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- FOR:** Any person who uses the Federal Register and Code of Federal Regulations.
- WHO:** Sponsored by the Office of the Federal Register.
- WHAT:** Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
  2. The relationship between the Federal Register and Code of Federal Regulations.
  3. The important elements of typical Federal Register documents.
  4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

#### WASHINGTON, DC

**WHEN:** June 17, 1997 at 9:00 am  
**WHERE:** Office of the Federal Register  
Conference Room  
800 North Capitol Street, NW.  
Washington, DC  
(3 blocks north of Union Station Metro)

**RESERVATIONS:** 202-523-4538



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Federal Register

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Friday, June 6, 1997

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

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

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 979

[Docket No. FV97-979-1 FIR]

#### Melons Grown in South Texas; Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of an interim final rule establishing an assessment rate for the South Texas Melon Committee (Committee) under Marketing Order No. 979 for the 1996-97 and subsequent fiscal periods. The Committee is responsible for local administration of the marketing order which regulates the handling of melons grown in South Texas. Authorization to assess Texas melon handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program.

**EFFECTIVE DATE:** October 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** Belinda G. Garza, Marketing Specialist, McAllen Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 1313 East Hackberry, McAllen, TX 78501, telephone 210-682-2833, FAX 210-682-5942, or Martha Sue Clark, Program Assistant, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone 202-720-9918; FAX 202-720-5698. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington,

DC 20090-6456; telephone 202-720-2491; FAX 202-720-5698.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 156 and Order No. 979, both as amended (7 CFR part 979), regulating the handling of melons grown in South Texas, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, South Texas melon handlers are subject to assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable melons beginning October 1, 1996, and continuing until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly

or disproportionately burdened.

Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 32 producers of South Texas melons in the production area and approximately 24 handlers subject to regulation under the marketing order. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts less than \$500,000 and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. The majority of South Texas melon producers and handlers may be classified as small entities.

The melon marketing order provides authority for the Committee, with the approval of the Department, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of South Texas melons. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

The Committee, in a telephone vote on September 25, 1996, unanimously recommended 1996-97 administrative expenses of \$100,000 for personnel, office, and the travel portion of the compliance budget. These expenses were approved by the Department in October 1996. The assessment rate and funding for the research projects and the road guard station maintenance portion of the compliance budget were to be recommended at a later Committee meeting.

The Committee subsequently met on December 17, 1996, and unanimously recommended 1996-97 expenditures of \$308,000 and an assessment rate of \$0.07 per carton of melons. In comparison, last year's budgeted expenditures were \$395,159. The assessment rate of \$0.07 is the same as last year's established rate. Major

expenditures recommended by the Committee for the 1996-97 fiscal period include \$84,500 for personnel and administrative expenses, \$115,500 for compliance, \$64,000 for a melon disease management program, \$33,125 for breeding and variety development, and \$10,875 for melon variety evaluation. Budgeted expenses for these items in 1995-96 were \$95,544, \$139,500, \$86,716, \$32,674, and \$10,875, respectively.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of South Texas melons. Melon shipments for the year are estimated at 3,870,000 cartons, which should provide \$270,900 in assessment income. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, will be adequate to cover budgeted expenses. Funds in the reserve will be kept within the maximum permitted by the order.

An interim final rule regarding this action was published in the February 20, 1997, issue of the **Federal Register** (62 FR 7659). That rule provided a 30-day comment period. No comments were received.

While this rule will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be offset by the benefits derived by the operation of the marketing order. Therefore, the AMS has determined that this rule will not have a significant economic impact on a substantial number of small entities.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by the Secretary upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The

Committee's 1996-97 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by the Department.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the 1996-97 fiscal period began on October 1, 1996, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable melons handled during such fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) an interim final rule was published on this action and provided for a 30-day comment period; no comments were received.

#### List of Subjects in 7 CFR Part 979

Marketing agreements, Melons, Reporting and recordkeeping requirements.

#### PART 979—MELONS GROWN IN SOUTH TEXAS

Accordingly, the interim final rule amending 7 CFR part 979 which was published at 62 FR 7659 on February 20, 1997, is adopted as a final rule without change.

Dated: June 2, 1997.

**Robert C. Keeney,**

*Director, Fruit and Vegetable Division.*

[FR Doc. 97-14877 Filed 6-5-97; 8:45 am]

BILLING CODE 3410-02-P

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#### SOCIAL SECURITY ADMINISTRATION

##### 20 CFR Part 416

RIN 0960-AD89

#### Supplemental Security Income for the Aged, Blind, and Disabled; Technical Changes to Title XVI

AGENCY: Social Security Administration.

ACTION: Final rules.

**SUMMARY:** We are amending the supplemental security income (SSI)

regulations by making technical changes to our rules on income and resources. These technical changes update lists of exclusions from income and resources under the SSI program that are in statutes other than the Social Security Act (the Act) and make an additional technical correction. We are also reflecting a statutory provision from the Social Security Independence and Program Improvements Act (SSIIPIA) of 1994 concerning optional State supplementary payments.

**EFFECTIVE DATE:** July 7, 1997.

**FOR FURTHER INFORMATION CONTACT:** Suzanne DiMarino, 3-A-3 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965-1769.

**SUPPLEMENTARY INFORMATION:** In these final regulations we are making technical changes to the SSI regulations as follows: Updating the appendix at the end of subpart K which lists exclusions from income in statutes other than the Act; updating the lists of statutory exclusions from resources contained in subpart L; and making a technical correction in subpart L for conformity with prior regulatory changes. In addition, we are reflecting, in subpart T, a statutory provision which explains that some States which have Federal administration of their optional supplementary payments may elect to exclude for pass-along compliance purposes certain payments made as a result of the *Sullivan v. Zebley*, 493 U.S. 521 (1990) class action. The changes and added provision are described below.

#### Subpart K, Appendix, Changes

At the end of part 416, subpart K, we maintain an appendix which lists types of income excluded under the SSI program as provided by Federal laws other than the Act. We update this list periodically. However, we apply the law in effect due to changes to Federal statutes whether or not the list in the appendix has been amended to reflect the statutory changes. We are revising the appendix to subpart K as follows:

1. Under the heading *IV. Native Americans*, we are updating the list to reflect the exclusion from income for SSI purposes of additional payments, funds, distributions, and other income provided by Federal laws that affect Alaskan Natives and other Indian entities. As appropriate, we include a Note— regarding our treatment of the income under the deeming of income from sponsors to aliens provisions.

We are adding 22 types of payments made to Native American entities to the list of income exclusions provided by Federal statutes. We also are making

some minor clarifications, such as correcting statutory citations or renumbering, for some of the exclusions already listed in section IV.

We are dividing the list of Native American exclusions into three subsections for ease of reference. The first group, in paragraph (a), lists types of payments that are excluded from income without regard to specific tribes or Indian groups. These include payments of certain Indian judgment funds; per capita distributions of all funds held in trust by the Secretary of the Interior; payments excluded pursuant to the Alaska Native Claims Settlement Act; and payments up to \$2,000 each year received by certain Native Americans that are derived from individual interests in trust or restricted lands. Only the latter exclusion, which was provided by the Omnibus Budget Reconciliation Act of 1993, Public Law (Pub. L.) 103-66, is being added to the appendix. The other three were in the appendix, but will be renumbered and grouped together.

The second group, in paragraph (b), of Native American exclusions lists certain payments to members of specific Native American tribes or groups. We are adding 21 payments to this group, and renumbering the exclusions already in the appendix, so that the list will be in chronological order by public law.

The third group of exclusions, in paragraph (c), lists receipts from land held in trust for specific tribes or groups. We are not adding any exclusions to that list, but are renumbering them.

2. Under the heading *V. Other* we are adding new paragraph (f) which excludes from income child care or reimbursement for child care as provided under the Child Care and Development Block Grant Act, as amended by section 8(b) of Public Law 102-586. We are also adding a new paragraph (g) to reflect the exclusion from income of payments made to individuals because of their status as victims of Nazi persecution pursuant to section 1(a) of the Victims of Nazi Persecution Act of 1994, Public Law 103-286.

#### Subpart L Changes

We are updating § 416.1236(a), *Exclusions from resources; provided by other statutes* which lists exclusions from resources under the SSI program. We update the list to show that resources derived from the conversion of most payments to Native Americans that are types of income listed in the appendix to subpart K of part 416—IV, *Native Americans*, are excluded from resources under the SSI program.

Accordingly, we are revising the resource exclusions specific to Indian tribes or groups to reflect the changes made in appendix K.

We are also adding a new paragraph (a)(18) to § 416.1236 to reflect the exclusion from resources of payments made to individuals because of their status as victims of Nazi persecution pursuant to section 1(a) of the Victims of Nazi Persecution Act of 1994, Public Law 103-286 (108 Stat. 1450).

Additionally, we are amending § 416.1245(b)(3)(ii) to conform with a change to § 416.1242(a) promulgated on November 15, 1993 at 58 FR 60103. Under that regulatory change, the Social Security Administration's acceptance of the written agreement for conditional payments is effective when the applicant/recipient receives our written notice. Our change to § 416.1245(b)(3)(ii) states that within 30 days of receiving our notice *accepting* the conditional payments agreement (instead of within 30 days of *signing* the agreement), the applicant/recipient must take certain steps to sell his or her property.

#### Subpart T Addition

We are amending § 416.2096(c), *Meeting the passalong requirement—total expenditures. Exception—*, by adding a new paragraph (6) to place in regulations the statutory provision of section 209 of the SSIPIA of 1994 (Pub. L. 103-296). Section 209 amends section 1618(b) of the Act. The amendment provides that for purposes of determining whether a State's expenditures for supplementary payments in the 12-month period beginning on the effective date of any increase in the level of SSI benefits are not less than the State's expenditures for the payments in the preceding 12-month period, the Commissioner of Social Security, in computing the State's expenditures, shall disregard, pursuant to a one-time election of the State, all expenditures by the State for retroactive supplementary payments that are required to be made in connection with the retroactive SSI benefits referred to in section 5041 of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90), Public Law 101-508. This section of OBRA '90 addresses only those retroactive SSI benefits paid as a result of *Sullivan v. Zebley*, 493 U.S. 521 (1990). To make clear that these regulations apply only to the retroactive SSI benefits as a result of *Sullivan v. Zebley*, we are including this court case reference in the regulations.

