overt contacts with individuals and organizations represented by counsel for the purpose of developing factual information up until the point at which they are arrested or charged with a crime or named as defendants in a civil law enforcement action. However, the regulation generally does not permit federal prosecutors to attempt to negotiate plea agreements, settlements, or similar arrangements with individuals represented by counsel without the consent of their attorneys. This regulation also precludes, with certain narrow exceptions, any contacts with represented parties after an arrest, indictment, or the filing of a complaint on the subject matter of the representation.

Additionally, the Department plans to add provisions to the United States Attorneys' Manual that will set forth further guidance. The Department intends to prohibit overt approaches by federal attorneys to represented targets of criminal or civil enforcement proceedings without the consent of counsel, unless certain enumerated exceptions are met. The planned provisions also will generally require that government attorneys receive approval from their supervisors before communicating with any represented party or represented target.

Since early in this century, the rules of professional conduct that govern attorneys have required that lawyers for one party in a dispute communicate only through an adverse party's lawyer, rather than directly. DR 7–104(A)(1) of the ABA Model Code of Professional Responsibility provides:

> A. During the course of his representation of a client a lawyer shall not:
>
> 1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2 of the ABA Model Rules states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Disciplinary authorities in all 50 states and in the District of Columbia have adopted one of these rules, or a similar prohibition. Underlying these rules is the recognition that when two parties in a legal proceeding are represented, it is generally unfair for an attorney to

circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party.

At the same time, the courts have long recognized that government law enforcement agents must be allowed broad powers, within constitutional limits, to investigate crime and civil violations of police and regulatory laws. These powers properly include the authority to conduct undercover operations and to interview witnesses, potential suspects, targets, and even those defendants who waive their right to remain silent. Although the Fifth and Sixth Amendments significantly restrict contacts with defendants after their initial appearance before a judge or after indictment, these constraints generally do not apply before a person has been taken into custody or charged in an adversary proceeding. Sound policies support this substantial power of police to investigate. The general public, victims of crime, and even potential suspects have a strong interest in vigorous inquiry by law enforcement officers before arrest or the filing of charges.

As long as investigations were treated as within the province of the police alone, the traditional rule forbidding counsel from directly contacting represented persons did not come into conflict with legitimate law enforcement activities. In recent years, however, the Department of Justice has encouraged federal prosecutors to play a larger role in preindictment, prearrest investigations. Some of this increased involvement stems from the wider use of law enforcement techniques, such as electronic surveillance, which require the preparation of legal filings. Also, complex white collar and organized crime investigations necessitate more intensive engagement of lawyers, who present such cases to grand juries. Most important, greater participation of lawyers at the preindictment stage of law enforcement has been regarded as helpful in assuring that police investigations comply with legal and ethical standards.

This extension of the traditional prosecutor's responsibility has been a salutary development. One by-product, however, has been uncertainty about whether the traditional professional limitation on attorney contacts with represented parties should be viewed as a restriction upon prosecutors engaged in investigations and, by extension, the agents with whom they work. The overwhelming preponderance of federal appellate courts have held that the restriction on contacts with represented persons does not apply at the preindictment investigation stage. *See, e.g., United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990); *United States* v. *Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981); *United States* v. *Weiss*, 599 F.2d 730, 739 (5th Cir. 1979); and *United States* v. *Lemonakis*, 485 F.2d 941, 955–56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). Only the Second Circuit has suggested otherwise. *See United States* v. *Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). However, that suggestion was muted significantly in a revised opinion by the Second Circuit that "urge[d] restraint in applying the rule to criminal investigations," 858 F.2d at 838, and ultimately concluded that "a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations * * *" *Id.* at 839. By contrast, state courts and state bar organizations have varied widely in their interpretation of the scope of the prohibition on contacts embodied in DR 7–104, Model Rule 4.2, and their analogs. Some examples of the varying interpretations are detailed below.

Uncertainty about the scope and applicability of DR 7–104, Model Rule 4.2, and their state counterparts has directly affected the investigative activities of agents, including Federal Bureau of Investigation and Drug Enforcement Administration personnel, who work with prosecutors. The expansive application of these rules in some jurisdictions may have the effect of blocking preindictment interviews or undercover operations that most courts have held permissible under federal constitutional and statutory law. Additionally, the heightened threat of disciplinary action that accompanies the expansive application of these rules has created a chilling effect on prosecutors responsible for directing these legitimate investigative activities.

These problems are compounded when federal attorneys assigned to the same case are members of different state bars. Under federal law, a Department attorney must be a member in good standing of a state bar, but he or she need not belong to the bar in each state in which he or she is practicing for the government. Therefore, prosecution teams often comprise attorneys admitted to different bars. The application of different state disciplinary rules to these individuals creates uncertainty, confusion, and the possibility of unfairness. Indeed, one member of a two-member federal prosecution team could receive a commendation for effective law enforcement while the other member, licensed in a different state, might be subject to state discipline for the same conduct.

In light of these circumstances, the Department has concluded that a compelling need exists that warrants a uniform federal rule to reconcile the traditional rule against contacts with a represented party with the obligation of the Department of Justice to enforce the law vigorously. Indeed, absent a uniform federal rule, prosecutors have been moved on occasion to reduce their participation in the investigative phase of law enforcement so as to leave federal agents unfettered by state disciplinary rules that were never intended to govern police behavior. Such a retreat from the field by prosecutors serves neither efficiency nor the interest in elevating legal compliance and ethical standards in all phases of law enforcement.

Furthermore, the disciplinary rules themselves invite promulgation of a regulation such as this one. Nearly all the states have adopted rules that include an "authorized by law" exception. This final rule, a duly promulgated regulation, is intended to constitute "law" within the meaning of those exceptions.

Finally, the Department has long maintained, and continues to maintain, that it has the authority to exempt its attorneys from the application of DR 7–104 and Model Rule 4.2 and their state counterparts. Furthermore, the Department maintains that whether, and to what extent, such prohibitions should apply to Department attorneys is a policy question. *See* Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. O.L.C. 576, 577 (1980). In light of the fact that all 50 states and the District of Columbia have adopted some form of a prohibition on contacts with represented parties, and in view of the long history of those rules, the Department believes that its attorneys should adhere to the principles underlying those rules to the maximum extent possible, consistent with the Department's law enforcement responsibilities. Therefore, even though the Department has the authority to exempt its attorneys from the reach of these rules, the Department has decided not to implement a wholesale exemption.

Rather, this regulation attempts to reconcile the purposes underlying DR 7–104 and Model Rule 4.2 with effective law enforcement. Recognizing the importance of the attorney-client relationship and the desirability that an individual who is represented by

counsel be fully advised by counsel before negotiating legal agreements, this regulation provides that federal attorneys may not negotiate plea bargains, settlement agreements, immunity agreements, or similar arrangements without the consent of the individual's attorney. There is a heightened risk in this context of the prosecutor's superior legal training and specialized knowledge being used to the detriment of the untutored layperson. Thus, the regulations comport with the principal purpose of DR 7–104 and Model Rule 4.2 by insisting that the individual's attorney participate in these types of negotiations. Further, even when contacts are allowed, the regulation is designed to minimize any intrusion into the attorney-client relationship. At the same time, this regulation does permit direct contacts at the preindictment, prearrest investigative stage with any individual, whether or not he or she is represented by counsel. The regulation is drafted to conform to the approach of most federal appellate courts that have considered the matter. *See, e.g., United States* v. *Ryans*, 903 F.2d 731 (10th Cir.) (discussing cases), *cert. denied*, 498 U.S. 855 (1990), and other cases cited previously in connection with the discussion of preindictment contacts. The Department believes that public policy and effective law enforcement would not be served if the simple act of retaining an attorney could serve to exempt a person from lawful, court-approved investigative techniques. The Department believes that it is inappropriate to alter investigative techniques based upon an individual's financial ability to retain counsel before the point at which an indigent would be afforded court-appointed counsel.

This regulation and the planned changes to the United States Attorneys' Manual also will give effect to other important aspects of the bar rules against contacts with represented parties. For example, the regulation precludes federal attorneys from disparaging an individual's counsel or from attempting to gain access to attorney-client confidences or lawful defense strategy. The guidelines that the Department intends to add to the Manual also will make clear that once an individual is in a likely adversarial situation with the government and has retained an attorney to represent himself or herself with respect to the particular subject matter under investigation, the government attorney must take greater care before making any *ex parte* contacts. While the regulation authorizes most communications before arrest, the planned Manual changes provide that, as a matter of internal policy guidance, federal prosecutors generally should not make overt contacts with represented targets of investigations. However, the planned Manual provisions permit overt contacts with a represented target when initiated by the target; when necessary to prevent death or physical injury; when the relevant investigation involves ongoing or additional crimes, or different crimes from that to which the representation relates; or when a United States Attorney or an Assistant Attorney General expressly concludes, under all of the circumstances, that the contact is needed for effective law enforcement.

Finally, the regulation and planned Manual provisions also address when a government attorney may communicate with an employee, officer, or director of a represented corporation or organization without the consent of counsel. The regulation generally prohibits a government attorney from communicating with a current, high-level employee of a represented organization who participates as a "decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter" once the organization has been named as a defendant in a criminal or civil law enforcement proceeding. Further, the contemplated Manual provisions would generally prohibit contacts without the consent of counsel with controlling individuals of organizations that have not yet been named as defendants but are targets of federal criminal or civil law enforcement investigations.

This final rule recognizes that state courts and disciplinary bodies generally play the primary role in regulating the conduct of all attorneys, including those who work for the federal government. The Department also recognizes that with respect to most matters, Department attorneys are subject to the bar rules and disciplinary proceedings of the states in which they are licensed. However, the Department believes it must be the final arbiter of the scope of policing with respect to *ex parte* contacts involving federal prosecutors, subject to the Constitution and the laws of the United States. As noted above, because of the expanded participation of federal prosecutors in preindictment investigations, and the trend of state courts increasingly to apply DR 7–104 and Model Rule 4.2 expansively against federal prosecutors, these rules have affected and circumscribed the power of federal officials to carry out their legally mandated responsibilities. This regulation provides that the Attorney General shall have exclusive authority to determine these rules. Further, the Department's rules are intended fully to preempt and supersede the application of state and local court rules relating to contacts by Department of Justice attorneys when carrying out their federal law enforcement functions. Only if the Attorney General finds that a Department attorney has willfully violated these new rules would that attorney continue to be subject to the full measure of state disciplinary jurisdiction.

The Department is confident that, taken together, this regulation, the planned Manual amendments, and this supplemental information will promote the public interest in effective law enforcement in a manner that also conforms to the highest standards of legal ethics.

The procedures established by this rule apply to conduct occurring after the rule's publication.

II. Rulemaking History

On November 22, 1992, the Department of Justice published in the **Federal Register** a proposed rule regarding communications with represented persons. 57 FR 54737. By December 21, 1992, the close of the comment period, the Department had received comments from 20 sources.

The Department was concerned that not all interested parties had received sufficient opportunity to respond during the initial comment period. Noting "the complex and important nature of the rule to the criminal and civil justice systems and the licenses and livelihoods of its attorneys," on July 26, 1993, the Department reissued the proposed rule for an additional 30-day comment period. 58 FR 39976. The Department received 219 comments following this second publication of the proposed rule.

On March 3, 1994, the Department issued a new proposed rule governing the same subject matter for an additional 30-day comment period. 59 FR 10086. In response to concerns raised by bar organizations, bar counsel, state and federal judges, and others, that proposal reflected substantial changes from the earlier proposals. This publication of the proposed rule was accompanied by the issuance of companion provisions that the Department intends to include in the United States Attorneys' Manual, which set forth certain more restrictive policies with regard to overt investigatory communications. The discussion that follows summarizes the issues that were raised in response to the Department's latest publication of the proposed rule.

III. Summary of Comments Received

During the most recent comment period, which closed on April 4, 1994, timely comments were received from 31 sources, including nine individuals, nine organizations, four state court judges, one federal court judge, five U.S. Attorney's Offices, two Department of Justice components, and one other federal agency. Of the 31 comments received, nine comments supported promulgation of the proposed rule, 20 comments opposed the rule, and two other comments failed to take any definitive position on the proposed rule as a whole. As with previous versions of this rule, many writing in opposition to the Department's proposal argued that it unfairly permits the Department to hold its attorneys to ethical rules different from those that apply to all other attorneys. Other opponents of the proposed rule—most notably the ABA and a special committee of the Conference of State Supreme Court Chief Justices—challenged the proposed rule on constitutional and statutory grounds, arguing that the Department lacks authority to preempt state ethics rules or to supersede local federal district court rules. Those writing in support of the proposal generally praised it for bringing certainty and clear guidance to an area that previously has been unclear and disruptive of law enforcement functions.

The Department has considered carefully each comment and appreciates the thoughtfulness reflected in them. The Department's responses to those comments are discussed below, either in the "General Comments" section or in the context of the particular section or paragraph to which they pertain as part of the "Section-by-Section" analysis. All revisions adopted in the final rule are indicated.

IV. General Comments

Comments were received on the following three general issues: (1) the need for the rule; (2) the constitutional and statutory authority for the rule; and (3) the sufficiency of the rule's internal enforcement mechanisms. These general comments essentially repeated comments received in response to previous versions of the proposed rule. After careful reconsideration of these recurring issues, the Department's position on many of these subjects—in particular, the constitutional and statutory basis for this rule and the need for and advisability of such a rule—remains the same. Therefore, the Department's response in this section builds upon responses published in previous commentaries.

A. *The Need for the Rule.* One state court judge, one federal judge, five individuals, and six organizations criticized the proposed rule as holding government attorneys to lower ethical standards than those that apply to all other attorneys. This comment was formulated in a variety of ways, with the following as illustrative examples: "[t]he rules apply to everyone, and it should especially apply to attorneys in Government service;" "I do not know why it is that the department somehow thinks [it] can exempt [its] attorneys from the rules of conduct that all of the lawyers must abide by;" "[Department] lawyers should be treated as subject to the same rule of law that applies to the conduct of all other lawyers;" and "[f]airness simply will not tolerate exalting the role of one adversary's advocate above the other."

In response to these comments, the Department finds it important, first, to make clear that this rule is not designed to diminish the ethical responsibilities of government attorneys; it is intended to clarify those responsibilities. The current situation, in which state contact rules purport to govern the substantive conduct of federal law enforcement attorneys, has proven unsatisfactory because the standards of ethical conduct are uncertain and subject to unpredictable and varying interpretations. This uncertainty as to what constitutes appropriate conduct by Department attorneys has interfered with the responsible exercise of the law enforcement duties of Department attorneys. The basic purpose of this regulation is to provide a uniform rule of ethics regarding contacts with represented persons that can be consistently and predictably applied. By doing so, the regulation will allow all Department attorneys involved in a federal law enforcement proceeding to understand and abide by applicable standards. There is simply no basis for believing that there will be a reduction in compliance with ethical standards by federal prosecutors.