#### Regulatory Procedures

When developing our regulations, we follow the rulemaking procedures specified in the Administrative Procedure Act (APA), 5 U.S.C. 553. The APA provides exceptions to its notice of proposed rulemaking and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for dispensing with the notice of proposed rulemaking and public comment procedures in this case. Good cause exists because these rules contain only changes which reflect statutory exclusions of income and resources in statutes other than the Act and a technical change, and reflect a statutory provision from the SSIPIA of 1994, none of which involve the setting of policy. Therefore, opportunity for prior comment is unnecessary, and we are issuing these changes to our regulations as final rules.

#### Executive Order No. 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these rules do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they were not subject to OMB review.

#### Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities since these rules affect only individuals and States. Therefore, a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act, is not required.

#### Paperwork Reduction Act

These final regulations impose no additional reporting and recordkeeping requirements subject to OMB clearance. (Catalog of Federal Domestic Assistance: Program No. 96.006—Supplemental Security Income.)

#### List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: May 27, 1997.

**John J. Callahan,**

*Acting Commissioner of Social Security.*

For the reasons set out in the preamble, part 416 of chapter III of title

20 of the Code of Federal Regulations is amended as follows:

**PART 416—[AMENDED]**

1. The authority citation for subpart K of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1602, 1611, 1612, 1613, 1614(f), 1621, and 1631 of the Social Security Act (42 U.S.C. 902(a)(5), 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j, and 1383); sec. 211, Pub. L. 93-66, 87 Stat. 154 (42 U.S.C. 1382 note).

2. In the appendix following subpart K of part 416, *IV. Native Americans* is revised and in *V. Other*, paragraphs (f) and (g) are added to read as follows:

**Appendix to Subpart K of Part 416—  
List of Types of Income Excluded  
Under the SSI Program as Provided by  
Federal Laws Other Than the Social  
Security Act**

\* \* \* \* \*

*IV. Native Americans*

(a) *Types of Payments Excluded Without  
Regard to Specific Tribes or Groups—*

(1) Indian judgment funds that are held in trust by the Secretary of the Interior or distributed per capita pursuant to a plan prepared by the Secretary of the Interior and not disapproved by a joint resolution of the Congress under Public Law 93-134 as amended by section 4 of Public Law 97-458 (96 Stat. 2513, 25 U.S.C. 1408). Indian judgment funds include interest and investment income accrued while such funds are so held in trust. This exclusion extends to initial purchases made with Indian judgment funds. This exclusion does not apply to sales or conversions of initial purchases or to subsequent purchases.

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(2) All funds held in trust by the Secretary of the Interior for an Indian tribe and distributed per capita to a member of that tribe are excluded from income under Public Law 98-64 (97 Stat. 365, 25 U.S.C. 117b). Funds held by Alaska Native Regional and Village Corporations (ANRVC) are not held in trust by the Secretary of the Interior and therefore ANRVC dividend distributions are not excluded from countable income under this exclusion. For ANRVC dividend distributions, see paragraph IV.(a)(3) of this appendix.

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(3) Distributions received by an individual Alaska Native or descendant of an Alaska Native from an Alaska Native Regional and Village Corporation pursuant to the Alaska Native Claims Settlement Act, as follows: cash, including cash dividends on stock received from a Native Corporation, to the extent that it does not, in the aggregate, exceed \$2,000 per individual each year; stock, including stock issued or distributed by a Native Corporation as a dividend or

distribution on stock; a partnership interest; land or an interest in land, including land or an interest in land received from a Native Corporation as a dividend or distribution on stock; and an interest in a settlement trust. This exclusion is pursuant to section 15 of the Alaska Native Claims Settlement Act Amendments of 1987, Public Law 100-241 (101 Stat. 1812, 43 U.S.C. 1626(c)), effective February 3, 1988.

**Note—**This exclusion does not apply in deeming income from sponsors to aliens.

(4) Up to \$2,000 per year received by Indians that is derived from individual interests in trust or restricted lands under section 13736 of Public Law 103-66 (107 Stat. 663, 25 U.S.C. 1408, as amended).

(b) *Payments to Members of Specific Indian Tribes and Groups—*

(1) Per capita payments to members of the Red Lake Band of Chippewa Indians from the proceeds of the sale of timber and lumber on the Red Lake Reservation under section 3 of Public Law 85-794 (72 Stat. 958).

(2) Per capita distribution payments by the Blackfeet and Gros Ventre tribal governments to members which resulted from judgment funds to the tribes under section 4 of Public Law 92-254 (86 Stat. 65) and under section 6 of Public Law 97-408 (96 Stat. 2036).

(3) Settlement fund payments and the availability of such funds to members of the Hopi and Navajo Tribes under section 22 of Public Law 93-531 (88 Stat. 1722) as amended by Public Law 96-305 (94 Stat. 929).

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(4) Judgment funds distributed per capita to, or held in trust for, members of the Sac and Fox Indian Nation, and the availability of such funds under section 6 of Public Law 94-189 (89 Stat. 1094).

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(5) Judgment funds distributed per capita to, or held in trust for, members of the Grand River Band of Ottawa Indians, and the availability of such funds under section 6 of Public Law 94-540 (90 Stat. 2504).

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(6) Any judgment funds distributed per capita to members of the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation under section 2 of Public Law 95-433 (92 Stat. 1047, 25 U.S.C. 609c-1).

(7) Any judgment funds distributed per capita or made available for programs for members of the Delaware Tribe of Indians and the absentee Delaware Tribe of Western Oklahoma under section 8 of Public Law 96-318 (94 Stat. 971).

(8) All funds and distributions to members of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians under the Maine Indian Claims Settlement Act, and the availability of such funds under section 9 of Public Law 96-420 (94 Stat. 1795, 25 U.S.C. 1728(c)).

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(9) Any distributions of judgment funds to members of the San Carlos Apache Indian Tribe of Arizona under section 7 of Public Law 93-134 (87 Stat. 468) and Public Law 97-95 (95 Stat. 1206).

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(10) Any distribution of judgment funds to members of the Wyandot Tribe of Indians of Oklahoma under section 6 of Public Law 97-371 (96 Stat. 1814).

(11) Distributions of judgment funds to members of the Shawnee Tribe of Indians (Absentee Shawnee Tribe of Oklahoma, the Eastern Shawnee Tribe of Oklahoma and the Cherokee Band of Shawnee descendants) under section 7 of Public Law 97-372 (96 Stat. 1816).

(12) Judgment funds distributed per capita or made available for programs for members of the Miami Tribe of Oklahoma and the Miami Indians of Indiana under section 7 of Public Law 97-376 (96 Stat. 1829).

(13) Distributions of judgment funds to members of the Clallam Tribe of Indians of the State of Washington (Port Gamble Indian Community, Lower Elwha Tribal Community and the Jamestown Band of Clallam Indians) under section 6 of Public Law 97-402 (96 Stat. 2021).

(14) Judgment funds distributed per capita or made available for programs for members of the Pembina Chippewa Indians (Turtle Mountain Band of Chippewa Indians, Chippewa Cree Tribe of Rocky Boy's Reservation, Minnesota Chippewa Tribe, Little Shell Band of the Chippewa Indians of Montana, and the nonmember Pembina descendants) under section 9 of Public Law 97-403 (96 Stat. 2025).

(15) Per capita distributions of judgment funds to members of the Assiniboine Tribe of Fort Belknap Indian Community and the Papago Tribe of Arizona under sections 6 and 8(d) of Public Law 97-408 (96 Stat. 2036, 2038).

(16) Up to \$2,000 of per capita distributions of judgment funds to members of the Confederated Tribes of the Warm Springs Reservation under section 4 of Public Law 97-436 (96 Stat. 2284).

**Note—**This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(17) Judgment funds distributed to the Red Lake Band of Chippewa Indians under section 3 of Public Law 98-123 (97 Stat. 816).

(18) Funds distributed per capita or family interest payments for members of the Assiniboine Tribe of Fort Belknap Indian Community of Montana and the Assiniboine Tribe of the Fort Peck Indian Reservation of Montana under section 5 of Public Law 98-124 (97 Stat. 818).

(19) Distributions of judgment funds and income derived therefrom to members of the Shoalwater Bay Indian Tribe under section 5 of Public Law 98-432 (98 Stat. 1672).

(20) All distributions to heirs of certain deceased Indians under section 8 of the Old Age Assistance Claims Settlement Act, Public Law 98-500 (98 Stat. 2319).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(21) Judgment funds distributed per capita or made available for any tribal program for members of the Wyandotte Tribe of Oklahoma and the Absentee Wyandottes under section 106 of Public Law 98-602 (98 Stat. 3151).

(22) Per capita and dividend payment distributions of judgment funds to members of the Santee Sioux Tribe of Nebraska, the Flandreau Santee Sioux Tribe, the Prairie Island Sioux, Lower Sioux, and Shakopee Mdewakanton Sioux Communities of Minnesota under section 8 of Public Law 99-130 (99 Stat. 552) and section 7 of Public Law 93-134 (87 Stat. 468), as amended by Public Law 97-458 (96 Stat. 2513; 25 U.S.C. 1407).

(23) Funds distributed per capita or held in trust for members of the Chippewas of Lake Superior and the Chippewas of the Mississippi under section 6 of Public Law 99-146 (99 Stat. 782).

(24) Distributions of claims settlement funds to members of the White Earth Band of Chippewa Indians as allottees, or their heirs, under section 16 of Public Law 99-264 (100 Stat. 70).

(25) Payments or distributions of judgment funds, and the availability of any amount for such payments or distributions, to members of the Saginaw Chippewa Indian Tribe of Michigan under section 6 of Public Law 99-346 (100 Stat. 677).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(26) Judgment funds distributed per capita or held in trust for members of the Chippewas of Lake Superior and the Chippewas of the Mississippi under section 4 of Public Law 99-377 (100 Stat. 805).

(27) Judgment funds distributed to members of the Cow Creek Band of Umpqua Tribe of Indians under section 4 of Public Law 100-139 (101 Stat. 822).

(28) Per capita payments of claims settlement funds to members of the Coshatta Tribe of Louisiana under section 2 of Public Law 100-411 (102 Stat. 1097) and section 7 of Public Law 93-134 (87 Stat. 468), as amended by Public Law 97-458 (96 Stat. 2513; 25 U.S.C. 1407).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(29) Funds distributed per capita for members of the Hoopa Valley Indian Tribe and the Yurok Indian Tribe under sections 4, 6 and 7 of Public Law 100-580 (102 Stat. 2929, 2930, 2931) and section 3 of Public Law 98-64 (97 Stat. 365; 25 U.S.C. 117b).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(30) Judgment funds held in trust by the United States, including interest and investment income accruing on such funds, and judgment funds made available for programs or distributed to members of the Wisconsin Band of Potawatomi (Hannahville Indian Community and Forest County Potawatomi) under section 503 of Public Law 100-581 (102 Stat. 2945).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(31) All funds, assets, and income from the trust fund transferred to the members of the Puyallup Tribe under section 10 of the Puyallup Tribe of Indians Settlement Act of 1989, Public Law 101-41 (103 Stat. 88, 25 U.S.C. 1773h(c)).

**Note**—This exclusion does not apply in deeming income from sponsors to aliens.

(32) Judgment funds distributed per capita, or held in trust, or made available for programs, for members of the Seminole Nation of Oklahoma, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida and the independent Seminole Indians of Florida under section 8 of Public Law 101-277 (104 Stat. 145).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(33) Payments, funds, distributions, or income derived from them to members of the Seneca Nation of New York under section 8(b) of the Seneca Nation Settlement Act of 1990, Public Law 101-503 (104 Stat. 1297, 25 U.S.C. 1774f).

**Note**—This exclusion does not apply in deeming income from sponsors to aliens.

(34) Per capita distributions of settlement funds under section 102 of the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Public Law 101-618 (104 Stat. 3289) and section 7 of Public Law 93-134 (87 Stat. 468), as amended by Public Law 97-458 (96 Stat. 2513; 25 U.S.C. 1407).

(35) Settlement funds, assets, income, payments, or distributions from Trust Funds to members of the Catawba Indian Tribe of South Carolina under section 11(m) of Public Law 103-116 (107 Stat. 1133).

(36) Settlement funds held in trust (including interest and investment income accruing on such funds) for, and payments made to, members of the Confederated Tribes of the Colville Reservation under section 7(b) of Public Law 103-436 (108 Stat. 4579).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

*(c) Receipts from Lands Held in Trust for Certain Tribes or Groups—*

(1) Receipts from land held in trust by the federal government and distributed to members of certain Indian tribes under section 6 of Public Law 94-114 (89 Stat. 579, 25 U.S.C. 459e).

**Note**—This exclusion applies to the income of sponsors of aliens only if the alien lives in the sponsor's household.

(2) Receipts derived from trust lands awarded to the Pueblo of Santa Ana and distributed to members of that tribe under section 6 of Public Law 95-498 (92 Stat. 1677).

(3) Receipts derived from trust lands awarded to the Pueblo of Zia of New Mexico and distributed to members of that tribe under section 6 of Public Law 95-499 (92 Stat. 1680).

*V. Other*

\* \* \* \* \*

(f) The value of any child care provided or arranged (or any payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act, as amended by section 8(b) of Public Law 102-586 (106 Stat. 5035).

(g) Payments made to individuals because of their status as victims of Nazi persecution excluded pursuant to section 1(a) of the Victims of Nazi Persecution Act of 1994, Public Law 103-286 (108 Stat. 1450).

3. The authority citation for subpart L of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1602, 1611, 1612, 1613, 1614(f), 1621, and 1631 of the Social Security Act (42 U.S.C. 902(a)(5), 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j, and 1383); sec. 211, Public Law 93-66, 87 Stat. 154 (42 U.S.C. 1382 note).

4. In § 416.1236, paragraph (a)(2) is revised; the last sentence of paragraph (a)(12) is revised; paragraphs (a)(13), (a)(16), and (a)(19) are removed; paragraphs (a)(14), (a)(15), (a)(17), (a)(18), and (a)(20) are redesignated as paragraph (a)(13), (a)(14), (a)(15), (a)(16), and (a)(17), respectively; and a new paragraph (a)(18) is added to read as follows:

**§ 416.1236 Exclusions from resources; provided by other statutes.**

(a) \* \* \*

(2) Payments made to Native Americans as listed in paragraphs (b) and (c) of section IV of the appendix to subpart K of part 416, as provided by Federal statutes other than the Social Security Act.

\* \* \* \* \*

(12) \* \* \* For the treatment of ANRVC dividend distributions, see paragraph (a)(10) of this section.

\* \* \* \* \*

(18) Payments made to individuals because of their status as victims of Nazi persecution excluded pursuant to section 1(a) of the Victims of Nazi Persecution Act of 1994, Public Law 103-286 (108 Stat. 1450).

5. In § 416.1245, the introductory text of paragraph (b)(3)(ii), is revised to read as follows:

**§ 416.1245 Exceptions to required disposition of real property.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(ii) Within 30 days of receiving notice that we have accepted the individual's signed written agreement to dispose of the property, and absent good cause for not doing so, the individual must:

\* \* \* \* \*

6. The authority citation for subpart T of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1616, 1618, and 1631 of the Social Security Act (42 U.S.C.

902(a)(5), 1382e, 1382g, and 1383); sec. 212, Public Law 93-66, 87 Stat. 155 (42 U.S.C. 1382 note); sec. 8(a), (b)(1)-(b)(3), Public Law 93-233, 87 Stat. 956 (7 U.S.C. 612c note, 1431 note and 42 U.S.C. 1382e note); secs. 1(a)-(c) and 2(a), 2(b)(1), 2(b)(2), Public Law 93-335, 88 Stat. 291 (42 U.S.C. 1382 note, 1382e note).

7. Section 416.2096 is amended by adding a new paragraph (c)(6) to read as follows:

**§ 416.2096 Basic pass-along rules.**

\* \* \* \* \*

(c) \* \* \*

(6) To determine whether a State's expenditures for supplementary payments in the 12-month period beginning on the effective date of any increase in the level of SSI benefits are not less than the State's expenditures for the payments in the preceding 12-month period, in computing the State's expenditures, we disregard, pursuant to a one-time election of the State, all expenditures by the State for the retroactive supplementary payments that are required to be made under the *Sullivan v. Zebley*, 493 U.S. 521 (1990) class action.

\* \* \* \* \*

[FR Doc. 97-14615 Filed 6-5-97; 8:45 am]

BILLING CODE 4190-29-U

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 172**

[Docket No. 91F-0160]

**Food Additives Permitted For Direct Addition to Food For Human Consumption; Polydextrose**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of polydextrose as a formulation aid in film coatings applied to vitamin and mineral supplement tablets. This action is in response to a petition filed by Scientific Services, Colorcon (Colorcon).

**DATES:** Effective June 6, 1997; written objections and requests for a hearing by July 7, 1997.

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

**FOR FURTHER INFORMATION CONTACT:** Rosalie M. Angeles, Center for Food Safety and Applied Nutrition (HFS-206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3107.

**SUPPLEMENTARY INFORMATION:** In a notice published in the *Federal Register* of May 31, 1991 (56 FR 24821), FDA announced that a food additive petition (FAP 1A4258) had been filed by Colorcon, 415 Moyer Blvd., West Point, PA 19486, proposing that § 172.841 *Polydextrose* (21 CFR 172.841) be amended to provide for the safe use of polydextrose as a formulation aid (film former/adhesion promoter) in film coatings applied to vitamin and mineral supplement tablets.

Film coatings are applied to tableted food supplements to mask taste and to facilitate both swallowing and identification. In the petition, data were provided by the petitioner to establish that: (1) Polydextrose provides substantial improvement in the adhesion of the coating to tableted food supplements, and (2) it considerably improves the stability of colored coatings. The petitioner also established that the optimal level of polydextrose in the coating is 25 percent. With the coating constituting 5 percent of the tablet, the polydextrose content in the final coated product would be about 1.25 percent by weight or a maximum of 13 milligrams (mg) per tablet. Thus, even for heavy users of food supplements (consuming 5 to 10 tablets per day), the petitioner estimates that the maximum consumption of polydextrose from the proposed use of the additive in vitamin and mineral supplements would be no more than 130 mg per person per day (Ref. 1).

FDA concurs with the petitioner's estimates of consumer exposure to the additive from the petitioned use. Further, the agency finds that this consumption is insignificant compared to the cumulative intake of polydextrose from all currently regulated uses of the additive.

Accordingly, based on its evaluation of the data in the petition and other relevant material, FDA concludes that the proposed food additive use is safe, that the additive will achieve its intended technical effect, and that therefore, the regulations should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment

with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

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

Any person who will be adversely affected by this regulation may at any time on or before July 7, 1997, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

**Reference**

The following reference has 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. Memorandum dated July 31, 1996, from Z. S. Olempska-Beer, Division of Product Manufacture and Use, FDA, to R. M. Angeles concerning review of chemistry data in FAP 1A4258.

**List of Subjects in 21 CFR Part 172**

Food additives, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 172 is amended as follows:

**PART 172—FOOD ADDITIVES  
PERMITTED FOR DIRECT ADDITION  
TO FOOD FOR HUMAN  
CONSUMPTION**

1. The authority citation for 21 CFR part 172 continues to read as follows:

**Authority:** Secs. 201, 401, 402, 409, 701, 721 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321, 341, 342, 348, 371, 379e).

2. Section § 172.841 is amended by revising paragraph (c) to read as follows:

**§ 172.841 Polydextrose.**

\* \* \* \* \*

(c) Polydextrose is used in accordance with current good manufacturing practices as a bulking agent, formulation aid, humectant, and texturizer in the following foods when standards of identity established under section 401 of the act do not preclude such use: Baked goods and baking mixes (restricted to fruit, custard, and pudding-filled pies; cakes; cookies; and similar baked products); chewing gum; confections and frostings; dressings for salads; frozen dairy desserts and mixes; fruit spreads; gelatins, puddings and fillings; hard and soft candy; peanut spread; sweet sauces, toppings, and syrups; film coatings on single and multiple vitamin and mineral supplement tablets.

\* \* \* \* \*

Dated: May 8, 1997.