Many commenters opposing the proposed rule dismissed as unnecessary the creation of a uniform set of rules for Department attorneys. Some commented that the *ex parte* contact rules currently in place do not vary significantly, given that virtually every jurisdiction has adopted some version of the ABA's anti-contact rule. Other commenters argued that, in any event, state and local ethics rules do not interfere substantially with federal law enforcement activities because only in rare instances have federal prosecutors actually been investigated by a state disciplinary authority.

Although an anti-contact rule is in effect in nearly all jurisdictions, it is not interpreted uniformly. Among other things, jurisdictions differ as to whether the anti-contact rule applies in the investigatory stage, *compare United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990) *with United States* v. *Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990); whether the rule applies to prosecutors, *compare Matter of Doe*, 801 F. Supp. 478 (D.N.M. 1992) *with* District of Columbia Rules of Professional Conduct Rule 4.2 cmt. ¶ 8; whether the rule applies to former employees of a represented corporate party, *compare Public Serv. Elec. & Gas* v. *Associated Elec. & Gas*, 745 F. Supp. 1037, 1042 (D.N.J. 1990) *with Polycast Technology Corp.* v. *Uniroyal, Inc.*, 129 F.R.D. 621, 628 (S.D.N.Y. 1990); and whether the rule applies to all corporate employees who could make admissions on behalf of the corporation or only to employees who belong to a so-called "control group." *Compare* Model Rules of Professional Conduct Rule 4.2 cmt. (1983) *with Wright by. Wright* v. *Group Health Hosp.*, 691 P.2d 564 (Wash. 1984). The lack of uniformity in interpreting existing anti-contact rules has created concern among government attorneys of inadvertently running afoul of state court or federal district court rules. The threat of disciplinary proceedings (and the possible resulting loss of license and livelihood) against a government attorney engaged in legitimate law enforcement activities has had a chilling effect on the responsible exercise of law enforcement duties. Many federal prosecutors who submitted comments in connection with the earlier versions of this rule stated that they feel compelled to refrain from authorizing or participating in legitimate and ethical law enforcement activities because of the current uncertainty as to the acceptability of various *ex parte* contacts.

To add to the confusion inherent in the current situation, the Department's attorney staff consists of members of many different state bars who commonly appear in multiple jurisdictions. Under the Model Rule's approach, an attorney practicing in a jurisdiction in which he or she is not a member of the bar remains subject to the jurisdiction of the bar of which he or she is a member, but if the rules in the two places differ, principles of conflict of laws may apply. Model Rules of Professional Conduct Rule 8.5 and cmt. (1983). As a result, when state anti-contact rules purport to govern the conduct of federal attorneys, the

question of which rule governs the conduct of Department lawyers may often be complicated. Indeed, as was noted in the "Background" section of this commentary, government attorneys may be subject to substantially different rules when they are working alongside one another on the same case. One commenter proposed that instead of issuing a uniform contacts rule for Department attorneys, the Department should encourage its attorneys to practice only in a given jurisdiction and to obtain bar membership in that jurisdiction. However, Congress has made clear that Department attorneys should be able to practice in different jurisdictions so long as they are a member of some state bar, and there is a significant federal interest in preserving the Department's ability to assign its attorneys wherever there are law enforcement needs to be met. This uniform rule regarding contacts with represented persons achieves consistency and high ethical standards without hampering federal law enforcement activity.

In formulating this uniform rule, the Department has not disregarded existing state ethics rules, as a number of comments imply. As set forth in section 77.12, this regulation is specifically intended to fit within the structure of DR 7–104 and Model Rule 4.2, as well as analogous state and local district court disciplinary rules. Both DR 7–104 and Model Rule 4.2 provide that communications that are "authorized by law" are exempted from the general prohibition of the rule and, according to the Reporter for the commission that developed the Model Rules, Yale Law School ethics professor Geoffrey Hazard, this exception was drafted with the "government lawyer" problem in mind. *See* Letter of January 19, 1994 from Professor Geoffrey C. Hazard, Jr. to Chief Justice E. Norman Veasey, at 2 ("I can state from first-hand knowledge that this [authorized by law] qualification was drafted mindful of the government lawyer problem, among others. In my opinion it is within the authority of the federal government, particularly the Justice Department, to promulgate such regulations.") (This letter and all comments are on file with the Office of the Associate Attorney General, United States Department of Justice). As explained later in this commentary, the Department's position is that communications with represented persons undertaken pursuant to this duly promulgated regulation clearly constitute communications "authorized by law." Therefore, in nearly all jurisdictions, communications approved under the Department's rules will be appropriate under existing ethical rules as well.

Furthermore, the content of this rule derives largely from DR 7–104 and Model Rule 4.2 and is wholly consistent with the principles underlying these rules. This regulation grants greater latitude for lawyer communications with a represented "person" during the investigative phase of law enforcement than with a represented "party" after adversarial proceedings have commenced. This distinction appears in the texts of DR 7–104 and Model Rule 4.2, which prohibit only communications with "a party" the lawyer knows to be represented by another lawyer in the matter. This distinction also accords with the great weight of federal court interpretations of the state ethics rules. *See Ryans*, 903 F.2d at 739 ("We are not convinced that the language of [the anti-contact rule] calls for its application to the investigative phase of law enforcement" because "the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting"); *United States* v. *Sutton*, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986) (anti-contact rule "was never meant to apply to [pre-indictment, non-custodial] situations such as this one"); *United States* v. *Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983) (agent's "noncustodial interview of [suspect] prior to the initiation of judicial proceedings against the appellant did not constitute an ethical breach"); *United States* v. *Fitterer*, 710 F.2d 1328, 1333 (8th Cir.) (anti-contact rule does not prohibit prosecutors from using undercover informants to communicate with represented persons prior to indictment), *cert. denied*, 464 U.S. 852 (1983); *United States* v. *Jamil*, 707 F.2d 638 (2d Cir. 1983) (prosecutor's use of undercover informant in pre-indictment, non-custodial setting to communicate with represented person does not violate DR 7–104); *United States* v. *Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982) (anti-contact rule was not intended to prohibit use of undercover informants prior to indictment); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.) ("the government's use of such investigative techniques at this stage of a criminal matter does not implicate the sorts of ethical problems addressed by the Code"), *cert. denied*, 452 U.S. 920 (1981); *United States* v. *Weiss*, 599 F.2d 730, 739–40 (5th Cir. 1979) (prosecutor's investigatory communications upheld against challenge under anti-contact rule); *United States* v. *Lemonakis*, 485 F.2d 941, 953–56 (D.C. Cir. 1973) (anti-contact rule does not apply prior to indictment, and use of undercover informant did not violate rule in any event), *cert. denied*, 415 U.S. 989 (1974); *In re U.S. Dept. of Justice Antitrust Investigation*, 1992–2 Trade Cases (CCH) ¶ 69,933, at 68,469 (D. Minn. 1992) (Minnesota's Rule 4.2 held inapplicable because "[t]he word 'parties' in Rule 4.2 indicates the presence of a lawsuit" and "[t]he present controversy relates to an investigation, not a lawsuit"); *United States* v. *Infelise*, 773 F. Supp. 93, 95 n.3 (N.D. Ill. 1991) (DR 7–104(A)(1) "speaks in terms of communications with a 'party', suggesting that the rule is to be applied only when adversarial proceedings have been initiated"); *United States* v. *Western Electric Co.*, 1990–2 Trade Cases (CCH) ¶ 69,148, at 64,314 & n.6 (D.D.C. 1990); *United States* v. *Buda*, 718 F. Supp. 1094, 1096 (W.D.N.Y. 1989); *United States* v. *Chestman*, 704 F. Supp. 451, 454 (S.D.N.Y. 1989), *rev'd on other grounds*, 903 F.2d 75 (2d Cir. 1990), *aff'd in part*, 947 F.2d 551 (2d Cir. 1991) (en banc); *United States* v. *Galanis*, 685 F. Supp. 901, 903–04 (S.D.N.Y. 1988); *United States* v. *Guerrerio*, 675 F. Supp. 1430, 1438 (S.D.N.Y. 1987). *But see United States* v. *Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (pre-indictment communications may be improper if accompanied by "misconduct" on the part of the government), *cert. denied*, 498 U.S. 871 (1990); *United States* v. *Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States* v. *Sam Goody, Inc.*, 518 F. Supp. 1223, 1224–25 n.3 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982); *see also* Comment to ABA Model Rule 4.2 (notwithstanding use of the term "party," the rule does not require that a person be "a party to a formal legal proceeding").

The courts have readily recognized that Department attorneys engaged in criminal and civil law enforcement matters perform distinctly different functions from attorneys engaged in the private practice of law. The courts have further recognized that the rules governing communications with represented persons should take account of these differences. To disregard these differences would therefore impose substantial and deleterious restrictions on the legitimate law enforcement duties of Department attorneys that do not presently exist.

For much the same reasons, the Department believes that there is a basis for distinguishing for purposes of this regulation between Department attorneys engaged in law enforcement activities (who are covered by this regulation) and Department attorneys

engaged in civil suits in which the United States is not acting under its police or regulatory powers (who are not covered). One commenter proposed extending these rules to cover also the latter activities of Department attorneys; however, because government attorneys engaged in other, ordinary civil litigation are not engaged in distinctly different functions from private attorneys involved in civil cases, they are not brought under this regulation.

Two organizations further criticized the Department for holding government attorneys to ethical standards no higher than what the Constitution provides. The Department agrees that the constitutional baseline does not provide the proper measure of government attorneys' ethical obligations. But this regulation does not purport to equate the two standards. On the contrary, the Department's final rule imposes a range of restrictions that go beyond those that are constitutionally compelled. For example, the regulation prohibits government attorneys generally from engaging in negotiations of certain specified legal agreements with any represented individual without the consent of that individual's counsel, even if that individual is not in custody and not formally charged. Such communications are not constitutionally proscribed. *See Brewer* v. *Williams*, 430 U.S. 387, 398 (1979); *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Additionally, the Department plans to issue United States Attorneys' Manual provisions that will place significant limits on the ability of government attorneys to engage in noncustodial communications with a represented "target" of a federal criminal or civil law enforcement investigation, even though narrowing an investigation to focus on a particular suspect does not trigger the suspect's right to counsel. *See Hoffa* v. *United States*, 385 U.S. 293 (1966). Therefore, in constructing these standards to guide the ethical conduct of its attorneys, the Department has imposed ethical restrictions on Department attorneys that extend significantly beyond what the Constitution requires.

B. *The Constitutional and Statutory Authority for the Rule.* 1. *The Department's Authority To Promulgate the Rule.* A number of commenters argued that the Attorney General lacks delegated authority to promulgate this regulation. Comments stressed that "[n]o act of Congress purports to authorize the Department to adopt regulations to override state ethics rules governing lawyers," and that the proposed regulation in fact is "contrary to . . . the explicit mandate of Congress" that every Department attorney must get a license from a State and maintain that license.

Rules governing the conduct of Department attorneys, or any other officials of the Executive Branch, may be promulgated only pursuant to constitutional or statutory authority. Congress's delegation of authority need not be specific or explicit. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 307–08 (1979). The Department believes that it possesses appropriate statutory authority to promulgate this regulation pursuant to two distinct sources: 5 U.S.C. 301 ("commonly referred to as the 'housekeeping statute,'" *Chrysler Corp.*, 441 U.S. at 309 (citation omitted)), and title 28 of the United States Code, which in a variety of provisions authorizes the Attorney General and the Department to enforce federal law and to regulate the conduct of Department attorneys.

Section 301 of title 5, United States Code, authorizes the Attorney General to "prescribe regulations for the government of [her] department," "the conduct of its employees," and "the distribution and performance of its business." 5 U.S.C. 301. The Supreme Court has held that this provision authorizes the Attorney General to issue regulations with extra-departmental effect. *See, e.g., Georgia* v. *United States*, 411 U.S. 526, 536 (1973) (holding that section 301 provided the Attorney General with "ample legislative authority" to issue regulations that established procedural and substantive standards binding on state and local governments); *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951) (federal government attorney could not be held in contempt for following an Attorney General regulation promulgated pursuant to a predecessor to section 301).

Title 28 of the United States Code grants the Attorney General and the Department a variety of law enforcement powers including the power (through intermediary officials) to conduct grand jury proceedings or any other kind of civil or criminal legal proceeding; to conduct litigation, and to "secur[e] evidence" therefor; to detect and prosecute crimes; and to prosecute "civil actions, suits, and proceedings in which the United States is concerned." 28 U.S.C. 515(a), 516, 533, 547; *see* 28 U.S.C. 509, 510. The Attorney General is also authorized to "supervise all litigation" to which the United States is a party and to direct United States Attorneys and other subordinate attorneys in the "discharge of their respective duties." 28 U.S.C. 519. These provisions grant the Attorney General extremely broad authority to supervise the enforcement of federal law.

In order for a Department regulation to have the force and effect of law, it must rest on a reasonable construction of the statutes delegating the authority to promulgate it and must not in substance contradict any act of Congress. *See, e.g., NLRB* v. *United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699–700 (1989). These rules represent the reasoned judgment of the Attorney General and of the Department about the lawful authority of federal lawyers effectively to investigate and prosecute crimes.

One individual and a number of organizations, including the Conference of Chief Justices, posited that the Department is acting outside the scope of its congressionally delegated authority because this regulation assertedly contravenes the Department of Justice Appropriation Authorization Act of 1979, which requires all Department attorneys to be "duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." Pub. Law No. 96–132, § 3(a), 93 Stat. 1040, 1044 (Nov. 30, 1979), as carried forward by Pub. Law No. 103–121, 107 Stat. 1153, 1163 (Oct. 27, 1993) (reenacting provisions of Pub. Law No. 96–132). These commenters suggested that when Congress required Department attorneys to be licensed by a state bar, Congress implied that Department attorneys should be subject to all the rules and regulations of state authorities, regardless of their impact on officials carrying out federal law enforcement. Therefore, this regulation, by shielding Department attorneys from state disciplinary proceedings for violations of state rules interfering with effective federal law enforcement, is alleged to violate Congress's clear intent in enacting the Department's appropriation statute.

The Department believes that these comments mistake the purpose and effect of the congressional requirement that federal attorneys have state licenses. That requirement, which is satisfied by admission to the state's bar and maintenance of bar membership, simply serves to ensure that the professional qualifications of all Department lawyers have in fact been examined. No comment received by the Department demonstrates that Congress intended the requirement to have the further effect of interfering with the Attorney General's ability to ensure effective federal law enforcement or of compelling federal attorneys to comply

with state bar ethical standards that contradict federal rules.

2. *The Department's Power to Preempt State Ethics Rules.* One individual, one state court judge, and five organizations, including the Special Committee of the Conference of Chief Justices, commented that the Department does not have the constitutional power to preempt state regulation of its attorneys.

It should first be noted that in most instances the force and effect of these rules should not depend on whether they preempt state ethics rules under the Supremacy Clause. As already noted, communications within the scope of the regulation are intended to constitute communications that are "authorized by law" within the meaning of DR 7–104, Model Rule 4.2, and analogous disciplinary rules. Therefore, if the relevant state rule contains an authorized-by-law exception, this regulation should be seen as constituting such authorization, thereby bringing any attorney communication permissible under these rules in conformity with that state law and eliminating the Supremacy Clause issue.