**Fred R. Shank,**

*Director, Center for Food Safety and Applied Nutrition.*

[FR Doc. 97-14752 Filed 6-5-97; 8:45 am]

BILLING CODE 4160-01-F

**DEPARTMENT OF HEALTH AND  
HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 886**

[Docket No. 95N-0400]

**Ophthalmic Devices: Reclassification  
of Rigid Gas Permeable Contact Lens  
Solution; Soft (Hydrophilic) Contact  
Lens Solution; and Contact Lens Heat  
Disinfecting Unit**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing a final rule reclassifying from class III (premarket approval) to class II (special controls) rigid gas permeable contact lens solution, soft (hydrophilic) contact lens solution, and the contact lens heat disinfection unit. Collectively, these devices are referred to as transitional contact lens care products, which include saline solutions; in-eye lubricating/rewetting drops; disinfecting and conditioning products; contact lens cleaners; and heat disinfecting units. This reclassification is in accordance with provisions in the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) and the Safe Medical Devices Act of 1990 (the SMDA). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance describing the evidence that may demonstrate the substantial equivalence of new contact lens care products to legally marketed predicate lens care products.

**EFFECTIVE DATE:** July 7, 1997.

**FOR FURTHER INFORMATION CONTACT:** James F. Saviola, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301-594-1744.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The act (21 U.S.C. 321 *et. seq.*), as amended by the 1976 amendments (Pub. L. 94-295) and the SMDA (Pub. L. 101-629), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) establishes three classes of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness: Class I, general controls; class II, special

controls; and class III, premarket approval.

The 1976 amendments broadened the definition of "device" in section 201(h) of the act (21 U.S.C. 321(h)) to include certain articles that were once regulated as drugs. Under the 1976 amendments, Congress classified into class III all transitional devices (i.e., those devices previously regulated as new drugs). The legislative history of the SMDA reflects congressional concern that many transitional devices were being overregulated in class III (H. Rept. 808, 101st Cong., 2d sess. 26-27 (1990); S. Rept. 513, 101st Cong., 2d sess. 26-27 (1990)). Congress amended section 520(l) of the act (21 U.S.C. 360j(l)) to direct FDA to collect certain safety and effectiveness information from the manufacturers of transitional devices still remaining in class III to determine whether the devices should be reclassified into class II (special controls) or class I (general controls). Accordingly, in the **Federal Register** of November 14, 1991 (56 FR 57960), FDA issued an order under section 520(l)(5)(A) of the act, requiring manufacturers of transitional devices, including rigid gas permeable contact lens solution (§ 886.5918 (21 CFR 886.5918)); soft (hydrophilic) contact lens solution (§ 886.5928 (21 CFR 886.5928)); and the contact lens heat disinfection unit (§ 886.5933 (21 CFR 886.5933)), to submit to FDA a summary of, and a citation to, any information known or otherwise available to them respecting the devices, including adverse safety or effectiveness information which had not been submitted under section 519 of the act (21 U.S.C. 360i). Manufacturers were to submit the summaries and citations to FDA by January 13, 1992. However, because of misunderstandings and uncertainties regarding the information required by the order, and whether the order applied to certain manufacturers' devices, many transitional class III device manufacturers failed to comply with the reporting requirement by January 13, 1992. Consequently, in the **Federal Register** of March 10, 1992 (57 FR 8462), FDA extended the reporting period to March 31, 1992.

Section 520(l)(5)(B) of the act, provides that, after the issuance of an order requiring manufacturers to submit a summary of, and citation to, any information known or otherwise available respecting the devices, but before December 1, 1992, FDA was to publish regulations either leaving transitional class III devices in class III or reclassifying them into class I or II. Subsequently, as permitted by section 520(l)(5)(C) of the act, in the **Federal**

**Register** of November 30, 1992 (57 FR 56586), the agency published a notice extending the period for issuing such regulations until December 1, 1993. Due to limited resources, FDA was unable to publish the regulations before the December 1, 1993, deadline.

In the **Federal Register** of April 1, 1996 (61 FR 14277), FDA published a proposed rule to reclassify from class III (premarket approval) to class II (special controls) rigid gas permeable contact lens solution, soft (hydrophilic) contact lens solution, and the contact lens heat disinfecting unit. The proposed rule contained reasons for the proposed reclassification, identified the risks to health presented by the device, and included a summary of the data upon which the proposed reclassification was based. Written comments were requested by June 17, 1996.

## II. Summary and Analysis of Comments and FDA's Responses

Only one person from the public commented on the proposal. This comment stated that: (1) The proposed rule did not provide a rational basis for reclassification because it did not summarize, or provide a bibliography of, supporting safety and effectiveness information so that interested persons could challenge the proposal; (2) FDA was basing its reclassification on protected information in approved premarket approval applications (PMA's) and on information submitted in response to the order issued under section 520(l)(5)(A) of the act; and (3) the special control document only addresses safety issues and does not encompass device effectiveness.

FDA disagrees that the proposed rule did not provide a rational basis for reclassification of these devices. Section 520(l)(5)(B) states: "In determining whether to revise the classification of a device or to require a device to remain in class III, the Secretary shall apply the criteria set forth in section 513(a)." In accordance with those criteria, FDA has determined that special controls, in the form of the 510(k) guidance document would provide reasonable assurance of the safety and effectiveness of these devices. FDA made this determination based on its identification of the risks to health presented by these devices and on its review of preclinical and clinical data and adverse experience reports. FDA did not use information made available under section 520(h)(1) or (h)(2) of the act to "establish the safety or effectiveness of another device", as alleged by the comment.

The SMDA mandates that FDA review the classification of transitional devices and reclassify them into class I or class

II unless FDA can justify requiring them to remain in class III. FDA has determined that premarket approval is not necessary for these devices because a special control entitled, "Guidance for Industry; Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products," is sufficient to provide reasonable assurance of the safety and effectiveness of the devices. Consequently, FDA cannot justify requiring these devices to remain in class III.

FDA believes that it was Congress' intent that, whenever possible, FDA use the historical information and expertise it has obtained in reviewing scientific data to designate special controls that can be used as a basis for reclassifying devices. FDA has had over 25 years of experience in reviewing and evaluating preclinical and clinical data contained in more than 100 PMA's; hundreds of PMA annual reports that include identification of adverse reactions reported for the device; the medical device reporting (MDR) data base within FDA; information submitted under section 520(l)(5)(A) of the act; and volumes of scientific literature for contact lens care products. FDA did not publish a bibliography of literature articles supporting safety and effectiveness information because of the voluminous number of literature articles published for all of the devices included in this reclassification. FDA is not using data from PMA's to support reclassification of these devices and will not disclose protected information in approved PMA's.

FDA disagrees that the guidance document does not address effectiveness issues. Some examples of recommended testing to address effectiveness included in the document are cleaning effectiveness, compatibility testing, and clinical testing to confirm results of preclinical testing.

The same comment suggested that the agency clarify the classification status of contact lens cases.

At the January 26, 1995, meeting of the Ophthalmic Devices Panel, members unanimously recommended that contact lens cases be classified in class II. In the near future, FDA intends to publish a proposal in the **Federal Register** classifying contact lens cases in class II and including them under § 886.5928.

In accordance with sections 520(l)(5)(B) and 513(a) of the act, FDA is reclassifying rigid gas permeable contact lens solution (§ 886.5918); soft (hydrophilic) contact lens solution (§ 886.5928); and the contact lens heat disinfection unit (§ 886.5933) from class III (premarket approval) to class II (special controls). FDA does not believe

that these devices can be classified into class I because general controls by themselves are insufficient to provide reasonable assurance of the safety and effectiveness of the devices. However, FDA does believe that these devices can be classified into class II because sufficient information exists to establish special controls to provide reasonable assurance of their safety and effectiveness. The revised guidance document entitled, "Guidance for Industry; Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products," the availability of which is being announced elsewhere in this issue of the **Federal Register**, is the special control that FDA believes is necessary to provide such assurance.

## III. Transitional Phase for Pending PMA's for Contact Lens Care Products

Below, FDA discusses how it will deal with the pending original and supplemental PMA's involving contact lens care products currently filed with the agency. As of today's date, all pending PMA applications will need to be examined to identify: (1) Those that are no longer subject to PMA review and can be converted to 510(k)'s or withdrawn and resubmitted to FDA by the sponsor to be evaluated through the 510(k) process; and (2) those that can be withdrawn by the sponsor and are not required to be resubmitted and evaluated as a 510(k) prior to implementing the request. FDA will make all final decisions on converted PMA's based on 510(k) regulatory requirements as elaborated in the document entitled, "Guidance for Industry; Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products."

To ensure expeditious conversions, sponsors should review their pending PMA's and advise the agency as to what administrative action the sponsor believes needs to be taken regarding their pending applications affected by the reclassification. As of the effective date of this final rule, FDA will suspend the review of each pending original and supplemental PMA affected in whole or in part by this reclassification until the respective sponsor amends its application, setting forth the status of the device and the administrative action requested.

To convert a pending original or supplemental PMA to a 510(k), the sponsor should submit an amendment to the applicable PMA or supplemental PMA requesting that it be converted in total to a 510(k). The amendment should: (1) Request that the application be converted in total to a 510(k), (2) include a claim of substantial

equivalence to a previously approved contact lens care product (a product included in this reclassification), and (3) provide all 510(k) content requirements not submitted in the pending PMA or supplemental PMA, thus making the application as complete as possible when converted to a 510(k). Because preclinical and clinical data formerly required in a PMA may be necessary to support a substantial equivalence determination, a sponsor may provide references to applicable preclinical and clinical data contained in the sponsor's approved PMA(s) rather than duplicating the same data in a 510(k). When referencing data previously reviewed by the agency, the sponsor should clearly identify the relevant PMA number(s) and section(s) of the PMA or supplemental PMA. Pending original or supplemental PMA's converted to 510(k)'s will retain their position in the review queue (if they are complete), and the review process will continue without further delay.

To withdraw and resubmit a pending original or supplemental PMA, the sponsor should first submit an amendment to the applicable PMA requesting that it be withdrawn. The sponsor should then determine whether the request should be resubmitted and evaluated through the 510(k) process or be implemented without the need for submission of a 510(k). All original PMA's should be resubmitted as 510(k)'s. However, not all supplemental PMA requests require the submission of a 510(k). For example, unlike PMA's, under the 510(k) regulations, sponsors are not required to submit a 510(k) for an additional manufacturing site for a cleared device. To determine whether a 510(k) is required, the sponsor should consult the 510(k) procedures (21 CFR part 807) and the "Guidance for Industry Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products." Any required 510(k) submission should follow the content and format requirements for 510(k)'s. However, sponsors may provide references to preclinical and clinical data in the pending PMA or in approved PMA's rather than duplicating the data in a 510(k). When referencing data previously reviewed by the agency, the sponsor should clearly identify the relevant PMA number(s) and sections of the PMA or supplemental PMA. The sponsor should include in the 510(k) a claim of substantial equivalence to an applicable legally marketed contact lens care product (a product included in this reclassification) and a summary of safety and effectiveness information or a statement that the sponsor will make the

safety and effectiveness information available to interested persons upon request.

To withdraw a pending supplemental PMA that contains a request that can be implemented without the need for submission of a 510(k), the sponsor should submit an amendment to the applicable supplemental PMA requesting that it be withdrawn.

In addition, sponsors should determine if there is information in the pending PMA that would not be needed when resubmitted as a 510(k) application. In making this determination, FDA cautions sponsors to review the regulations pertaining to releasability of information in PMA's and 510(k) submissions since different disclosure rules apply to PMA's and 510(k) submissions. For this reason, a manufacturer may choose not to have a pending PMA converted to a 510(k) submission, but instead choose to withdraw the pending application, purge it of unnecessary information that the sponsor might not want released, and resubmit the relevant data in a new 510(k) submission.

If a sponsor fails to submit an amendment as outlined above within 180 days of the effective date of reclassification, FDA will consider the pending PMA or PMA supplement to be voluntarily withdrawn. In such cases, the agency will notify the sponsor by letter of the withdrawal. All amendments to pending PMA's shall include the PMA or PMA supplement number and shall be addressed to the PMA Document Mail Center (HFZ-401), Center for Devices and Radiological Health, Office of Device Evaluation, 9200 Corporate Blvd., Rockville, MD 20850. Additional questions regarding administrative procedures resulting from this reclassification should be directed to the PMA Staff (Kathy Poneleit, 301-594-2186), or to the Division of Ophthalmic Devices, Vitreoretinal and Extraocular Devices Branch (James F. Saviola, or Muriel Gelles, 301-594-1744.)

#### IV. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### V. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601-612). Executive Order 12866

directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive Order. In addition, the final rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this final rule would reduce the regulatory burdens for all manufacturers of contact lens care products covered by this rule, the Commissioner of Food and Drugs certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

Accordingly, FDA is amending the regulations in §§ 886.5918, 886.5928, and 886.5933 as set forth below.

#### List of Subjects in 21 CFR Part 886

Medical devices, Ophthalmic goods and services.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 886 is amended as follows:

#### PART 886—OPHTHALMIC DEVICES

1. The authority citation for 21 CFR part 886 continues to read as follows:

**Authority:** Secs. 501, 510, 513, 515, 520, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351, 360, 360c, 360e, 360j, 371).

2. Section 886.5918 is revised to read as follows:

#### § 886.5918 Rigid gas permeable contact lens care products.

(a) *Identification.* A rigid gas permeable contact lens care product is a device intended for use in the cleaning, conditioning, rinsing, lubricating/rewetting, or storing of a rigid gas permeable contact lens. This includes all solutions and tablets used together with rigid gas permeable contact lenses.

(b) *Classification.* Class II (Special Controls) Guidance Document:

"Guidance for Industry Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products."

3. Section 886.5928 is revised to read as follows:

**§ 886.5928 Soft (hydrophilic) contact lens care products.**

(a) *Identification.* A soft (hydrophilic) contact lens care product is a device intended for use in the cleaning, rinsing, disinfecting, lubricating/rewetting, or storing of a soft (hydrophilic) contact lens. This includes all solutions and tablets used together with soft (hydrophilic) contact lenses and heat disinfecting units intended to disinfect a soft (hydrophilic) contact lens by means of heat.

(b) *Classification.* Class II (Special Controls) Guidance Document: "Guidance for Industry Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products."

**§ 886.5933 [Removed and Reserved]**

4. Section 886.5933 *Contact lens heat disinfection unit* is removed and reserved.

Dated: May 28, 1997.

**Joseph A. Levitt,**

*Deputy Director for Regulations Policy, Center for Devices and Radiological Health.*

[FR Doc. 97-14751 Filed 6-5-97; 8:45 am]

BILLING CODE 4160-01-F

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## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 100

[CGD01-97-009]

RIN 2115-AE46

#### Special Local Regulation: Fireworks Displays Within the First Coast Guard District

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

**SUMMARY:** The Coast Guard is revising the special local regulation for annual fireworks displays in the First Coast Guard District. The final rule includes additional fireworks displays and arranges the events listed in Table 1 by event date. This regulation is necessary to control vessel traffic within the immediate vicinity of the fireworks launch sites and to ensure the safety of life and property during each event.

**DATE:** Effective June 23, 1997.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Commander James B.

Donovan, Office of Search and Rescue, First Coast Guard District, (617) 223-8268.

#### SUPPLEMENTARY INFORMATION:

##### Regulatory History

A notice of proposed rulemaking (NPRM) was published on April 21, 1997, (62 FR 19240) in the **Federal Register** proposing to update the permanent special local regulation for the annually recurring fireworks displays in the First Coast Guard District. The Coast Guard received no comments on the proposed rulemaking. A public hearing was not requested and one was not held.

##### Background and Purpose

Each year, organizations in the First District sponsor fireworks displays in the same general location during the same general time period. The Coast Guard is updating the special local regulation at 33 CFR 100.114 which provides a regulated area surrounding the launch platform used during each fireworks display. Table 1 of the regulation provides dates and locations for the annual fireworks events. This final rule updates Table 1 by adding and deleting several events. Table 1 has also been revised to list the events in chronological order to ease administration by the Coast Guard and provide better notice to the public.

Each event listed in Table 1 will use a barge or on-shore site as the fireworks launch platform. The special local regulation controls vessel movement within a 500 yard radius around the launch platform to ensure the safety of persons and property at these events. In the event the fireworks are launched from shore, the regulated area only includes navigable waters that fall within a 500 yard radius of the launch site. Coast Guard personnel on-scene may allow persons within the 500 yard radius should conditions permit. The Coast Guard publishes notices in the **Federal Register** each year which provide the exact dates and times for these events.

Good cause exists for this rule to become effective in less than 30 days. Due to the need to publish notice in the **Federal Register** of the exact dates and times of each event and the necessity to have the regulation in effect for events celebrating the Fourth of July, this final rule is being made effective in less than 30 days after publication. Any delay encountered in making this rule effective would be contrary to the public interest as the rule is needed to ensure the safety of the boating public during these events.

#### Discussion of Changes

No comments were received. The Coast Guard has deleted the Museum of Science Memorial Day Fireworks and the Yampol Family Fireworks from Table 1. Both events are no longer held. Also, the Macys' July 4th Fireworks Display has been deleted from Table 1 since it is not an appropriate event for inclusion in section 100.114.

#### Regulatory Evaluation

This proposal is not a significant regulatory action under Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). Due to the short duration of each fireworks display, the advance notice provided to the marine community, and the small size of each regulated area, the Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation, under paragraph 10e of the regulatory policies and procedures of DOT, is unnecessary.

#### Small Entities

The Coast Guard has considered the economic impact of this rule on small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) For the reasons discussed in the Regulatory Evaluation, the Coast Guard has determined that this rule will have no significant economic impact on small entities. If, however, you think that your business or organization qualifies as a small entity and that this rule will have a significant economic impact on your business or organization, please submit a comment explaining why you think it qualifies and in what way and to what degree this rule will economically affect it.

#### Collection of Information

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

#### Federalism

The Coast Guard has analyzed this proposal under the principles and criteria contained in Executive Order 12612 and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Environment**

The Coast Guard has considered the environmental impacts of this proposal and concluded that, under paragraph 2.B.2.e.34(h) of COMDTINST 16475.1B, (as revised by 61 FR 13564, March 27, 1996) this proposal is a special local regulation issued in conjunction with annual regattas or marine parades and is categorically excluded from further environmental documentation.

**List of Subjects in 33 CFR Part 100**

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

**Final Regulation**

For reasons set out in the preamble, the Coast Guard amends 33 CFR Part 100 as follows:

**PART 100—[AMENDED]**

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

**Authority:** 33 USC 1233 through 1236; 49 CFR 1.46; 33 CFR 100.35.

2. In section 100.114 table 1 is revised to read as follows:

**§ 100.114 First Coast Guard District Fireworks.**

\* \* \* \* \*

*Table 1—Fireworks Displays*

## December

1. First Night Fireworks  
Sponsor: First Night Inc.  
Date: December 31  
Location: Boston Inner Harbor, Boston, MA
2. Night Martha's Vineyard  
Sponsor: Town of Martha's Vineyard Chamber of Commerce  
Date: December 31  
Location: Vineyard Haven Harbor, Martha's Vineyard, MA
3. First Night Mystic  
Sponsor: Mystic Community Center  
Date: December 31  
Location: Mystic River, Mystic, CT
4. City of New Bedford First Night  
Sponsor: City of New Bedford  
Date: December 31  
Location: New Bedford Harbor, New Bedford, MA

## May

1. Hull Memorial Day Festival  
Sponsor: Town of Hull  
Date: Memorial Day week or weekend  
Location: Nantasket Beach, Hull, MA
2. Ellis Island Medals of Honor Ceremony Fireworks Display  
Sponsor: National Ethnic Coalition of Organizations  
Date: Third Sunday of May  
Location: Upper Bay New York Harbor, New York, NY

## June

1. Brick Founders Day Fireworks  
Sponsor: Brick Township Chamber of Commerce  
Date: First weekend in June  
Location: Metedeconk River, Windward Beach, Brick Township, NJ
2. Barnum Festival Fireworks  
Sponsor: The Barnum Foundation  
Date: A date during the last week of June or first week of July  
Location: Location Seaside Park—Bridgeport Harbor, Bridgeport, CT