The Committee of Chief Justices commented that it is the exclusive province of the state supreme courts to construe state disciplinary rules and to determine whether this regulation falls within the "authorized by law" exception to these rules. The Department has simply expressed its *intention* to fit communications made pursuant to these rules within the "authorized by law" exception to state and local federal court rules, and its *belief* that this regulation indeed constitutes legal authorization for such communications. The Department notes that it would seem to require a very strained reading to conclude that a regulation duly promulgated after notice and comment and within the scope of its delegated authority does not also constitute "law." *Cf. Chrysler Corp.*, 441 U.S. at 295–96 (1979) ("It has been established in a variety of contexts that properly promulgated substantive agency regulations have the 'force and effect of law.'. . . It would therefore take a clear showing of contrary legislative intent before the phrase 'authorized by law' in [18 U.S.C.] § 1905 could be held to have a narrower ambit than the traditional understanding." (citation omitted)).

However, the Department recognizes that situations may arise in which the power of this regulation to displace state rules will depend on its preemptive force under the Supremacy Clause. Such situations may arise in several forms: where the applicable ethics rule has no "authorized by law" exception; where this regulation is deemed not to constitute "law" for purposes of such exception; or where a communication is held to violate the applicable ethics rule and not be "authorized" by this regulation. Therefore, an important feature of this regulation is its express intention to preempt and supersede the operation of state and local federal court rules as they relate to contacts by Department attorneys, regardless of whether such rules are inconsistent or consistent with this regulation, absent a finding of a willful violation of these rules by the Attorney General.

The preemption of state regulation of contacts with represented persons, except when the Attorney General has found a willful violation of the federal regulation, was an integral feature of this rule as proposed earlier. The proposed rule reflected the Department's belief that preemption of state and local rules, which have been unevenly applied, is necessary to ensure that government attorneys' conduct respecting *ex parte* contacts is subject to uniform and predictable standards. The Department has made minor revisions to section 77.12 to clarify that the Department's intent is to displace even purportedly consistent state regulation in this area (or, as it is commonly phrased, to "occupy the field" of reviewing *ex parte* contacts by Department attorneys). The rules and this commentary now state in more express terms the Department's intention to preclude any state regulation of government attorneys respecting the subject matter of these rules, unless the Attorney General first finds a willful violation of these rules.

Several comments suggested that the Attorney General lacks the authority to preempt state disciplinary rules, absent an explicit Congressional authorization to do so. These comments misconceive the power of a federal agency or department to preempt state regulation. Congress may, of course, expressly preempt all state regulation in a particular field, *see Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 247, 255 (1947); *accord Jones* v. *Rath Packing Co.*, 430 U.S. 519, 536–37 (1977), and, in proper circumstances, a federal agency similarly "may determine that its authority is exclusive and preempts any state efforts to regulate in the forbidden area." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988). *See generally Fidelity Federal Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153–54 (1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes" under the Supremacy Clause); *Hillsborough County, Fla.* v. *Automated Med. Labs*, 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."). A federal agency may preempt state regulation whenever the agency, in doing so, is acting within the proper scope of its congressionally delegated authority. *Louisiana Public Serv. Comm'n* v. *FCC*, 476 U.S. 355, 368–69 (1986). *Accord City of New York*, 486 U.S. at 64 ("if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned' " (citation omitted)). Thus, contrary to the commenters' suggestion, "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law . . . ." *Fidelity Federal Sav. & Loan Ass'n*, 458 U.S. at 154.

In promulgating this regulation, the Department is acting within the scope of its discretionary authority. The ample consideration given to this regulation and its earlier versions reflects the Department's effort reasonably to accommodate the relevant policies concerning law enforcement and professional conduct, and, as discussed in the previous section, there is no basis for concluding that the Department has exceeded its statutory authority. Moreover, the purpose of these rules, as defined in section 77.1, is to "ensure the Department's ability to enforce federal law effectively and ethically" and so fulfill the Department's statutory responsibilities. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984) (authority to regulate extends to all regulatory actions necessary to ensure the achievement of statutory responsibilities).

The "presumption against finding preemption of state law in areas traditionally regulated by the States," *California* v. *ARC America Corp.*, 490 U.S. 93, 101 (1989), and the traditional state regulation of legal practice and lawyers' ethics, *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979), does not foreclose the Attorney General from concluding that it is appropriate here to displace those state rules that regulate the conduct of federal officials in the performance of their law enforcement duties. Here, the presumption against preemption is overcome by this regulation's express preemption provision, which is fully effective even in matters traditionally occupied by the states.

Furthermore, under the intergovernmental immunity doctrine, states may not directly regulate or punish federal officials for acts undertaken in their official capacities, or otherwise substantially interfere with the lawful functions of federal officials. *See, e.g., Hancock* v. *Train*, 426 U.S. 167, 178–79 (1976); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 437 (1819); Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. O.L.C. 576, 601–02 (1980). "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any further than such laws have been adopted and sanctioned by the legislative authority of the United States." *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 63 (1825). Contacts covered by this regulation fall within the scope of federal attorneys' duties to carry out the law enforcement activities of the United States. The application to those attorneys of state ethics laws prohibiting such conduct therefore would constitute interference with the activities of the federal government forbidden by the intergovernmental immunity doctrine.

For the foregoing and other reasons, the Department believes that this regulation effectively preempts state ethical rules regarding contacts with represented persons.

3. *The Department's Authority to Supersede Federal District Court Rules.* Most federal district courts have adopted as local federal district court rules one of the two sets of ABA rules or a similar anti-contact rule of the state in which the district court sits. *See Rand* v. *Monsanto Co.*, 926 F.2d 596, 601–603 (7th Cir. 1991). Such adoption gives the state rules the force of federal law. *See United States* v. *Hvass*, 355 U.S. 570, 575 (1958). One individual and two organizations commented that this regulation, if promulgated, would abrogate the primary authority of federal courts to regulate the conduct of attorneys arising out of federal law enforcement proceedings.

The Department views this concern as significant but essentially theoretical, because the regulation has been crafted so that it will not operate in a way that puts it into conflict with local district court rules. However, in response to these comments, it should be noted that through this regulation the Department does intend not only to preempt the application by state courts of state rules relating to contacts by attorneys for the government, but also to supersede the application by federal courts of the local federal district court rules relating to contacts by government attorneys in civil and criminal law enforcement investigations and proceedings. *See* § 77.12 and accompanying commentary.

There are two reasons why the promulgation and operation of this regulation is unlikely to present the issue of abrogation of federal court authority identified by these commenters. The first is that the regulation adopts the line of analysis adopted by the great weight of authority interpreting local district court rules governing contacts with represented persons. *See United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.) (discussing cases), *cert. denied*, 498 U.S. 855 (1990). The Department has not sought in this regulation to validate conduct that would otherwise be invalid under most local district court rules.

In addition, nearly all district courts that have adopted local rules governing contacts with represented persons have incorporated the "authorized by law" exception in the Model Rules or in the corresponding state rule. *See generally Rand*, 926 F.2d at 601–603. As explained above, this regulation constitutes "law" within the meaning of any such exception. Thus, the conduct this regulation authorizes is for that reason equally authorized by these local district court rules.

Thus, this regulation in practice should not present any tension between the federal executive and judicial powers. In response to the commenters' suggestion that any tension would have to be resolved in favor of the judicial power, however, the Department disagrees. Were the issue to arise, it would be properly considered, as an initial matter, as a question of the proper exercise of delegated legislative authority. Congress, not the courts, has the primary power to prescribe rules for the federal courts. *See Palermo* v. *United States*, 360 U.S. 343, 353 n. 11 (1959); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10 (1941). *See generally Hanna* v. *Plumer*, 380 U.S. 460, 472–73 (1965). In the case of this regulation, Congress has delegated that authority by statute to the Attorney General. This regulation therefore has no less legal force than, for example, the Federal Rules, which derive their ultimate authority from legislation. *See* 28 U.S.C. §§ 2071 *et seq.* Local district court rules, even those dealing with attorney discipline, may not displace legislatively-authorized national rules of procedure. *Rand*, 926 F.2d at 600 (Rules of Civil Procedure). *Accord, Baylson* v. *Disciplinary Bd. of Supreme Court of Pa.*, 975 F.2d 102, 107 (3d Cir. 1992) (Rules of Criminal Procedure). A local rule inconsistent with a regulation lawfully issued under statutory authority is, as a matter of law, inconsistent with the underlying statute, and must yield to Congress's paramount authority as delegated to the department or agency issuing the regulation. Thus, the conclusion that the Attorney General has the statutory authority to promulgate the proposed regulation entails the further conclusion that the regulation displaces inconsistent local federal court rules.

Furthermore, the regulation has been carefully drawn in such a way so that once a person has been brought before a court, in general no substantive communication can occur without the consent of counsel unless: the court finds a knowing, intelligent, and voluntary waiver; the communication is made pursuant to court-approved discovery procedures; or the communication concerns a criminal or civil offense different from the offense before the court. The regulation thus accords substantial and appropriate deference to the court's supervisory authority over the parties and proceedings before it. Moreover, this regulation does not purport to disturb the authority of federal courts to fashion appropriate remedies when an *ex parte* contact violates the Constitution. *See* § 77.11(b) and accompanying commentary. Therefore, federal courts will retain significant powers under the Constitution to respond to or sanction improper *ex parte* contacts by government attorneys with represented parties.

The balance of the regulation regulates contacts with persons who are not before the court, and as to whom the supervisory authority of a federal court is, at best, attenuated. *See, e.g., United States* v. *Payner*, 447 U.S. 727, 735 n. 7 (1980) ("The supervisory power merely permits federal courts to supervise the administration of criminal justice among the parties before the bar."); *United States* v. *Williams*, 112 S. Ct. 1735, 1742 (1992) (federal court has no "supervisory" judicial authority to prescribe standards of prosecutorial conduct before the grand jury in the first instance). It would raise significant separation of powers concerns for a district court to assert supervisory authority to regulate and sanction the conduct of executive branch attorneys when the Attorney General has adjudged such conduct legitimate and necessary for law enforcement purposes, when that judgment has been embodied in a duly promulgated regulation, and when the conduct concerns persons who have not yet come before the court.

C. *Sufficiency of Internal Enforcement Mechanisms.* Four organizations and two individuals commented that these

rules, as proposed, lacked enforcement mechanisms sufficient to deter prohibited communications. These comments took two forms: (1) a general suggestion that the Department could not be trusted to police itself (or as, one commenter put it, it would be a case of "the fox maintain[ing] . . . guard over the hen-house"); and (2) a specific concern that the restrictions to be placed in the United States Attorneys' Manual would not in fact be enforced against Department attorneys who violated them.

The Attorney General has exclusive authority over any violations of these rules. As a general matter, violations of these rules will be addressed as matters of attorney discipline by the Department, rather than by any external disciplinary authority. Only if the Attorney General finds a willful violation of these rules may sanctions for the violations be imposed by a state disciplinary authority. This disciplinary structure reflects the Department's belief that allowing sanctions to be issued independent of the Department's internal review process would frustrate the Department's efforts to eliminate the current uncertainty arising from the differing interpretations of the various anti-contact rules by federal courts, state courts, and state disciplinary authorities. The Department intends fully to enforce these rules and to issue appropriate and strong sanctions for any violation of these rules.

The Department also disagrees with those comments that suggest that the provisions the Department currently intends to add to the United States Attorneys' Manual will not be enforced. The Manual contains a great number of significant Department of Justice policies, many of which impose substantial restrictions on Department attorneys. There is no evidence that such policies are routinely overlooked by Department attorneys or that violations of policies set forth in the Manual are not regarded by the Department as serious breaches of professional duties. On the contrary, the failure to follow such policies is taken very seriously. The Department expects its attorneys involved in criminal or civil law enforcement to follow all provisions in the Manual amendments that it intends to issue regarding *ex parte* contacts. Failure to follow such rules will result in appropriate discipline by the Department.

V. Section-by-Section Analysis

Section 77.1: Purpose and Authority

Comments relating to this section are addressed in the "General Comments" section above. No changes have been made to this section.

Section 77.2: Definitions

The following terms are defined in section 77.2 of this part. In the final rule, unlike in the proposed rule, these terms are arranged alphabetically for the reader's ease.

a. *"Attorney for the government."* The term "attorney for the government" includes virtually all Department of Justice attorneys with investigative, litigative, or management responsibilities, regardless of title. It does not, however, include law enforcement agents employed by the Department of Justice who are also members of state bars, if they are employed as, and are performing the function of, agents rather than attorneys. The Federal Bureau of Investigation, Drug Enforcement Agency and other investigative agencies have long recruited individuals with advanced degrees—including, for example, engineering, business, and law degrees—to serve as agents. The Department strongly encourages the recruitment of educated and specially-trained individuals for positions as agents. An agent's bar membership should not adversely affect his or her ability to conduct comprehensive investigations and otherwise to fulfill his or her law enforcement functions. Therefore, the rule specifically exempts attorney-agents from its scope if they are employed by the government as investigative agents and not as attorneys.

The term also does not include attorneys for departments or agencies outside the Department of Justice, regardless of their litigative authority, except to the extent such persons have been specially appointed pursuant to 28 U.S.C. 515 or 543.

Two Department of Justice components commented that the definition of "attorney for the government," which explicitly covers attorneys employed in the six main divisions of the Department, should be amended to cover all attorneys working in the legal offices of the various Department agencies, such as the Drug Enforcement Administration and the Federal Bureau of Investigation. The Department agrees that the definition of "attorney for the government" should not distinguish between attorneys employed in the Department's divisions and attorneys employed in the Department's agencies, given that both sets of attorneys exercise similar functions and responsibilities with respect to criminal investigations and prosecutions. Accordingly, the definition of "attorney for the government" has been modified to include explicitly "the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of Justice agency."

b. *"Civil Law Enforcement Investigation."* This term includes any investigation of potential civil violations of, or claims under, federal law that may form the basis of a civil law enforcement proceeding, as defined in paragraph 77.2(c).

c. *"Civil Law Enforcement Proceeding."* The term "civil law enforcement proceeding" encompasses a variety of activities beyond the particular areas identified in the definition, which are intended only to be illustrative.

The exclusion of proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand (CID) is intended to ensure that the filing of such a proceeding does not trigger the limitations of section 77.5, which generally prohibits *ex parte* communications once adversary proceedings have commenced against a represented "party." Thus, the filing by the United States of a proceeding to enforce a subpoena, summons, or CID will not prohibit further investigatory communications regarding the underlying substantive violations.