## July

1. Boston Harborfest Fireworks  
Sponsor: Harborfest Committee  
Date: A date during late June/early July  
Location: Boston Inner Harbor, Boston, MA
2. American Legion Post 83 Fireworks  
Sponsor: Town of Branford American Legion Post 83  
Date: A date during late June/early July  
Location: Branford Point, Branford, CT
3. Devon Yacht Club Fireworks  
Sponsor: Devon Yacht Club, Amagansett, NY  
Date: A date within the first week of July  
Location: Devon Yacht Club, Amagansett, NY
4. Hempstead Fireworks  
Sponsor: Town of Hempstead, NY  
Date: A date within the first week of July  
Location: Point Lookout, Hempstead, NY
5. Schooner Days Fireworks  
Sponsor: Town of Rockland Chamber of Commerce  
Date: A date within the first two weeks of July  
Location: Rockland Harbor, Rockland, ME
6. Summer Music Fireworks  
Sponsor: Summer Music, Inc.  
Date: On or about July 3  
Location: Niantic River, Harkness Park, Waterford, CT
7. Bangor Fireworks  
Sponsor: Bangor 4th of July Corporation  
Date: On or about July 4  
Location: Bangor/Brewer waterfront, ME
8. Bar Harbor Fireworks  
Sponsor: Bar Harbor Chamber of Commerce  
Date: On or about July 4  
Location: Bar Harbor/Bar Island, ME
9. Stewarts 4th of July Fireworks Display  
Sponsor: W. P. Stewart  
Date: On or about July 4  
Location: Somes Sound, Northeast Harbor, ME
10. Walsh's Fireworks  
Sponsor: Mr. Patrick Walsh  
Date: On or about July 4

## Location: Union River Bay, ME

11. Colchester Bay, VT  
Sponsor: Town of Colchester Parks and Recreation Dept.  
Date: On or about July 4  
Location: Malletts Bay, Lake Champlain, Colchester, VT
12. Town of Barnstable Fireworks  
Sponsor: Town of Barnstable  
Date: On or about July 4  
Location: Dunbar Point/Kalmus Beach, Barnstable, MA
13. Fourth of July Celebration  
Sponsor: Farms-Pride 4th of July Committee, Inc.  
Date: On or about July 4  
Location: West Beach, Manchester Bay, Beverly Farms, MA
14. Edgartown Fireworks  
Sponsor: Edgartown Firefighters Association  
Date: On or about July 4  
Location: Edgartown Harbor, Edgartown, MA
15. Falmouth Fireworks  
Sponsor: Falmouth Fireworks Committee  
Date: On or about July 4  
Location: Falmouth Harbor, .25 nm east of buoy #16, Falmouth, MA
16. Gloucester Fireworks  
Sponsor: Gloucester Chamber of Commerce  
Date: On or about July 4  
Location: Gloucester Harbor, Gloucester, MA
17. Marion Fireworks  
Sponsor: Town of Marion Fireworks Committee  
Date: On or about July 4  
Location: Silver Shell Beach, Marion, MA
18. City of New Bedford Fireworks  
Sponsor: City of New Bedford  
Date: On or about July 4  
Location: New Bedford Harbor, New Bedford, MA
19. Onset Fireworks  
Sponsor: Prudential Commerce Onset Fire District  
Date: On or about July 4  
Location: Onset Harbor, Onset, MA
20. Plymouth Fireworks Display  
Sponsor: July Four Plymouth Inc.  
Date: On or about July 4  
Location: Plymouth Harbor, Plymouth, MA
21. Wellfleet Fireworks  
Sponsor: Wellfleet Fireworks Committee  
Date: On or about July 4  
Location: Indian Neck Jetty, Wellfleet, MA
22. Weymouth 4th of July Fireworks  
Sponsor: Town of Weymouth Harbormaster  
Date: On or about July 4  
Location: Weymouth Fore River, Weymouth, MA
23. Yarmouth-Dennis Fireworks

- Sponsor: Yarmouth-Dennis Chamber of Commerce  
Date: On or about July 4  
Location: Nantucket Sound, east of channel entrance to Bass River, Yarmouth, MA
24. Bristol 4th of July Fireworks  
Sponsor: Bristol Fourth of July Committee  
Date: On or about July 4  
Location: Bristol Harbor, Bristol, RI
25. Oyster Harbor Club Fourth of July Festival  
Sponsor: Oyster Harbor Club, Inc.  
Date: On or about July 4  
Location: Tim's Cove, North Bay, Osterville, RI
26. Shooters Independence Day  
Sponsor: Shooters Waterfront Cafe USA  
Date: On or about July 4  
Location: Providence River off India Point Park, Providence, RI
27. Tiverton Waterfront Festival  
Sponsor: Tiverton Waterfront Festival Committee  
Date: On or about July 4  
Location: Grinnel's Beach, Sakonnet River, Tiverton, RI
28. Fairfield Aerial Fireworks  
Sponsor: Fairfield Park Commission  
Date: On or about July 4  
Location: Jennings Beach, Long Island Sound, Fairfield, CT
29. Subfest Fireworks  
Sponsor: U.S. Naval Submarine Base  
Date: On or about July 4  
Location: Thames River, Groton, CT
30. Middletown Fireworks  
Sponsor: City of Middletown  
Date: On or about July 4  
Location: Connecticut River, Middletown, CT
31. Hartford Riverfest  
Sponsor: July 4th Riverfest, Inc.  
Date: On or about July 4  
Location: Connecticut River, Hartford, CT
32. City of Norwalk Fireworks  
Sponsor: Norwalk Recreation and Parks Department  
Date: On or about July 4  
Location: Calf Pasture Beach, Long Island Sound, Norwalk, CT
33. Norwich American Wharf Fireworks  
Sponsor: American Wharf Marina  
Date: On or about July 4  
Location: Norwich Harbor, Norwich, CT
34. Old Lyme Fireworks  
Sponsor: Mr. James R. Rice  
Date: On or about July 4  
Location: South View Beach, Long Island Sound, Old Lyme, CT
35. Stratford Fireworks  
Sponsor: Town of Stratford  
Date: On or about July 4  
Location: Short Beach, Stratford, CT
36. Westport P.A.L. Fireworks  
Sponsor: Westport Police Athletic League  
Date: On or about July 4  
Location: Compo Beach, Westport, CT
37. Bayville Crescent Club Fireworks  
Sponsor: Bayville Crescent Club, Bayville, NY  
Date: On or about July 4  
Location: Cooper Bluff, Cove Neck, NY
38. Montauk Independence Day  
Sponsor: Montauk Chamber of Commerce  
Date: On or about July 4  
Location: Montauk Town Beach, Montauk, NY
39. Dolan Family Fireworks  
Sponsor: Mr. Charles F. Dolan  
Date: On or about July 4  
Location: Cove Point, Oyster Bay, NY
40. Jones Beach State Park Fireworks  
Sponsor: Long Island State Park Administration Headquarters  
Date: On or about July 4  
Location: Fishing Pier, Jones Beach State Park, Wantagh, NY
41. Staten Island's 4th of July  
Sponsor: Borough of Staten Island  
Date: On or about July 4  
Location: Raritan Bay, vicinity of federal anchorages 44 and 45, Ward Point Bend, NY/NJ
42. Fireworks on the Navesink  
Sponsor: Red Bank Fireworks Committee  
Date: On or about July 4  
Location: Navesink River, 4 nm WSW Oceanic Bridge, Red Bank, NJ
43. Brick Summerfest Fireworks  
Sponsor: Brick Township Chamber of Commerce  
Date: On or about July 4  
Location: Metedeconk River, Windward Beach, Brick Township, NJ
44. Thames River Fireworks  
Sponsor: Town of Groton  
Date: Weekend following July 4  
Location: Thames River, off Electric Boat, Groton, CT
45. Stamford Fireworks  
Sponsor: City of Stamford  
Date: A date within first two weeks of July  
Location: Westcott Cove, Stamford, CT
46. Town of Babylon Fireworks  
Sponsor: Town of Babylon, NY  
Date: A date within the first two weeks of July  
Location: Nezeras Island, Babylon, NY
47. Boys Harbor Fireworks Extravaganza  
Sponsor: Boys Harbor Inc.  
Date: Second or third weekend in July  
Location: Three Mile Harbor, East Hampton, NY
48. Belfast Fireworks  
Sponsor: Belfast Bay Festival Committee  
Date: Third Saturday in July  
Location: Belfast Bay, ME
- August
1. National Night Out Against Crime  
Sponsor: 100th Precinct Community Council  
Date: First Tuesday of August  
Location: Rockaway Park, Rockaway Beach, NY
2. Summer Music Fireworks  
Sponsor: Summer Music Inc.  
Date: On or about August 3  
Location: Niantic River, Harkness Park, Waterford, CT
3. Hartford Riverfront Regatta  
Sponsor: Riverfront Recapture Inc.  
Date: First or second weekend in August  
Location: Connecticut River, Hartford, CT
4. Fall River Celebrates America Fireworks  
Sponsor: Fall River Chamber of Commerce  
Date: Second Saturday in August  
Location: Taunton River, vicinity of bouy #17, Fall River, MA
5. Summer Music Fireworks  
Sponsor: Summer Music Inc.  
Date: On or about August 23  
Location: Niantic River, Harkness Park, Waterford, CT
6. Oaks Bluff Fireworks  
Sponsor: Oaks Bluff Fireman's Civic Association  
Date: A date during the last two weeks in August  
Location: Oaks Bluff Beach, Oaks Bluff, MA
7. Camden Fireworks Display  
Sponsor: Town of Camden Chamber of Commerce  
Date: Labor Day weekend  
Location: Camden Harbor, Camden, ME
8. Gloucester Fireworks  
Sponsor: Gloucester Chamber of Commerce  
Date: Labor Day holiday weekend  
Location: Gloucester Harbor, Gloucester, MA
9. Salute to Summer  
Sponsor: Naval Education and Training Center  
Date: Friday of weekend preceding Labor Day holiday weekend  
Location: Narragansett Bay, East Passage, off Coasters Harbor Island, Newport, RI
10. Norwich Harbor Day Fireworks  
Sponsor: Harbor Day Committee  
Date: Last Sunday in August  
Location: Norwich Harbor, off American Wharf Marina, Norwich, CT
- September
1. Grand Fiesta Italiana  
Sponsor: Sons of Italy, Port Washington, NY  
Date: First Saturday following Labor Day  
Location: Hempstead Harbor, Hempstead, NY
2. Taste of Italy  
Sponsor: Italian Heritage Committee  
Date: Weekend following Labor Day holiday weekend

Location: Norwich Harbor, off Norwich Marina, Norwich, CT

3. Norwalk Oyster Festival Fireworks  
Sponsor: Norwalk Seaport Association  
Date: A date within the first two weekends of September

Location: Norwalk Harbor, Norwalk, CT  
4. Anniversary Fireworks

Sponsor: Town of Chilmark

Date: On or about 14 September

Location: Menemsha Beach, Chilmark, MA

5. City of Yonkers Fireworks

Sponsor: City of Yonkers

Date: Third Saturday of September

Location: Hudson River, Yonkers, NY

6. City of Yonkers Fireworks

Sponsor: City of Yonkers

Date: A date during the second or third weekend of September

Location: Hudson River

7. Cow Harbor Day Fireworks

Sponsor: Village of Northport Harbor

Date: A date within last two weekends of September

Location: Sand Pit, Northport Harbor, Northport, NY

8. Rensselaer Festival

Sponsor: City of Rensselaer

Date: A date during the second or third weekend in September

Location: Hudson River, Rensselaer, NY

9. Deepavali Festival

Sponsor: Association of Indians in America, Inc.

Date: A day during last week of September or first week of October

Location: East River, Manhattan, NY

\* \* \* \* \*

Dated: May 22, 1997.

**J.L. Linnon,**

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

[FR Doc. 97-14742 Filed 6-5-97; 8:45 am]

BILLING CODE 4910-14-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[AL-044-1 9710a; FRL5829-9]

#### Approval and Promulgation of Implementation Plans: Revisions to Several Chapters and Appendices of the Alabama Department of Environmental Management (ADEM) Administrative Code for the Air Pollution Control Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** On October 30, 1996, the State of Alabama through ADEM submitted a State Implementation Plan

(SIP) revision of the ADEM Administrative Code for the Air Pollution Control Program. Revisions were made to Chapters 335-3-1, -2, -3, -4, -5, -6, -8, -9, -10, -11, -12, -13, -14, -15, -16, -17, and -18, Appendices C, E, and F. The EPA will not be taking action in this document on the revisions made to chapters 335-3-10, -11, -16, -17, and -18 because they are not a part of the federally approved SIP for Alabama.

**DATES:** This action will be effective August 5, 1997 unless adverse or critical comments are received by July 7, 1997. If the effective date is delayed, timely notice will be published in the **Federal Register**.

**ADDRESSES:** Comments may be mailed to Kimberly Bingham at the EPA Region 4 address listed below. Copies of the material submitted by ADEM 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, Atlanta Federal Center, Region 4 Air Planning Branch, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303-3104.  
Alabama Department of Environmental Management, 1751 Congressman W. L. Dickinson Drive, Montgomery, Alabama 36109.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Bingham, Regulatory Planning Section, Air Planning Branch, Air Pesticides and Toxics Management Division, Region 4, Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303. The telephone number is (404)562-9038.

**SUPPLEMENTARY INFORMATION:** On October 30, 1996, the State of Alabama through ADEM submitted numerous changes to their Air Division Administrative Code to be incorporated into their SIP. Many of the revisions were made to make the SIP consistent with the Alabama State law including a more uniform numbering system. The following is a brief summary of the major revisions made to Chapters 335-3-1, -2, -3, -4, -5, -6, -8, -9, -12, -13, and -14, Appendices C, E, and F. There are also numerous minor numbering and wording changes that are not specifically discussed in this notice.

#### Summary of Revisions

##### Chapter 335-3-1—General Provisions

ADEM is revising 335-3-1-.02(gggg) to add perchloroethylene (PERC or

tetrachloroethylene) to the list of compounds excluded from the definition of volatile organic compounds (VOC) on the basis that this compound has been determined to have negligible photochemical reactivity. The EPA published a notice in the **Federal Register** on February 7, 1996, (61 FR 4590), which documents the Agency's decision to add perchloroethylene to this list of excluded compounds.

ADEM revised 335-3-1-.04 to clarify reports the ADEM Director may require.

##### Chapter 335-3-3—Control of Open Burning and Incineration

Rule 335-3-.01(8) was revised to make clear that only wood vegetation, coal, propane, kerosene, and fuel oil or used oil may be used as fuel in salamanders for heating purposes.

##### Chapter 335-3-4—Control of Particulate Emissions

This chapter was revised to change all references to "equivalent opacity" to opacity. The adjective equivalent is not needed when describing visible emission restrictions from sources.

Rule 335-3-4-.01 was amended to delete paragraph (3) which addresses uncombined water. Paragraph (2) requires that sources' opacity standards comply with EPA Reference Method 9 which adequately addresses uncombined water.

##### Chapter 335-3-6—Control of Organic Emissions

Rules 335-3-6-.19 and 335-3-6-.40 were deleted because they address requirements for perc dry cleaning control technique guidelines which are no longer needed because perc was exempted from the list of VOCs.

Rule 335-2-6-.37(13) and Appendix F were amended to incorporate by reference EPA's revised capture efficiency guidance.

##### Chapter 335-3-15—Synthetic Minor Operating Permits

Rule 335-3-15-.04 was amended to better define the application process for stationary sources applying for synthetic minor operating permits. It also states that new stationary sources applying for a permit at a greenfield site will not be able to initiate construction until the permit is issued.

#### Final action

The EPA is approving the aforementioned revisions because they meet the Agency requirements. This action is being published 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 August 5, 1997 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 the proposed rule published with this action. 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 August 5, 1997.

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

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) and 7410(k)(3).

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.

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Under section 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by section 804(2).

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 August 5, 1997. 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).)

## List of Subjects in 40 CFR Part 52

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

Dated: April 7, 1997.

**Michael V. Peyton,**

*Acting Regional Administrator.*

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 B—Alabama

2. Section 52.50 is amended by adding paragraph (c)(70) to read as follows:

#### § 52.50 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

(70) The State of Alabama submitted revisions to the ADEM Administrative Code for the Air Pollution Control Program on October 30, 1996. These revisions involve changes to Chapters 335-3-1, -2, -3, -4, -5, -6, -8, -9, -12, -13, -14, Appendices C, E, and F.

(i) *Incorporation by reference.*  
Chapters 335-3-1-.02(gggg)(23-25); 335-3-1-.04(1-2); 335-3-1-.06(3); 335-3-1-.08; 335-3-1-.09(11); 335-3-1-.11; 335-3-2-.02(c); 335-3-2-.08(3); 335-3-3-.01(8); 335-3-4-.01(1)(a-b), (3); 335-3-4-.04(5); 335-3-4-.07(6-7); 335-3-4-.08(2), (3), (3)(b), (4)(b); 335-3-4-.09(1)(4a-b), (4)(c); 335-3-4-.11(2); 335-3-4-.14(2)(a)2, (2)(b)3; 335-3-4-.15(5-6), (6)(e), (6)(g)1; 335-3-4-.17(4), (7-9); 335-3-5-.01(2), (2)(b), (4); 335-3-5-.02(1-3); 335-3-5-.03(4), (4)(b), (5)(b), (8); 335-3-5-.04(10)(d), (12)(b); 335-3-6-.01(3-6); 335-3-6-.04(4); 335-3-6-.05(3), (4), (5)(a), (5)(f), (6), (7); 335-3-6-.06(3)(a), (3)(a)3, (4-5); 335-3-6-.07(1), (2)(d), (3), (4), (4)(c), (5)(a), (5)(c), (7); 335-3-6-.11(1)(a), (1)(b-c), (2)(a), (2)(b-c), (3), (3)(b-c), (4)(a), (4)(b-d), (5)(a), (5)(b-c), (6)(a), (6)(b-c), (7)(a), (7)(b-c), (8)(a-c), (9)(a)3, (9)(b), (10)(a), (10)(b), (10)(c-d), (11)(a), (11)(b), (11)(c), (11)(d-e); 335-3-6-.12(4), (5), (6), (6)(b)3; 335-3-6-.13(2)(a); 335-3-6-.15(1)(a), (1)(b), (2)(a), (2)(c), (3)(a), (3)(b), (4)(a), (4)(c-d), (5); 335-3-6-.16(1)(e)1, (1)(e)2I, (2)(g)1, (2)(g)3iii, (2)(g)3vii, (3)(a), (6)(a), (7)(a), (7)(c)2(d), (8)(a), (9)(a), (10)(a), (11)(a), (11)(d), (12)(a), (13)(a); 335-3-6-.17(3), (3)2(c-d), (4)(b); 335-3-6-.18(4)(b); 335-3-6-.19; 335-3-6-.20(3)(a), (4)(a), (4)(c), (5)(a)2, (5)(a)3(b), (6); 335-3-6-.21(1)(b), (3-4), (10)(b), (12)(b), (13); 335-3-6-.22(3)(b), (3)(c)1-2, (4); 335-3-6-