The final sentence of paragraph 77.2(c)(2) ensures that the United States need not be the plaintiff in order for a civil action to be "brought by the United States," but may be a counterclaimant or cross-claimant if the counterclaim or cross-claim otherwise fits within the description of civil law enforcement.

d. *"Cooperating witness or individual."* A "cooperating witness or individual" is defined to include informants, witnesses, and other persons who are not law enforcement agents, but only to the extent that such a person is acting "to assist the government in an undercover or confidential capacity."

e. *"Employee."* The term "employee" is not limited to its literal meaning, but also includes officers, directors, partners, members, and trustees. *See* § 77.10 (communications involving organizations). An independent contractor would not be considered an "employee" for purposes of these rules.

f. *"Organization."* The term "organization" includes any corporation, partnership, association,

joint-stock company, union, trust, pension fund, unincorporated organization, state or local government or political subdivision thereof, or non-profit organization. It does not, of course, include groups of individuals "associated in fact" within the meaning of the racketeering statutes. *See* 18 U.S.C. 1961(4).

Communications with organizations and their employees are governed generally by section 77.10.

g. "*Person.*" The term "person" includes individuals and organizations as defined in paragraph 77.2(f).

h. "*Undercover investigation.*" Under this definition, the hallmark of an "undercover operation" is an investigation in which an individual "whose identity as an official of the government or a person acting at the behest thereof is concealed or is intended to be concealed." This definition is intended to be read broadly to include every type of law enforcement investigation in which the identity of a government employee, or the fact that an individual is cooperating with the government, is concealed.

Section 77.3: Represented Party; Represented Person

This section differentiates between a represented "party" and a represented "person." This distinction is fully consistent with the language of and principles underlying DR 7–104(a)(1) and Model Rule 4.2, which establish general prohibitions against *ex parte* contacts with a represented "party." Section 77.5 of this part generally prohibits government attorneys from initiating *ex parte* contacts with represented parties, but does not prohibit *ex parte* contacts with represented persons. (However, sections 77.8 and 77.9 also prohibit certain contacts with represented persons).

An individual is considered to be a "represented party" under paragraph 77.3(a) if: (1) the person is represented by counsel; (2) the representation is current *and* concerns the subject matter in question; *and* (3) the person has either been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation. If the person is currently represented in fact regarding the subject matter in question, but has not been charged or arrested, that person is considered a "represented person." Thus, witnesses, suspects, and targets of investigations who have not been indicted or arrested, but are represented regarding the subject matter in question, are considered represented persons under this rule.

Several commenters argued that this section's basic distinction between represented "persons" and represented "parties" runs counter to the policy considerations underlying DR 7–104(A)(1) and Model Rule 4.2. However, as discussed in the "General Comments" section, this distinction is consistent with the vast majority of federal court opinions interpreting DR 7–104(A)(1) and Model Rule 4.2., as well as the text of those rules. Furthermore, this distinction is grounded in logic and common sense, given the legitimate necessity for attorneys for the government to be able to direct agents and cooperating witnesses to contact represented persons during undercover investigations.

One organization commented that prosecutors will hold back on filing formal charges in order to maximize their ability to communicate with represented "persons." The Department does not agree that prosecutors are likely to engage in this kind of systematic manipulation. The capacity to do so exists under the Sixth Amendment (given that the Sixth Amendment right to counsel attaches only once formal charges are filed, *see Brewer* v. *Williams*, 430 U.S. 387, 398 (1979)), but there is no evidence of systematic prosecutorial abuse of the charging process under the Sixth Amendment. Furthermore, the Department intends to add a new provision to the United States Attorneys' Manual that will prohibit a Department attorney from communicating overtly with a "target" of an investigation before he or she is formally charged or named as a civil defendant, except in specifically enumerated circumstances.

Section 77.4: Constitutional and Other Limitations.

This section makes clear that this regulation does not purport to authorize any communication prohibited by the Constitution or any federal statute or Federal Rule of Criminal or Civil Procedure. Although these rules do not supersede the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, this limitation does not extend to other rules regarding procedure in federal courts. Thus, rules of procedure adopted by individual courts as local rules, many of which incorporate state bar rules, are not included in this limitation; and, in fact, this regulation is explicitly intended to supersede local federal court rules regarding *ex parte* contacts by attorneys for the government. *See* § 77.12 and accompanying commentary.

No specific comments were received regarding this section, and it has not been changed.

Section 77.5: General Rule for Civil and Criminal Enforcement; Represented Parties

This section closely tracks the language of DR 7–104(A)(1) and Model Rule 4.2 and applies similar prohibitions to attorneys for the government. The section prohibits an attorney for the government from communicating with a represented party, as defined in section 77.3, about the subject matter of the representation without the consent of that individual's attorney. As with DR 7–104(A)(1) and Model Rule 4.2, the prohibition applies only if the attorney for the government knows that the represented party is, in fact, represented by counsel. Therefore, communications by an attorney for the government with a represented party will not violate this rule if the attorney for the government is unaware of the fact of representation.

This section also prohibits an attorney for the government from causing another individual to communicate with a represented party. Accordingly, this rule proscribes an attorney from directing a government investigator to do what the attorney himself or herself is prohibited from doing. Conversely, a government attorney will not be personally responsible for the actions of agents in communicating with represented persons unless, in doing so, the agents were acting as the attorney's "alter ego." *See United States* v. *Heinz*, 983 F.2d 609, 612–14 (5th Cir. 1993).

It also should be noted that this provision is violated (and thus, a basis for departmental discipline exists) when an inappropriate communication takes place, regardless of whether or not the communication results in eliciting an inculpatory statement or is otherwise prejudicial to the represented party.

No specific comments were received regarding this section, and it has not been changed.

Section 77.6: Exceptions; Represented Parties

This section describes the circumstances under which Department attorneys may communicate, or cause others to communicate, with a represented party whom the Department attorney knows is represented concerning the subject matter of the representation, without first obtaining the consent of the represented party's counsel.

Paragraph (a): Determination if representation exists.

This exception recognizes the fact that there is no reason to prohibit a limited inquiry about whether an individual is, in fact, represented by counsel regarding the relevant subject matter. Such an inquiry does not involve the kind of communication about which courts have expressed concern and has little potential for undermining the attorney-client relationship. It is also consistent with DR 7–104(A)(1) and Model Rule 4.2.

There may be uncertainty about the existence of representation with respect to whether it has been established, whether it may have been terminated, and whether a particular subject falls within the scope of the representation. The first issue typically arises before a judicial or other appearance, when the government attorney has some information suggesting that the person may be represented. It also may arise when an attorney purports to represent a group of persons, such as all the employees of a corporation. Uncertainty about the termination of the representation may arise when substantial time has passed since it was made known that the person was represented by counsel or when the attorney for the government has reason to believe that the representation has ceased. It is unlikely, however, that such uncertainty will arise when there are pending judicial proceedings, because in such circumstances the court in most jurisdictions must approve termination of representation.

In response to one comment, it is worth clarifying that that representation is presumed to cease to be current for purposes of these rules when the matter in question has reached a final judgment (i.e., once the direct appeals process, including any petition for certiorari, has run its full course), unless there is reason to believe that representation is continuing.

When inquiring about the status of representation, government attorneys and agents generally must refrain from stating whether it is necessary or desirable to be represented by counsel. After the right to counsel has attached, a statement or implication suggesting that counsel is not providing proper or effective representation could violate the Sixth Amendment right to effective assistance of counsel. *See United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

One organization commented that the right to inquire whether a party is represented by counsel is an invitation to a more substantive conversation with a represented party with respect to the matter underlying the representation, which would violate these rules. The Department does not agree that this paragraph creates a significant potential for abuse. This exception, which is clear in its terms, allows Department attorneys to do no more than determine whether a person is in fact represented by counsel. The Department expects that all Department attorneys will understand the limited parameters and purpose of this exception, and any attempt to use this paragraph to gather additional information about the subject matter of the representation would be a clear violation of these rules and would constitute sanctionable conduct.

Paragraph (b): Discovery or judicial or administrative process.

Any communication that is authorized by discovery procedures, such as a deposition of a party-opponent, or by judicial or administrative process, such as a grand jury, deposition, or trial subpoena or an administrative summons, obviously should not be prohibited by any rule. *See United States* v. *Schwimmer*, 882 F.2d 22, 28 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (prosecutor's questioning of represented person before the grand jury outside the presence of counsel is "authorized by law" under DR 7–104). Among other reasons for this exception, a person who is served with process has an opportunity to consult with counsel prior to his or her appearance at the proceeding, and may have counsel present if desired during the proceeding (except, of course, while testifying before a grand jury). More generally, communications authorized by discovery procedures already have in place appropriate mechanisms for protection of the attorney-client relationship. This provision ensures that this regulation does not prevent such communications from continuing to be allowed.

This exception does not purport to authorize any communications not otherwise available pursuant to approved discovery procedures or legal process. However, one individual commented that the text of paragraph (b), as proposed in March 1994, might be construed to authorize certain discovery procedures—such as the taking of a party's deposition testimony in the absence of the party's attorney and without the attorney's prior agreement—even where such practice was not in accordance with the rules of the applicable tribunal. To clarify that this paragraph's intent is to authorize only approved discovery procedures or legal process, this paragraph has been amended in the final rule to exempt only those communications made pursuant to discovery procedures or legal process "in accordance with the orders or rules of the court or other tribunal where the matter is pending."

Paragraph (c): Initiation of communication by represented party.

This paragraph sets out the circumstances under which it is proper for a government attorney to communicate with a represented party who has initiated contact, without the consent of that party's counsel.

A defendant may wish to communicate with the government outside the presence of counsel for many valid reasons. For instance, a defendant may wish to cooperate with the government but not want his or her attorney to know for fear that the attorney will disclose the defendant's intentions to others. This situation may arise, for example, when the defendant's attorney is being paid by another individual involved in a criminal enterprise, and the defendant questions whether he or she has the attorney's undivided loyalty. The same problem may arise when a single attorney represents multiple parties who are part of the same criminal enterprise.

When the desire of a defendant or arrestee to speak with the attorney for the government outside the presence of his or her counsel is "voluntary, knowing, and informed," there is no valid reason to prohibit the government from engaging in such communications. In fact, the Department believes that it would be a dereliction of its obligation vigorously to enforce federal law if it promulgated a rule that would prohibit such communications.

It is well established that an individual who is entitled to counsel under the Fifth Amendment or the Sixth Amendment may waive that right and choose to communicate with the government outside the presence of his or her attorney, "provided the waiver is made voluntarily, knowingly and intelligently." *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (internal quotations omitted); *Patterson* v. *Illinois*, 487 U.S. 285, 292 (1988); *Brewer* v. *Williams*, 430 U.S. 387, 404–06 (1977). In such a situation, the defendant should not be prohibited from engaging in communications that are allowed by the Constitution by a disciplinary rule that was intended to protect that individual in the first place. Neither common sense nor the principles underlying DR 7–104 and Rule 4.2 requires such a result.

This paragraph includes procedural protections designed to ensure that such waivers are in fact voluntary, knowing, and informed. After a represented individual has been arrested or charged in a criminal proceeding or is named as a defendant in a civil law enforcement proceeding, this paragraph requires that

several steps be taken before a government attorney may engage in a substantive discussion with the represented party. First, the government attorney must inform the individual of his or her right to speak through his or her attorney and to have that attorney present for any communications with the government attorney. Second, the represented party must manifest his or her desire to waive the right to counsel in a voluntary, knowing, and informed way. If at all possible, the attorney for the government should obtain a signed written waiver. Third, the attorney for the government must bring the matter before the appropriate district court judge, magistrate judge, or other tribunal of competent jurisdiction. Then, it is up to the court to determine that the waiver satisfies the provisions of this rule or that substitute counsel is in place (including counsel appointed at that time by the court) who has consented to the communication.

This paragraph does not require, however, that the waiver must always take place before the judge or magistrate judge. In exceptional circumstances, it may be impractical or unsafe to bring the defendant before a judge or magistrate judge to secure the waiver. In such circumstances, the government attorney may secure a waiver from the defendant outside the court, and, before any substantive discussion between the defendant and the government takes place, bring evidence of the waiver to the court so that the court can determine whether the waiver was made knowingly, intelligently, and voluntarily.

One United States Attorney's Office commented that paragraph (c), as proposed, appeared to require an attorney first to obtain an informed waiver and only after receiving such a waiver to bring the matter before the appropriate tribunal. The Department does not intend to require (and does not understand the text of paragraph (c) to require) an attorney for the government, when contacted by a represented party, necessarily to attempt to secure a waiver himself or herself before bringing the matter to the attention of the court. A government attorney who is contacted by a represented party may, consistent with this paragraph, choose to bring the matter directly to the attention of the court, assuming the represented party has manifested his or her desire to waive the right to counsel. The court then would determine whether the party wishes to waive the presence of counsel for the communication. In general, however, the usual practice is for the government attorney to obtain from the represented party a waiver before bringing the matter before the court.

As noted above, the initiation of *ex parte* contacts by represented parties frequently occurs in the context of the "fearful defendant" whose attorney has been chosen by a third party, often an individual above the defendant in the criminal hierarchy. Such a defendant may wish to cooperate with the government but may fear that his life or safety will be endangered if his attorney learns of the cooperation. Although the need for a mechanism by which a represented party can initiate contacts with the government is particularly acute in this context, paragraph (c) is not limited to this setting. Rather, the proper inquiry is whether the represented party's waiver of the right to counsel is voluntary, knowing, and informed, not whether the represented party has established some overriding justification for his or her decision.

One organization objected to the extension of this exception to anyone other than a "fearful defendant," suggesting that any other client will have no better reason to initiate communication than "a misguided belief that he can help himself by talking to the prosecutor." The Department believes that it would be overly paternalistic to refuse to permit any but fearful represented parties to initiate direct contact with the government. Given that a criminal defendant has a constitutional right to decline legal representation entirely, *see Faretta* v. *California*, 422 U.S. 806 (1975), government attorneys should not be ethically bound to refuse to listen to a criminal defendant who chooses to decline the presence of counsel for purposes of a particular communication with appropriate court approval.

Additionally, it would be neither workable nor proper to require a Department attorney or judicial officer to probe the client about his or her relationship with counsel in order to ascertain whether the client is genuinely fearful, or fearful enough, of his or her attorney's involvement to justify a conversation outside the presence of counsel. Such an inquiry would tend to enhance, not minimize, intrusion into the attorney-client relationship. A more reliable protection of the client's interest and of the attorney-client relationship is this paragraph's careful process of testing the client's desire (as opposed to the client's reasons) for waiving the presence of counsel. This is the same analysis the courts undertake in assessing waivers of the constitutional rights to counsel or against self-incrimination. The proper issue in such a setting, as here, is whether the waiver is knowing, intelligent, and voluntary.

Another commenter opined that paragraph (c), by allowing represented parties to waive the presence of counsel and speak directly to a government attorney, would authorize a violation of the represented party's constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny. Cases following *Miranda* provide that custodial interrogation must cease whenever the person in custody invokes his or her right to have counsel present. *See, e.g., Edwards* v. *Arizona*, 451 U.S. 477 (1981). However, the prohibition against further interrogation does not apply when the accused himself or herself initiates further communication, *see id.* at 484–86, which would need to be the case for this paragraph to apply.

Paragraph (d): Waivers at the time of arrest.

The previous paragraph (paragraph (c)) provides the general guidelines regarding how a represented party may waive protections otherwise provided under this regulation. This paragraph provides for a different rule dealing specifically with a waiver at the time of arrest.

This paragraph provides that a government attorney may communicate directly with a represented party "at the time of arrest of the represented party" without the consent of that party's counsel, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. The government attorney need not comply with any of the additional requirements of paragraph (c) in such a situation.

A substantial body of law has developed regarding waiver of constitutional rights in the immediate post-arrest setting. The Department believes that the constitutional protections established in that decisional law adequately protect represented individuals following arrest. Furthermore, the effectiveness of post-arrest interviews would be significantly curtailed if the procedural requirements of paragraph (c) applied. Accordingly, this paragraph is intended to preserve this investigative tool without adding any additional procedural requirements.

The Department received two comments regarding this paragraph: one relating to the timing of the waiver, and the other relating to the terms of the waiver.

A Department component commented that it would clarify the meaning of a communication "at the time of the arrest of the represented person" to add to the text that such communication must be

made "at the time of the arrest of the represented party before he or she is presented to a judicial officer with respect to that arrest . . . ." The Department has decided against adopting the proposed additional language, because it would unadvisedly extend this exception beyond its proper and intended narrow limits. This exception to the general rule against post-arrest communications is designed to preserve the ability of government attorneys to interview individuals immediately (i.e., within hours) following arrest as an effective and important law enforcement tool. *See, e.g.*, 18 U.S.C. 3501(c). It is not intended to allow government attorneys to attempt to initiate communications with an arrested person any time before the person is presented to a judicial officer, which can extend days beyond the "time of arrest." The Department believes that such an extension of this limited exception could put excessive pressure on clients and unduly intrude upon the attorney-client relationship.

A United States Attorney's Office commented that proposed paragraph (d), under which the represented party must be advised of and waive "his or her constitutional rights," could be construed to require the represented party to be explicitly told that he or she has a right to *his* or *her* attorney, and not just that he or she has a right to *an* attorney (as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). This paragraph is intended to apply whenever an arrested person is read his or her *Miranda* rights and waives those rights; it is not intended to require the represented party to be apprised of his right to counsel in any different or more specific terms than *Miranda* and its progeny require. To make clear that the usual *Miranda* warnings and waiver suffice for purposes of this section, paragraph 77.6(d) has been amended in the final rule to read as follows: "The communication is made at the time of the arrest of the represented party and he or she is advised of his or her rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them."

Paragraph (e): Investigation of additional, different, or ongoing crimes or civil violations.

The Sixth Amendment right to counsel is "offense-specific." *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2207 (1991). Thus, a defendant whose Sixth Amendment rights have attached as to one offense remains subject to questioning, whether direct or covert, regarding uncharged crimes. *Id.*; *Maine* v. *Moulton*, 474 U.S. 159, 180 n.16 (1985); *United States* v. *Mitcheltree*, 940 F.2d 1329, 1342 (10th Cir. 1991); *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1111–12 (11th Cir. 1990); *United States* v. *Chu*, 779 F.2d 356, 368 (7th Cir. 1985); *United States* v. *Grego*, 724 F.2d 701, 703 (8th Cir. 1984). The proposed rule employs an analogous approach, permitting *ex parte* contacts with a represented party if the contacts involve the investigation of offenses as to which the represented party has been neither arrested nor charged in a criminal or civil law enforcement proceeding. The Department believes this approach is wholly consistent with DR 7–104 and Model Rule 4.2 and the cases interpreting those rules.

Accordingly, this section provides that communications may be made in the course of investigations of additional, different, or ongoing criminal or unlawful activity, even though the individual is represented by counsel with respect to conduct for which he or she has already been arrested or charged. Such additional criminal or unlawful conduct is typically one of three varieties: (1) conduct that is separate from the original wrongful conduct; (2) crimes or unlawful conduct that are intended to impede the administration of justice or the trial of the charged crime, such as subornation of perjury, obstruction of justice, jury tampering, or murder, assault, or intimidation of witnesses; and (3) conduct that is a continuation of the charged crime, such as a conspiracy or a scheme to defraud that continues past the time of indictment. The new or additional criminal or wrongful activity may have occurred in the past or may be ongoing at the time of the investigation.

One organization objected to this section's coverage of criminal or wrongful activity that has already been completed at the time of the communication, as distinct from activity that is ongoing. However, the Department sees no basis in the policies underlying the Sixth Amendment and the Model Rules for basing the propriety of investigation into additional or different uncharged crimes on whether such activity is complete or ongoing.

One individual expressed concern that Department attorneys would exploit this exception by making gratuitous allusions to other offenses in the course of an otherwise illicit contact with a represented party. As noted above, prevailing case law interpreting the Sixth Amendment and the Model Rules permit an attorney to question a defendant as to uncharged offenses, and there is no evidence of systemic prosecutorial abuse of this type of interrogation. Accordingly, there is no reason to suspect that prosecutorial practice under these rules will be different.

Paragraph (f): Threat to safety or life.

The Supreme Court has recognized that, in certain limited situations, the need to guard against threats to public safety can justify noncompliance with otherwise applicable constitutional safeguards. *See Warden* v. *Hayden*, 387 U.S. 294, 298–99 (1967) (warrantless search permissible when delay would endanger lives of officers and citizens); *New York* v. *Quarles*, 467 U.S. 649, 657 (1984) ("the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the [*Miranda*] prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"). This paragraph recognizes an analogous exception to the general prohibition against communications with represented parties in the absence of their counsel. It is the Department's intention that this exception be invoked only in rare circumstances and only for the purpose of protecting human life or safety.

The exception has three requirements: (1) the attorney for the government must have a good faith belief that the safety or life of any person is threatened; (2) the purpose of the communication must be to obtain information to protect against the risk of injury or death; and (3) the attorney for the government must, in good faith, believe that the communication is reasonably necessary to protect against such risk. These requirements are imposed to ensure that the exception is invoked only to protect human life or safety, and not as a routine matter in violent crime prosecutions. For example, the fact that potentially dangerous firearms have not been recovered would not in and of itself be sufficient under ordinary circumstances to constitute a threat to safety under this exception. Furthermore, the communication must be for the purpose of protecting human life or safety, and may not be designed to elicit testimonial evidence. However, information thus obtained may be used for any purpose consistent with constitutional limitations.

No specific comments were received regarding this paragraph, and it has not been changed.

Section 77.7: Represented Persons; Investigations

As noted in the discussion of section 77.3, individuals and organizations who are neither defendants nor arrestees are not "parties" within the meaning of this rule, and the general prohibition on *ex*

parte contacts therefore does not apply. This section makes clear that attorneys for the government are authorized to communicate, directly or indirectly, with a represented person unless the contact is prohibited by some other provision of federal law. These communications are subject, however, to the restrictions set forth in sections 77.8 and 77.9 regarding certain categories of negotiations and respect for attorney-client relationships.

Two individuals commented that this section, even as limited by sections 77.8 and 77.9, allows a broader range of contact with persons under investigation than is necessary to meet the Department's legitimate investigative needs. These individuals agreed that the government must be free to conduct undercover operations and investigations, even when field investigators coming into contact with potential criminal or civil respondents are directed by government attorneys. They argued, however, that overt communications with persons during the investigative stage are not similarly justified.

The Department agrees that overt communications between a government attorney and a represented person during the investigative stage raise different considerations from covert communications and should be subject to greater restrictions. For this reason, the Department plans to make revisions to the United States Attorneys' Manual providing that government attorneys should engage in overt communications only after carefully considering whether the communication is more appropriately handled by others, and should generally not communicate overtly, or cause another to communicate overtly, with a target of a federal criminal or civil investigation, who is known by the Department attorney to be represented by counsel, concerning the subject matter of the representation. Nevertheless, the Department believes that overt contacts by federal attorneys and agents with witnesses and subjects of investigations are often necessary for effective law enforcement and hence should be permitted.

Section 77.8: Represented Persons and Represented Parties; Plea Negotiations and Other Legal Agreements

This section prohibits government attorneys from initiating or engaging in negotiations of certain specified legal agreements with any individual whom the government attorney knows is represented by counsel, without the counsel's consent. Even when the regulation otherwise permits substantive discussions with a represented party or represented person, it ordinarily would be improper for a government attorney to initiate or negotiate a plea agreement, settlement, immunity agreement or any other disposition of a claim or charge without the consent of the individual's counsel. The one exception to this prohibition occurs when the communication is initiated by the represented person or represented party and the procedural safeguards provided for in paragraph 77.6(c) are satisfied.

The Department believes that this section is important for the preservation of the attorney-client relationship. One of the primary purposes of DR 7–104 and Model Rule 4.2 is to protect an individual represented by counsel from overreaching by an attorney for an adversary. The Department believes the risk and the consequences of such overreaching are at their greatest during negotiations over plea agreements, settlements, and other key legal agreements. The training, experience, and knowledge of the law possessed by an attorney is particularly valuable in such situations.

The prohibition contained in this section includes all negotiations of the terms of a particular plea agreement, settlement agreement, or other agreement covered by the section. However, this section does not prohibit an attorney for the government from responding to questions regarding the nature of such agreements, potential charges, potential penalties, or other subjects related to such agreements during an otherwise permissible discussion. Nevertheless, an attorney for the government should take care in such situations not to go beyond providing information on these and similar subjects and should generally refer the represented person to his or her counsel for further discussion of these issues. The government attorney should also make it clear that he or she will not negotiate any agreement with respect to the disposition of criminal charges, civil claims or potential charges, or immunity agreements without the consent of counsel.

No specific comments were received regarding this section, and it has not been changed.

Section 77.9: Represented Persons and Represented Parties; Respect for Attorney-Client Relationships

When an attorney for the government communicates with a represented party pursuant to one or more of the exceptions listed in section 77.6, or with a represented person pursuant to section 77.7, the communication is nevertheless subject to the restrictions of this section.

Paragraph (a): Deference to Attorney-Client Relationship

Federal courts have recognized that it is improper for an attorney for the government to disparage counsel for the represented party or otherwise to seek to disrupt the relationship between that party and his attorney. *See, e.g., United States* v. *Morrison*, 449 U.S. 361, 362, 367 (1981); *United States* v. *Weiss*, 599 F.2d 730, 740 (5th Cir. 1979); *id.* at 740–41 (Godbold, J., specially concurring). This paragraph codifies those basic principles by prohibiting communications that: (1) attempt to elicit information regarding lawful defense strategies; (2) disparage the represented party's counsel; or (3) otherwise improperly seek to disrupt the attorney-client relationship. These prohibitions apply in every phase of criminal and civil enforcement investigations and proceedings.

However, the paragraph also accommodates an important exception to this prohibition. Courts have held that a government attorney may not permit legal proceedings to go forward if he or she is aware of a conflict of interest between a represented party and his or her lawyer. *See United States* v. *Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986). Under this circumstance, the attorney for the government ordinarily should move to disqualify the lawyer involved, if legal proceedings have already commenced. If it is not feasible to move for disqualification or otherwise challenge the representation, this paragraph allows an attorney for the government to communicate with the represented individual for the limited purpose of apprising the represented individual of the perceived conflict. However, any substantive discussion of the subject matter of the representation is permissible only insofar as it is authorized by some other provision of this rule.

In order to ensure that this provision is used only in rare circumstances, the rule requires prior authorization for such communications from the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney. The authorization should be in writing if at all possible. Furthermore, before providing approval, the authorizing officer must find: (1) a substantial likelihood of a conflict; and (2) that it is not feasible to obtain a court order on the matter.

One organization commented that judicial approval, or at least approval by a designated Assistant Attorney General

(rather than by a United States Attorney), should be required before an attorney for the government may apprise a represented party or person of any perceived conflict of interest. Another organization and an individual commented that attorneys for the government should never be allowed to inform a represented individual of a perceived conflict of interest, and, instead, should be required to move to disqualify counsel and leave it to the court to adjudicate any conflicts of interest. The Department believes that there will be circumstances in which it will not be feasible to obtain a judicial order challenging the representation (especially prior to the filing of charges), or when the exigencies of the situation may make it impracticable to obtain prior authorization of a judicial officer or an Assistant Attorney General. In such circumstances, and when a high-level Department official, such as a United States Attorney, determines that there is a significant likelihood of a conflict of interest between a represented individual and his or her attorney, it is better that the represented person or party be apprised of the potential conflict of interest than be left uninformed. Accordingly, the Department has decided to leave this paragraph unchanged in the final rule.

Paragraph (b): Attorney-Client Meetings

The attendance of an undercover agent or a cooperating witness at lawful meetings of an individual and his or her attorneys is ordinarily an improper intrusion into the attorney-client relationship. The courts have recognized, however, that such attendance occasionally will be required when the operative is invited to participate and his or her refusal to do so would effectively reveal his or her connection to the government. *See, e.g., Weatherford* v. *Bursey*, 429 U.S. 545, 557 (1977); *United States* v. *Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States* v. *Mastroianni*, 749 F.2d 900, 906 (1st Cir. 1984). As the First Circuit has noted, a contrary rule "would provide the defense with a quick and easy alarm system to detect the presence of any informants, simply by inviting all known associates of defendants to a supposed defense strategy meeting." *Mastroianni*, 749 F.2d at 906.

Attendance at such meetings, however, intrudes into the attorney-client relationship and impairs the right of the defendant to a fair trial. Accordingly, this section provides that undercover agents or cooperating witnesses may participate in such meetings, but only when requested to do so by the defense and when reasonably necessary to protect their safety or life or the confidentiality of an undercover operation. *See Weatherford*, 429 U.S. at 557.

However, even when an undercover operative's attendance at such a lawful meeting is authorized to protect his or her cover and safety, any information acquired regarding lawful defense strategy or trial preparation may not be communicated to government attorneys or otherwise used to the substantial detriment of the represented party. *See Weatherford*, 429 U.S. at 558; *Ginsberg*, 758 F.2d at 833; *Mastroianni*, 749 F.2d at 906. As a safeguard, this rule provides that such information should not be communicated to the attorneys for the government or law enforcement agents who are participating in the trial of the pending criminal charges.

When there is reasonable cause to believe that the purpose of the meeting is not the lawful defense of the underlying charges, but the commission of a new or additional crime (such as bribery of a witness or subordination of perjury), attendance by informants or undercover agents at attorney-client meetings is permissible pursuant to paragraph 77.6(e). The belief, however, must be based on reasonable cause, not mere suspicion or conjecture. *See Mastroianni*, 749 F.2d at 906. Furthermore, the prohibition against communication of lawful defense strategy to the prosecution should be observed if, in fact, such strategy is imparted to the informant or agent.

Government attorneys should give serious consideration to the extreme sensitivity of permitting agent and informant attendance at defense meetings. Agents and informants should be instructed to avoid participating in such meetings, and to minimize their participation when attendance is required, if it is possible to do so without arousing suspicion. Agents or witnesses who attend defense meetings should also be instructed to make every attempt to avoid taking any role in the shaping of defense strategy or trial preparations. Additionally, agents and informants should be instructed to avoid imparting lawful defense strategy or trial preparation information to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges.

Finally, this restriction applies only to law enforcement officials and cooperating witnesses who are acting as "agents for the government" at the time of the communication. If one of several co-defendants who attended an attorney-client defense strategy meeting later testifies for the government at trial, no violation will have occurred as long as the co-defendant was not a government agent at the time of the meeting. *United States* v. *Brugman*, 655 F.2d 540, 545–46 (4th Cir. 1981).

A Department component commented that an undercover agent's attendance at a meeting at which legal strategy is not discussed does not intrude on the attorney-client relationship; therefore, the component proposed limiting this paragraph's prohibition against government agents participating in an attorney-client meeting or communication to situations where there is a "reasonable basis" to believe that the meeting or communication will concern legal advice or strategy. The Department believes that it is unwise and unworkable to encourage government attorneys and undercover agents to guess whether legal issues will come up in an attorney-client meeting or communication. It would also be disruptive of the attorney-client relationship for government attorneys and undercover agents to gather the information that might make such a determination even remotely reliable. Therefore, this paragraph has not been changed.

Section 77.10: Organizations and Employees

This section addresses the difficult issue of when a communication with an employee or member of a represented organization should be considered a communication with the organization itself. Important interests depend on this determination. On the one hand, organizations should not be shielded from effective criminal or civil law enforcement prosecution simply by retaining counsel. It is not uncommon for federal prosecutors to encounter attorneys who assert that they represent every individual in a large corporation or organization. If such attorneys were able to prevent government investigators from gaining informal access to any employee of the organization by withholding consent, information relevant to claims against the organization might never come to light because such information is often in the exclusive possession of the organization and its employees. *See, e.g., Suggs* v. *Capital Cities/ABC Inc.*, 54 Empl. Prac. Dec. (CCH) ¶ 40,195 at 63,910 (S.D.N.Y. Apr. 24, 1990). On the other hand, organizations are entitled to the effective assistance of counsel, and the relationship between an organization and its counsel deserves respect.

The Department believes that this section, and particularly the definition of "controlling individual" in paragraph

(a) of this section, strikes an appropriate balance, one that ensures government attorneys the ability to enforce federal law, while preserving the opportunity for corporations and other organizations to secure effective assistance of counsel.

Paragraph (a): Communications with current employees; organizational representation.

This paragraph states that a communication with a current employee of an organizational party or person should be treated as a communication with the organization for purposes of this part only if the employee is a "controlling individual." If a communication with a current employee is properly characterized under this regulation as a communication with a represented organization (that is, if the communication is with a controlling individual), then that communication is subject generally to the same limitations that would apply if the communication were with a represented person or represented party.

In accord with the basic structure of this regulation, which distinguishes between represented parties and represented persons, this paragraph effectively provides that when an organization is a represented party, an attorney for the government shall not communicate, or cause another to communicate, with any controlling individual of the organization without the consent of the organization's attorney, subject to the exceptions enumerated in § 77.6. In contrast, when an organization qualifies as a represented person, an attorney for the government may communicate, or cause another to communicate, with any controlling individual, provided the communication does not violate the provisions of §§ 77.8 or 77.9.

The definition of "controlling individual" is intended to encompass those individuals who typically are part of the organization's control group. A controlling individual under this definition must: (1) be a current employee or member of the organization; (2) hold a high-level position with the organization; (3) participate "as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter;" and (4) be known by the government to be engaged in such activities. This definition attempts to identify those limited number of individuals affiliated with the organization who actually are involved in determining the organization's position with regard to the legal proceeding or investigation.

One individual and one organization questioned limiting the class of employees who should be considered "controlling individuals" for purposes of this subsection to those who participate in framing the organization's legal position in the matter. They argued that the proposed "controlling individual" test authorizes contacts with employees who, while not directing the organization's counsel, nonetheless have extensive authority to act on behalf of the organization. The underlying concern of these comments appears to be that this paragraph, as proposed, authorizes contacts with many employees who are likely to possess information relevant to claims asserted against the corporation and who have the capacity to make statements that a court will deem admissible at trial as evidentiary admissions against the corporation. This is certainly true. However, the Department believes that its anti-contact rule should not be designed with the goal of protecting corporations from disclosure of prejudicial facts. *See, e.g., Action Air Freight* v. *Pilot Air Freight,* 769 F. Supp. 899, 903 (E.D. Pa. 1991) (anti-contact rule "should not necessarily chill the flow of harmful information"); *Hanntz* v. *Shiley, Inc.,* 766 F. Supp. 258, 267 (D.N.J. 1991) ("the policies of Rule 4.2 do not justify a wholesale restriction on discovery of factual information, damaging or not").

Anti-contact rules such as DR 7–104 and Model Rule 4.2 are intended to protect the attorney-client relationship from unnecessary interference and to protect represented parties from overreaching by opposing counsel. Damage to the attorney-client relationship inheres particularly in communications with high-level corporate employees who have contact with the corporation's attorneys in the course of making ultimate decisions regarding choice of counsel, implementing counsel's advice, and determining settlement and other litigation strategies. Therefore, communications with those high-level individuals affiliated with or employed by an organization who are responsible for employing and directing the organization's counsel and for determining legal positions taken by the organization are the type of communications prohibited by DR 7–104.

Accordingly, this paragraph defines "controlling individual" consistently with the principles underlying the disciplinary rules on *ex parte* contacts. The Department also believes that the alternative approaches urged by commenters would impose unacceptable constraints on federal law enforcement. Therefore, this paragraph has not been changed.

Paragraph (b): Communications with former employees; organizational representation.

This paragraph authorizes communications with former employees of represented organizations. Because former employees do not direct the affairs of the organization and therefore cannot be considered members of the "control group" or any other controlling entity of an organization, communications with them are not considered communications with the organization for purposes of the rule. This reasoning is consistent with the conclusion of the majority of federal courts that have held that DR 7–104(A)(1) does not bar communications with former employees of a represented corporate party. *See, e.g., Hanntz* v. *Shiley, Inc.,* 766 F. Supp. 258, 267 & n.8 (D.N.J. 1991); *Action Air Freight, Inc.* v. *Pilot Air Freight Corp.,* 769 F. Supp. 899, 904 (E.D. Pa. 1991); *Shearson Lehman Bros., Inc.* v. *Wasatch Bank,* 139 F.R.D. 412, 417–18 (D. Utah 1991); *Sherrod* v. *Furniture Center,* 769 F. Supp. 1021, 1022 (W.D. Tenn. 1991); *Dubois* v. *Gradco Systems, Inc.,* 136 F.R.D. 341, 345 n.4 (D. Conn. 1991); *Polycast Technology Corp.* v. *Uniroyal, Inc.,* 129 F.R.D. 621, 628 (S.D.N.Y. 1990). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991) ("Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer."). *But see PPG Industries, Inc.* v. *BASF Corp.,* 134 F.R.D. 118, 121 (W.D. Pa. 1990); *Public Serv. Elec. & Gas* v. *Associated Elec. & Gas,* 745 F. Supp. 1037, 1042 (D.N.J. 1990).

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (c): Communications With Former or Current Employees; Individual Representation

This paragraph provides that if a former or current employee or a member of an organization retains his or her own counsel, the government shall provide the same protection to him or her that would be provided under this part to any other represented person or represented party. Communications with that individual are subject to the limitations set forth in this part. Although this paragraph provides the

general rule for such communications, paragraph (d) addresses the specific situation in which a controlling individual of a represented organization retains separate counsel.

This paragraph also provides that the government will not accept, for purposes of this rule, blanket claims by counsel that he or she represents all or a large number of employees of the organization. It is important to note that this provision is only relevant when the attorney for the government would be prohibited by some other provision of this regulation from contacting an individual falling under the broad claims of representation under question. For example, an attorney for the government may contact a low-level employee of a corporation, without consent of that employee's counsel or the corporation's counsel, regarding a matter for which the corporation has already been indicted as part of an undercover or overt factual investigation, if that individual has not been arrested or named as a defendant in a related criminal or civil law enforcement proceeding. Therefore, the fact that an attorney has stated that he or she represents that individual will have no bearing on whether the communication is proper.

However, if a particular communication with an individual employee included in such a claim of representation would be improper under these rules if he or she were in fact represented by counsel (for example, communications to negotiate a plea agreement), then this paragraph provides that a government attorney must first inquire whether the employee is in fact represented before undertaking substantive communications with the employee. As part of this inquiry, the government attorney is not required to disclose to the employee the fact that counsel has asserted that he or she represents the employee. If the employee indicates that he or she is not represented by counsel, it is proper for the government attorney to treat the employee as unrepresented. If the employee indicates that he or she is represented by counsel with regard to the relevant subject matter, the attorney for the government shall treat that employee as a represented person or represented party, and any further communications with that individual shall be governed by this regulation.

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (d): Communications with separately represented controlling individuals.

This paragraph applies only when a controlling individual of a represented organizational party has retained separate counsel. In such circumstances, a government attorney may not communicate with the controlling individual without the consent of that individual's separate counsel unless the communication satisfies one of the exceptions contained in §§ 77.6 or 77.9 of this part. The paragraph also allows such communications if the individual does not qualify as a represented party, initiates the communication, and waives the presence of counsel. Thus, the same rules apply to contacts with controlling individuals of represented organizational parties who retain separate counsel as apply to controlling individuals of represented organizational parties who are not separately represented.

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (e): Initiation of communication by unrepresented controlling individuals.

This paragraph addresses a relatively narrow circumstance: when a controlling individual who is not individually represented by counsel initiates a communication with the government outside the presence of counsel for the organization. An attorney for the government may participate in such communications if: (1) the controlling individual indicates that he or she is speaking exclusively in his or her personal capacity and not as a representative of the organizational party; and (2) he or she indicates that the waiver of counsel is voluntary, knowing, and informed and, if willing, signs a statement to that effect. The fact that the controlling individual indicates that he or she is speaking in his or her personal capacity does not mean, however, that incriminating testimony received from the controlling individual cannot be used against the represented organization.

If the controlling individual is also a named defendant in a civil enforcement proceeding or has been arrested or charged in a criminal action, the requirements set forth in paragraph 77.6(c) must be satisfied before any substantive communications are made.

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (f): Multiple representation.

This paragraph makes clear that these rules should not be construed as altering existing legal and ethical rules regarding the propriety of multiple representation.

No specific comments were received regarding this paragraph, and it has not been changed.

Section 77.11: Enforcement of This Part

Paragraph (a): Exclusive enforcement by Attorney General.

In order to ensure consistency and uniformity in the interpretation of the final rule, this paragraph provides that the Attorney General shall have exclusive authority to enforce these regulations. Thus, state courts, state disciplinary boards, and federal courts may not impose sanctions on or otherwise regulate a Department attorney engaged in federal law enforcement activities for violations of an anti-contact rule or subject a Department attorney to regulation under state or local federal court rules governing communications with represented parties, except as provided in § 77.12. This paragraph further provides the framework for investigating allegations that a Department attorney has violated this regulation. It provides that the Department's Office of Professional Responsibility ("OPR") shall have sole original jurisdiction to investigate such allegations and that violations will be treated as matters of attorney discipline. *See* 28 CFR § 0.39 (establishing and defining duties of OPR). It also makes clear that the Attorney General's determination as to whether a violation has occurred shall be final and conclusive except to the extent that the Department attorney enjoys a right of review provided by other laws.

One individual and one organization objected to placing investigative responsibility in OPR, suggesting that OPR had, in the past, been reluctant to share the results of its investigations. The Department recently adopted a policy under which the results of OPR investigations are disclosed to the public if, *inter alia*, there is a finding of intentional and knowing professional misconduct by a Department attorney in the course of an investigation or litigation and the public interest in disclosure outweighs the privacy interest of the attorney and any law enforcement interest. Therefore, there will be meaningful disclosure of findings of violations of these rules.

Moreover, allegations of professional misconduct by Department attorneys concerning violations of these rules may be reported directly to OPR by any person. Complaints filed by members of the public will be fully and thoroughly reviewed by OPR.

Therefore, this paragraph has not been changed.

Paragraph (b): No private remedies.

This paragraph provides that the rule is not intended to and does not create any substantive rights for any person other than an attorney for the government. In particular, a violation of the regulation will not provide a basis for the dismissal of civil or criminal charges or for the suppression of evidence that is otherwise admissible. This provision accords with existing law. Traditionally, matters relating to communications with represented persons have been treated as matters of attorney discipline without granting substantive rights to defendants or any other persons. *See, e.g.*, ABA Code of Professional Responsibility, Preliminary Statement; ABA Model Rules of Professional Conduct, Scope. Of course, when the communication with a represented person or represented party violates the Constitution, the federal courts retain the power to fashion appropriate remedies.

No specific comments were received regarding this paragraph, and it has not been changed.

Section 77.12: Relationship to State and Local Regulation

Both DR 7–104 and Model Rule 4.2 provide that communications that are "authorized by law" are not prohibited by the rule. Virtually all the states have adopted some version of DR 7–104 or Model Rule 4.2 that includes an "authorized by law" exception. As discussed in the "General Comments" section, these rules, as substantive regulations duly promulgated by the Attorney General pursuant to statutory authority, have the force and effect of law. Accordingly, communications with represented persons that are undertaken pursuant to these rules should be considered "authorized by law" within the meaning of rules adopted by the various states. Such communications should therefore be consistent with state rules wherever state bar authorities have adopted a rule containing the "authorized by law" exception. Thus, no conflict will arise between state and federal law in those jurisdictions with regard to communications with represented persons. Similarly, no conflict should arise between this regulation and the federal district court rules that have adopted an anti-contact rule containing the "authorized by law" exception. This regulation therefore need not give rise to any tension with any provision of state or federal law.

The Department nonetheless recognizes the likelihood that government attorneys' conduct with respect to contact with represented persons may continue to be viewed by some as inconsistent with state or local district court rules. To effectuate fully the provisions of this regulation, it therefore is important that the regulation include a plain statement by the Department of its intention to preempt and supersede regulation by state courts, state disciplinary authorities, or federal district courts of *ex parte* communications by government attorneys in civil or criminal law enforcement investigations or proceedings. *See Hillsborough County, Fla.* v. *Automated Med. Labs*, 471 U.S. 707, 718 (1985) ("because agencies normally express problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretative statements and responses to comments, we can expect that they will make their intention clear if they intend for their regulations to be exclusive").

There is no indication from any of the comments received of any confusion regarding the breadth of the Department's intention to displace state and federal law; on the contrary, the comments in this area generally both fully grasped and took issue with the Department's stated intention to occupy the field. Given the integral importance of the exclusive enforcement authority to the overall regulatory scheme, however, some revisions have been made to this section to leave no doubt that it is the express intention of these rules to completely preempt and supersede the operation of state and local laws or rules as they relate to contacts by government attorneys in civil or criminal law enforcement investigations or proceedings. Such occupation of the field is necessary to ensure that government attorneys' conduct respecting contacts with represented persons be subject to uniform regulation and predictable standards, as against potential variations in individual state and local rules and in interpretations of those rules.

Accordingly, this regulation completely preempts state or federal court regulation of *ex parte* contacts in law enforcement matters by government attorneys and those acting at their direction, with one important exception. If the Attorney General finds that a Department attorney has committed a "willful violation" of any of these rules, preemption will not apply, and that attorney will be subject to disciplinary proceedings both by the Department and by the appropriate state disciplinary authorities.

Several commenters argued that it is inappropriate to preclude an otherwise appropriate state or federal court disciplinary proceeding when the Department's own rules have been violated. The Department respectfully disagrees. A primary purpose for this regulation is to remove the substantial burden on federal law enforcement caused by uncertainty as to what constitutes appropriate conduct by Department attorneys. This uncertainty would not be removed were it left to the various state and federal district courts to interpret these rules and determine on their own whether they had been violated in any particular case. For this reason, the Department believes that it is necessary that it retain exclusive authority to determine whether one of its lawyers has breached these rules, with the important proviso that, when there is a finding of a willful violation, a state disciplinary authority may also impose sanctions.

One United States Attorney's Office commented that the meaning of a "willful violation" had not been clearly explained in the previous commentary. In response to this comment, the Department here clarifies that a "willful violation" means an intentional and deliberate violation of these rules, as determined by the Attorney General.

United States Attorneys' Manual

In addition to the promulgation of the rules discussed above, the Department intends to add several new provisions to the United States Attorneys' Manual to provide additional guidance to Department attorneys when they deal with represented individuals during criminal or civil law enforcement investigations and proceedings.

The Department has deliberately chosen to include certain baseline restrictions in the regulation and impose broader restrictions through provisions in the Manual. In the process of determining what the appropriate Departmental policy should be, it became clear that any regulation would have to apply to a variety of circumstances, including: white collar and organized crime investigations, complex conspiracy investigations, individuals whose counsel are paid by a third party, and individuals fearful of their counsel for various reasons. Accordingly, the Department determined that the regulation should be broad in scope and should provide unambiguous guidance that would not adversely affect federal law enforcement efforts. Thus, part 77 distinguishes between the investigative period (before indictment, arrest, or the filing of a complaint) and the prosecutive period (after arrest or the commencement of formal proceedings). It also distinguishes between communications that are part of a factual investigation and communications that occur during

negotiations of plea agreements, settlements, and similar legal arrangements.

The planned Manual provisions will require that government attorneys consider the principles underlying the basic prohibitions in a much wider variety of circumstances. The Department expects all Department attorneys involved in criminal or civil law enforcement proceedings to adhere to all applicable provisions in the Manual. Failure to do so will result in appropriate departmental action.

The planned changes to the Manual were included in the earlier publications simply for reference and were not subject to the requirements of notice and comment that applied to the provisions in the proposed regulation itself. The Department nonetheless received several comments regarding the draft Manual provisions. The Department has carefully considered those comments and has decided that it is appropriate (though not required) to respond to them briefly in this commentary. However, none of the comments received has prompted the Department to conclude that it should alter the planned Manual provisions. The Department anticipates that the Manual provisions will be substantially similar to the draft published in March 1994. The Department envisions publishing the Manual provisions soon and integrating them in the Manual with the final rules adopted here.

Comments were directed mainly to a draft Manual provision that would prohibit a government attorney from communicating overtly about the subject matter of a representation with a person who the government attorney knows is a "target" of a federal criminal or civil enforcement investigation and who the government attorney knows is represented by counsel, without the consent of the target's attorney. (The provisions, as published in March 1994, would also provide several exceptions to this general prohibition against overt contacts with targets, including the following: when the communication is initiated by the target; when the communication occurs at the time of arrest and the represented person has waived his or her *Miranda* rights; when the government attorney believes the contact is necessary to protect against a risk to human life or safety; or when a senior Department official determines that exigent circumstances exist, making the communication necessary for effective law enforcement).

Two United States Attorney's Offices urged reconsideration of the guideline generally prohibiting Department attorneys from directly communicating with known "targets." These commenters expressed a number of concerns about the "target" provision—most significantly, that the determination of "target" status would be subjective and variable and that the proposed limitation on overt contacts with represented targets would interfere with the investigative process.

The Department does not agree that the term "target" would make application of this planned restriction particularly troublesome. While determinations of "target" status surely are not scientifically precise, neither are a range of other similar determinations (e.g., "probable cause" determinations) that prosecutors are expected routinely to make. In its enforcement of the planned provision, the Department intends to give substantial deference to a federal attorney's good faith judgment regarding the likelihood that a particular person will ultimately become a defendant. Even if the attorney for the government believes that an individual probably will be named as a defendant, that individual would not be considered a target until the government has actually obtained substantial evidence linking that individual to the commission of a crime or to unlawful conduct. The government attorney's uncorroborated belief that an individual will ultimately be named as a defendant would not be enough. Thus, an individual will not be considered a target under the Manual guidelines until both the attorney for the government believes that he or she will probably be named as a defendant *and* substantial evidence has been obtained.

The Department also does not believe that the contemplated restriction on overt communications with represented targets would significantly impede legitimate law enforcement activities. It is true that in certain types of cases and under certain exceptional circumstances, target interviews may be necessary for effective investigation; for that reason, the planned Manual provisions would allow that in such situations target interviews may be approved by a high-ranking Department official. However, as a general matter and in more routine circumstances, overt communications with targets have a more limited value to the investigative process, which is outweighed by the risk that they will interfere with the attorney-client relationship and place undue pressure on the target. Because an individual who is a target of a federal investigation is typically in a clearly adversarial relationship with the federal government, the Department believes that the principles underlying DR 7–104 and Rule 4.2 are implicated and that the planned restrictions on overt communications with represented targets are appropriate.

Certifications

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule was not reviewed by the Office of Management and Budget pursuant to Executive Order No. 12866.

List of Subjects in 28 CFR Part 77

Government employees, Investigations, Law enforcement, Lawyers.

Accordingly, chapter I of title 28 of the Code of Federal Regulations is amended by adding a new part 77 to read as follows:

PART 77—COMMUNICATIONS WITH REPRESENTED PERSONS

Sec.

77.1 Purpose and authority.
77.2 Definitions.
77.3 Represented party; represented person.
77.4 Constitutional and other limitations.
77.5 General rule for civil and criminal enforcement; represented parties.
77.6 Exceptions; represented parties.
77.7 Represented persons; investigations.
77.8 Represented persons and represented parties; plea negotiations and other specified legal agreements.
77.9 Represented persons and represented parties; respect for attorney-client relationships.
77.10 Organizations and employees.
77.11 Enforcement of this part.
77.12 Relationship to state and local regulation.

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515(a), 516, 519, 533, 547.

§ 77.1 Purpose and authority.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, while eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state

and federal courts and by bar association organizations and committees. (Copies of the Bar rules are on file in most law libraries, and through on-line legal research services).

(b) This part is issued under the authority of the Attorney General to prescribe regulations for the government of the Department of Justice, the conduct of its employees, and the performance of its business, pursuant to 5 U.S.C. 301; to direct officers of the Department of Justice to secure evidence and conduct litigation, pursuant to 28 U.S.C. 516; to direct officers of the Department to conduct grand jury proceedings and other civil and criminal legal proceedings, pursuant to 28 U.S.C. 515(a); to supervise litigation and to direct Department officers in the discharge of their duties, pursuant to 28 U.S.C. 519; and otherwise to direct Department officers to detect and prosecute crimes, to prosecute offenses against the United States, to prosecute civil actions, suits, and proceedings in which the United States is concerned, and to perform such other functions in an appropriate and ethical manner as may be provided by law, pursuant to 28 U.S.C. 509, 510, 533, and 547.

§ 77.2 Definitions.

As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) *Attorney for the government* means the Attorney General; the Deputy Attorney General; the Associate Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, or Tax Division; the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; or any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The term *attorney for the government* does not include any attorney employed by the Department of Justice as an investigator or other law enforcement agent who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

(b) *Civil law enforcement investigation* means an investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

(c) (1) *Civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the police or regulatory powers of the United States to enforce federal laws, including, but not limited to, civil actions or proceedings brought to enforce the laws relating to:

(i) Antitrust;

(ii) Banking and financial institution regulation;

(iii) Bribery, kickbacks, and corruption;

(iv) Civil rights;

(v) Consumer protection;

(vi) Environment and natural resource protection;

(vii) False claims against the United States;

(viii) Food, drugs, and cosmetics regulation;

(ix) Forfeiture of property;

(x) Fraud;

(xi) Internal revenue;

(xii) Occupational safety and health;

(xiii) Racketeering; or

(xiv) Money-laundering.

(2) The term *civil law enforcement proceeding* shall not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand. An action or proceeding shall be considered "brought by the United States" only if it involves a claim asserted by the Department of Justice on behalf of the United States, whether the claim is asserted by complaint, counterclaim, cross-claim, or otherwise.

(d) *Cooperating witness or individual* means any person, other than a law enforcement agent, who is acting to assist the government in an undercover or confidential capacity.

(e) *Employee* means any employee, officer, director, partner, member, or trustee.

(f) *Organization* means any corporation, partnership, association, joint-stock company, union, trust, pension fund, unincorporated association, state or local government or political subdivision thereof, or non-profit organization.

(g) *Person* means any individual or organization.

(h) *Undercover investigation* means any investigation undertaken in good faith to fulfill law enforcement objectives, in which a person communicates with a federal, state or local law enforcement agent or a cooperating witness or individual whose identity as an official of the government or a person acting at the behest thereof is concealed or is intended to be concealed.

§ 77.3 Represented party; represented person.

(a) A person shall be considered a "represented party" within the meaning of this part only if all three of the following circumstances exist:

(1) The person has retained counsel or accepted counsel by appointment or otherwise;

(2) The representation is ongoing and concerns the subject matter in question;

(3) The person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.

(b) A person shall be considered a "represented person" within the meaning of this part if circumstances set forth in paragraphs (a) (1) and (2) of this section exist, but the circumstance set forth in paragraph (a)(3) does not exist.

§ 77.4 Constitutional and other limitations.

Notwithstanding any other provision of this part, any communication that is prohibited by the Sixth Amendment right to counsel, by any other provision of the United States Constitution, by any federal statute, by the Federal Rules of Criminal Procedure (18 U.S.C. App.) or by the Federal Rules of Civil Procedure (28 U.S.C. App.) shall be likewise prohibited under this part.

§ 77.5 General rule for civil and criminal enforcement; represented parties.

Except as provided in this part or as otherwise authorized by law, an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such party.

§ 77.6 Exceptions; represented parties.

An attorney for the government may communicate, or cause another to communicate, with a represented party without the consent of the lawyer representing such party concerning the subject matter of the representation if

one or more of the following circumstances exist:

(a) *Determination if representation exists.* The communication is to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

(b) *Discovery or judicial or administrative process.* The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including, but not limited to testimony before a grand jury, the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena or civil investigative demand.

(c) *Initiation of communication by represented party.* The represented party initiates the communication directly with the attorney for the government or through an intermediary and:

(1) Prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the client's right to speak through his or her attorney and/or to have the client's attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed and, if willing to do so, signs a written statement to this effect; and

(2) A federal district judge, magistrate judge or other court of competent jurisdiction has concluded that the represented party has:

(i) Waived the presence of counsel and that such waiver is voluntary, knowing, and informed; or

(ii) Obtained substitute counsel or has received substitute counsel by court appointment, and substitute counsel has consented to the communication.

(d) *Waivers at the time of arrest.* The communication is made at the time of the arrest of the represented party and he or she is advised of his or her rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) *Investigation of additional, different or ongoing crimes or civil violations.* The communication is made in the course of an investigation, whether undercover or overt, of additional, different or ongoing criminal activity or other unlawful conduct. Such additional, different or ongoing criminal activity or other unlawful conduct may include, but is not limited to, the following:

(1) Additional, different or ongoing criminal activity or other unlawful conduct that is separate from or committed after the criminal activity for which the represented party has been arrested or charged or for which the represented party is a defendant in a civil law enforcement proceeding; or

(2) Criminal activity that is intended to impede or evade the administration of justice including, but not limited to, the administration of justice in the proceeding in which the represented party is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution.

(f) *Threat to safety or life.* The attorney for the government in good faith believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of injury or death; and the attorney for the government in good faith believes that the communication is necessary to protect against such risk.

§ 77.7 Represented persons; investigations.

Except as otherwise provided in this part, an attorney for the government may communicate, or cause another to communicate, with a represented person in the process of conducting an investigation, including, but not limited to, an undercover investigation.

§ 77.8 Represented persons and represented parties; plea negotiations and other legal agreements.

An attorney for the government may not initiate or engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney representing such person or party; provided, however, that this restriction will not apply if the communication satisfies § 77.6(c).

§ 77.9 Represented persons and represented parties; respect for attorney-client relationships.

When an attorney for the government communicates, or causes a law enforcement agent or cooperating witness to communicate, with a represented person or represented party pursuant to any provision of these regulations without the consent of counsel, the following restrictions must be observed:

(a) *Deference to attorney-client relationship.* (1) An attorney for the government, or anyone acting at his or her direction may not, when communicating with a represented person or represented party:

(i) Inquire about information regarding lawful defense strategy or legal arguments of counsel;

(ii) Disparage counsel for a represented person or represented party or otherwise seek to induce the person to forego representation or to disregard the advice of the person's attorney; or

(iii) Otherwise improperly seek to disrupt the relationship between the represented person or represented party and counsel.

(2) Notwithstanding paragraph (a)(1) of this section, if the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney finds that there is a substantial likelihood that there exists a significant conflict of interest between a represented person or party and his or her attorney; and that it is not feasible to obtain a judicial order challenging the representation, then an attorney for the government with prior written authorization from an official identified above may apprise the person of the nature of the perceived conflict of interest, unless the exigencies of the situation permit only prior oral authorization, in which case such oral authorization shall be memorialized in writing as soon thereafter as possible.

(b) *Attorney-client meetings.* An attorney for the government may not direct or cause an undercover law enforcement agent or cooperating witness to attend or participate in lawful attorney-client meetings or communications, except when the agent or witness is requested to do so by the represented person or party, defense counsel, or another person affiliated or associated with the defense, and when reasonably necessary to protect the safety of the agent or witness or the confidentiality of an undercover operation. If the agent or witness attends or participates in such meetings, any information regarding lawful defense strategy or trial preparation imparted to the agent or witness shall not be communicated to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges, or used in any other way to the substantial detriment of the client.

§ 77.10 Organizations and employees.

This section applies when the communication involves a former or current employee of an organization that qualifies as a represented party or represented person, and the subject matter of the communication relates to the business or other affairs of the organization.

(a) *Communications with current employees; organizational representation.* A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

(b) *Communications with former employees; organizational representation.* A communication with a former employee of an organization that is represented by counsel shall not be considered to be a communication with the organization for purposes of this part.

(c) *Communications with former or current employees; individual representation.* A communication with a former or current employee of an organization who is individually represented by counsel may occur only to the extent otherwise permitted by this part. However, a claim by an attorney that he or she represents all or a large number of individual current and/or former employees of an organization does not suffice to establish that those employees are represented persons or represented parties under this part. In such circumstances, prior to engaging in communications that would be prohibited under this part as a result of the individual representation, the attorney for the government shall communicate with the individual current or former employee to determine if in fact that employee is represented by counsel concerning the subject matter of the investigation or proceeding.

(d) *Communications with separately represented controlling individuals.* When this part would preclude discussions with a controlling individual as defined in § 77.10(a) and the controlling individual has retained separate counsel on the relevant subject matter, an attorney for the government may communicate with such individual in the following circumstances:

(1) If the controlling individual's separate counsel consents;

(2) If the communication falls within one of the exceptions set forth in §§ 77.6 or 77.9; or

(3) In the case in which the individual does not qualify as a represented party, if the individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed, and, if willing to do so, signs a written statement to this effect.

(e) *Initiation of communication with unrepresented controlling individuals.* Notwithstanding any other provision of this part, an attorney for the government may communicate with a controlling individual who is not individually represented as to the subject matter of the communication when the controlling individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing, and informed, and, if willing to do so, signs a written statement to this effect.

(f) *Multiple representation.* Nothing in this section is intended or shall be construed to affect the requirements of Rule 44(c) of the Federal Rules of Criminal Procedure, or to permit the multiple representation of an organization and any of its employees, or the multiple representation of more than one such employee, if such representation is prohibited by any applicable law or rule of attorney ethics.

§ 77.11 Enforcement of this part.

(a) *Exclusive enforcement by Attorney General.* The Attorney General shall have exclusive authority over this part and any violations of it, except as provided in § 77.12. Allegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice and shall be addressed when appropriate as matters of attorney discipline by the Department. The Office of Professional Responsibility shall review any complaint alleging a violation of this part made by a state or federal judge, bar disciplinary board, official, or ethics committee, or by any other person or entity. The findings of the Attorney General or her designee as to an attorney's compliance or non-compliance with this part shall be final and conclusive except insofar as the attorney for the government is afforded a right of review by other provisions of law.

(b) *No private remedies.* This part is not intended to and does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States.

§ 77.12 Relationship to state and local regulation.

Communications with represented parties and represented persons pursuant to this part are intended to constitute communications that are "authorized by law" within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7–104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and local federal court rules. In addition, this part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts. When the Attorney General finds a willful violation of any of the rules in this part, however, sanctions for the conduct that constituted a willful violation of this part may be applied, if warranted, by the appropriate state disciplinary authority.

Dated: July 30, 1994.

Janet Reno,

Attorney General.

[FR Doc. 94–19077 Filed 8–3–94; 8:45 am]

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federal register

Thursday
August 4, 1994

Part VII

The President

Proclamation 6712—National Neighborhood Crime Watch Day, 1994

Federal Register
Vol. 59, No. 149
Thursday, August 4, 1994

Presidential Documents

Title 3—

The President

Proclamation 6712 of August 2, 1994

National Neighborhood Crime Watch Day, 1994

By the President of the United States of America

A Proclamation

Crime, in one way or another, affects every individual in every community in America. The loss of one parent touches all of our families. The death of one child breaks all of our hearts. But by reaching out to each other in a gesture of courage and cooperation, law enforcement officers and the citizens they serve forge a shield of safety—our greatest weapon in the fight against crime.

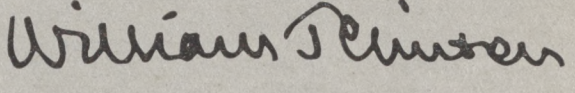
Robert Kennedy once said that each time one of us "stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope." Tonight, millions of Americans across the country will join their neighbors in turning on lights from 9:00 to 10:00 o'clock p.m. in front of their homes. "National Night Out" provides communities the opportunity to heighten crime and drug prevention awareness, to encourage participation in anti-crime programs, and to strengthen the relationship between local police and private citizens. Already, we have seen how important these simple steps can be in avoiding tragedy. In big cities and small towns throughout our Nation, police rely on the active involvement of community members to help identify potential problems before they explode into violence. As we resolve tonight to end the violence, the message of this event is clear: Crime in America will not be tolerated.

One of the primary duties of any government is to work to keep its citizens safe from harm. I welcome this responsibility, and I am determined to fulfill it. But no government program will be truly successful without the help of each American. I hope that the lights coming on across America this evening will serve as a signal of both warning and hope. With shared responsibility and a willingness to change, we can turn the tide on the wave of crime in America. Working together, we can build a brighter, more secure future for all of our people.

The Congress, by House Joint Resolution 374, has authorized and requested the President to issue a proclamation observing August 2, 1994, as "National Neighborhood Crime Watch Day."

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, do hereby proclaim August 2, 1994, as National Neighborhood Crime Watch Day. I call upon the people of the United States to observe this day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of August, in the year of our Lord nineteen hundred and ninety-four, and of the Independence of the United States of America the two hundred and nineteenth.



[FR Doc. 94–19242
Filed 8–3–94; 11:16 am]
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Vol. 59, No. 149

Thursday, August 4, 1994

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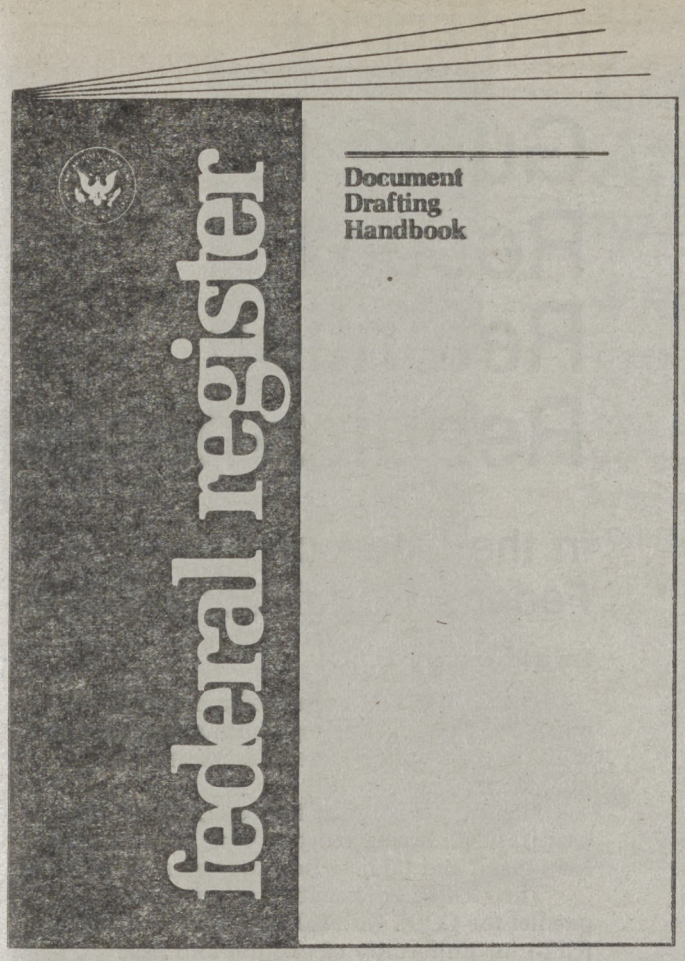
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S. 832/P.L. 103–284

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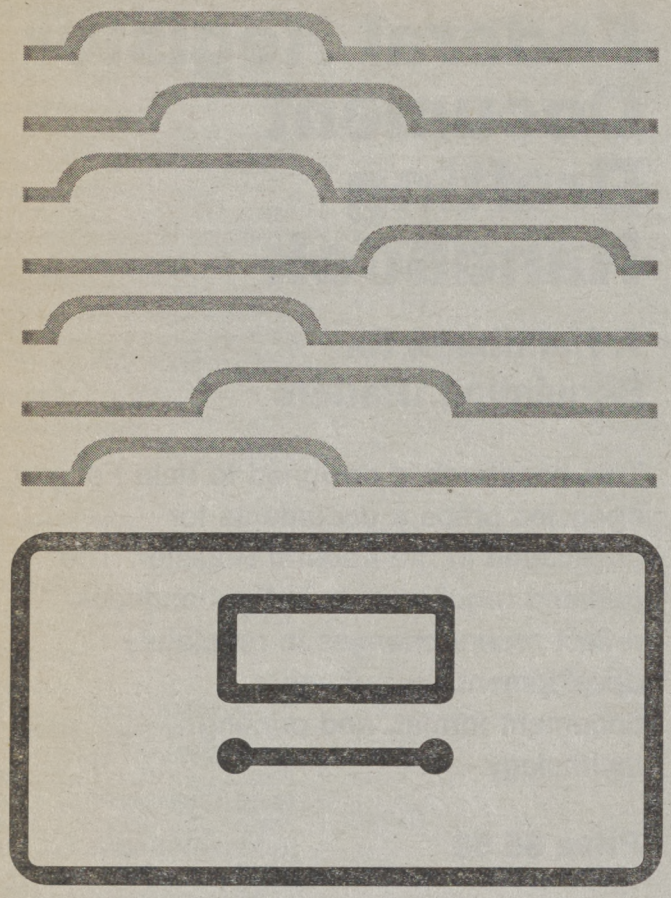
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103d Congress, 2d Session, 1994

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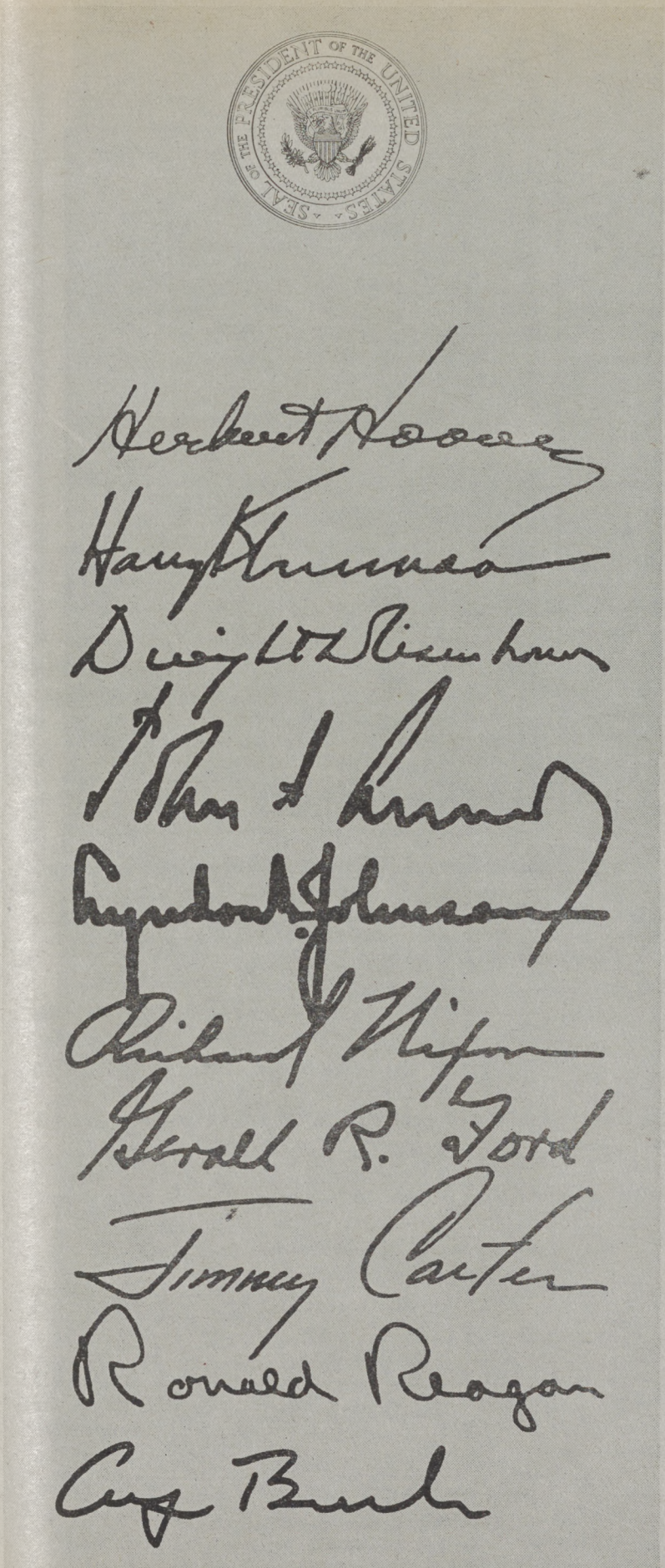
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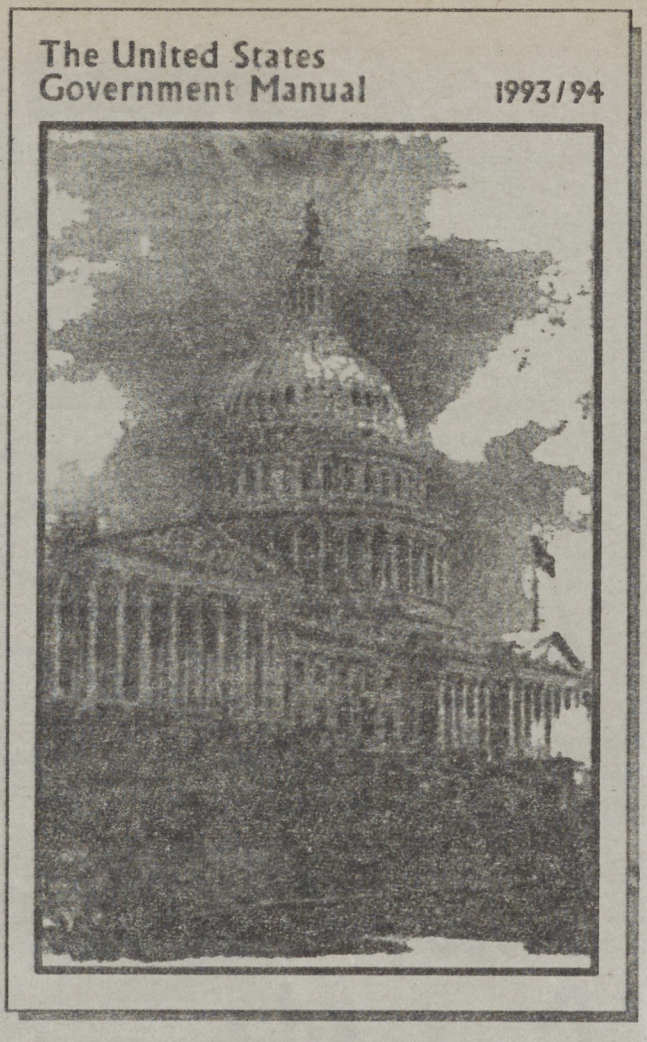
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