.23(4)(a)2, (4)(b)3, (5)(a-b), (8); 335-3-6-.24(1)(a), (2); 335-3-6-.27(4); 335-3-6-.28(3), (4), (5)(a), (5)(f), (6), (7)(c-d); 335-3-6-.29(3)(a), (3)(a)3, 3(e), (4), (5), (6)(c-d); 335-3-6-.30(2)(d), (3), (4), (4)(c), (5)(a), (5)(c-d), (7); 335-3-6-.32(1)(a), (1)(a)7(b-c), (2)(a), (2)(a)2(b-c), (3)(a), (3)(a)2(b-c), (4)(a), (4)(a)3(b-d), (6)(a), (6)(b-c), (7)(a), (7)(b-c), (8)(a), (8)(b-c), (9)(a), (10)(a), (10)(b), (10)(c-d), (11)(a), (11)(b), (11)(c), (11)(d-e), (12)(a), (12)(b-d); 335-3-6-.33(3)(a-b), (4), (5), (6), (6)(b)3; 335-3-6-.34(5)(b-c); 335-3-6-.36(1)(a), (1)(b), (2)(a), (2)(a)4-6, (2)(c), (3)(a), (3)(b), (4)(a), (4)(c-e), (5), (6)(a)1-2, (6)(b); 335-3-6-.37(1)(c)3, (3)(a), (3)(b)1-2, (5)(a), (6)(a), (7)(a), (7)(c), (7)(d), (8)(a), (10)(a), (11)(a), (11)(d), (12)(a), (13)(a), (13)(a)11-16, (13)(a)20-22, (13)(b)1-2, (13)(c)1, (13)(c)3, (13)(c)3(i-iv), (13)(d)4-5; 335-3-6-.39(4)(b); 335-3-6-.40; 335-3-6-.41(3)(a), (4)(a-b), (5)(a)2, (5)(b), (6); 335-3-6-.43(4), (6)(f-g); 335-3-6-.44(4)(a)2-3, (4)(b)3, (5)(a-c), (8); 335-3-6-.45(4)(a), (4)(a)1(I-III), (4)(a)3, (4)(b-c), (4)(d); 335-3-6-.46; 335-3-6-.47(1), (3)(a-c), (4)(d), (5)(a-b), (10)(a)7, (11)(c); 335-3-6-.48(1), (3); 335-3-6-.49(1), (5)(a); 335-3-6-.50(1); 335-3-6-.53(13); 335-3-8-.02(1); 335-3-9-.01(3); 335-3-12-.02(2); 335-3-13-.02(3); 335-3-13.03(3); 335-3-13-.04(3); 335-3-13-.05(3); 335-3-13-.06(3); 335-3-14-.01(1)(b-c), (1)(e), (1)(g), (1)(k), (1)(k)1-5, (6)(a), (6)(b), (6)(b)1, (6)(b)3, (6)(c), (7)(a)2, (7)(c-d); 335-3-14-.02(1)(a), (4)(b-c), (4)(e)1, (4)(e)4, (5)(a-c); 335-3-14-.03(1)(g)1-3, (1)(h)2(V), (2)(a), (2)(a)4(V), (2)(a)6(i-ii), (2)(a)7, (2)(a)7(i-ii), (2)(a)7(I), (2)(a)7(II)(iii), (2)(b-c), (2)(f-g); 335-3-14-.04(2), (2)(a)1(i-iii), (2)(b)1, (2)(c)2(i), (2)(c)4, (2)(c)6(i-ii), (2)(f), (2)(i), (2)(i)1, (2)(m)1, (2)(m)1(i), (2)(n)2, (2)(u)1, (2)(u)4, (2)(w)3, (6)5(b), (8)(a-d), (8)(e-f), (8)(g-h), (8)(h)3, (8)(k), (8)(l), (11)(a), (12)(a)6-8, (12)(c), (13)(a), (15)(c), (15)(f-h), (17)(c), (18)(a), (18)(b)2-3, (18)(c), (18)(d), (19)(a), (19)(c); 335-3-14-.05(2)(c)1(ii), (2)(l), (3), (3)(c), (4)(c), (4)(c)2, (4)(d), (5-6), (6)(c), (7)(a), (9)(c)2, (9)(d), (11), (12)(a), (13)(b)7; 335-3-15-.01(b), (d-f), (h); 335-3-15-.02(3-4), (7)(c), (8)(f), (8)(h)2, (8)(h)4(i), (8)(h)4(iv), (9)(a)4(iv)1-3, (9)(a)4(iv)(V), (9)(a)6(i-ii), (9)(a)7, (9)(a)7(i-ii), (9)(a)7(ii)(I), (9)(a)7(iii), (9)(b-c), (9)(f-g); 335-3-15-.04(1)(a-d), (1)(e), (1)(g-h), (2)(a)3(c), (4)(a-b); and 335-3-15-.05(a) were adopted on October 15, 1996.

(ii) *Other material.* None.

[FR Doc. 97-14851 Filed 6-5-97; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

[AD-FRL-5836-6]

RIN 2060-AE37

### National Emission Standards for Hazardous Air Pollutants Emissions: Group IV Polymers and Resins

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule; extension of compliance.

**SUMMARY:** This action provides a temporary extension of the compliance dates specified in 40 CFR 63.1311(b) and (d) for poly(ethylene terephthalate) (PET) affected sources and announces the reconsideration of the equipment leak provisions contained in 40 CFR 63.1331 as these provisions pertain to PET affected sources. The EPA is providing this temporary extension only as necessary to complete reconsideration and any necessary revision to the rule. The EPA is providing this temporary extension pursuant to Clean Air Act section 301(a)(1).

**DATES:** The direct final rule will be effective July 27, 1997. However, if significant adverse comments on any portion of the direct final rule are received by July 7, 1997 then the EPA will publish a timely withdrawal of the direct final rule, and all public comments received will be addressed in a subsequent final rule. For additional information concerning comments, see the parallel proposal notice found in the Proposed Rules Section of this **Federal Register**.

**ADDRESSES:** *Comments.* Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Number A-92-45 (see docket section below), Room M-1500, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460. The EPA requests that a separate copy also be sent to the contact person listed under **FOR FURTHER INFORMATION CONTACT**. Comments and data may also be submitted electronically by following the instructions provided in the **SUPPLEMENTARY INFORMATION** section. No Confidential Business Information (CBI) should be submitted through electronic mail.

*Docket.* The official record for this rulemaking has been established under docket number A-92-45 (including comments and data submitted electronically as described below). A

public version of this record, including printed, paper versions of electronic comments and data, which does not include any information claimed as CBI, is available for inspection between 8 a.m. and 4 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in the **ADDRESSES** section. Alternatively, a docket index, as well as individual items contained within the docket, may be obtained by calling (202) 260-7548 or (202) 260-7549. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Rosensteel, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5608.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Filing

Electronic comments and data can be sent directly to EPA at: a-and-r-docket@epamail.epa.gov. Electronic comments and data must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on diskette in WordPerfect 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number A-92-45. Electronic comments may be filed online at many Federal Depository Libraries.

##### Electronic Availability

This document is available in docket number A-92-45 or by request from the EPA's Air and Radiation Docket and Information Center (see **ADDRESSES**), and is available for downloading from the Technology Transfer Network (TTN), the EPA's electronic bulletin board system. The TTN provides information and technology exchange in various areas of emissions control. The service is free, except for the cost of a telephone call. Dial (919) 541-5742 for up to a 14,000 baud per second modem. For further information, contact the TTN HELP line at (919) 541-5348, from 1:00 p.m. to 5:00 p.m., Monday through Friday, or access the TTN web site at: <http://ttnwww.rtpnc.epa.gov>.

##### Regulated entities

Regulated categories and entities include:

Category	Examples of regulated entities
Industry .....	Facilities that produce PET.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities regulated by the NESHAP addressed in this direct final rule. If you have questions regarding the applicability of the NESHAP addressed in this direct final rule to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

The information presented in this preamble is organized as follows:

- I. Background and Rationale
- II. Authority for Temporary Extension of the Compliance Date and Reconsideration
- III. Impacts
- IV. Administrative Requirements

### **I. Background and Rationale**

On September 12, 1996, the EPA promulgated 40 CFR part 63, subpart JJJ—Group IV Polymers and Resins NESHAP (61 FR 48208). 40 CFR 63.1331 establishes standards for equipment leaks based on the equipment leaks provisions from the Hazardous Organic NESHAP, 40 CFR part 63, subpart H. The final rule required existing sources to comply with 40 CFR 63.1331 beginning March 12, 1997 (see 40 CFR 63.1311(d)). On January 14, 1997, EPA extended the compliance date for 40 CFR 63.1331 from March 12, 1997 to July 31, 1997.

A petition has been submitted to the EPA by two PET manufacturers requesting reconsideration of the technical basis for estimates of emissions, emission reductions, and costs for equipment leaks emission control at PET affected sources. The petition summarizes new information claimed by the petitioners to “confirm the petitioners’ comments made during the public comment period questioning the validity of EPA’s predictions of the costs and cost-effectiveness of the leak detection and repair program.” This new information, which the EPA did not have prior to promulgation of the final rule, includes data related to emissions and costs and has led the EPA to accept the petitioner’s request to reconsider the equipment leak provisions of the rule applicable to PET affected sources. A second petition was subsequently filed by a third PET manufacturer requesting the same relief. For these reasons, the EPA is providing a temporary extension of the compliance date associated with the provisions of 40 CFR 63.1331 that regulate equipment leaks for PET affected sources until such time as the EPA is able to fully evaluate the petition for reconsideration and take any curative regulatory action necessary. This temporary extension applies to affected sources in the following

regulated subcategories: (1) PET using a batch dimethyl terephthalate process; (2) PET using a continuous dimethyl terephthalate process; (3) PET using a batch terephthalic acid process; and (4) PET using a continuous terephthalic acid process. It does not affect any other provisions of the rule or any other source categories or subcategories.

By this action the EPA is providing, pursuant to Clean Air Act section 301(a)(1), a temporary extension of the compliance dates specified in 40 CFR 63.1311(b) and (d), only as necessary to complete reconsideration and potential revision of the rule. The EPA intends to complete its reconsideration of the rule and, following the notice and comment procedures of Clean Air Act section 307(d), take appropriate action as expeditiously as practical. The EPA does not believe this temporary extension will, as a practical matter, impact the overall effectiveness of the rule. The EPA will seek to ensure that the affected parties are not unduly prejudiced by the EPA’s reconsideration. The compliance date will only be extended until the effective date of the EPA’s final action following reconsideration of the rule. In no event will the extension last beyond September 12, 1999 which is the latest compliance date permitted by section 112 of the Clean Air Act (in the absence of a one year extension).

### **II. Authority for Temporary Extension of the Compliance Date and Reconsideration**

The temporary extension of the compliance dates specified in 40 CFR 63.1311 (b) and (d) for PET affected sources is being undertaken pursuant to Clean Air Act section 301(a)(1). Reconsideration is being undertaken pursuant to Clean Air Act section 307(d)(7)(B). Reconsideration is appropriate if the grounds for an objection arose after the period for public comment and if the objection is of central relevance to the outcome of the rule.

The grounds for reconsideration of this rule arose after the public comment period. The emissions and cost data which serve as the basis for the summary of data provided by the petitioners became available after the close of the comment period on the rule. Therefore, the EPA is temporarily extending the compliance date specified in 40 CFR 63.1311 (b) and (d) for PET affected sources in order to allow time to reconsider the provisions of 40 CFR 63.1331 as these provisions pertain to PET affected sources.

### **III. Impacts**

The extension on the compliance date for equipment leaks at PET affected sources will not affect the eventual annual estimated emissions reduction or the control cost for the rule.

### **IV. Administrative Requirements**

#### *A. Paperwork Reduction Act*

For the Group IV Polymers and Resins NESHAP, the information collection requirements were submitted to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*. The OMB approved the information collection requirements and assigned OMB control number 2060-0351. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA’s regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15. The EPA has amended 40 CFR part 9, section 9.1, to indicate the information collection requirements contained in the Group IV Polymers and Resins NESHAP.

This action has no impact on the information collection burden estimates made previously. Therefore, the ICR has not been revised.

#### *B. Executive Order 12866 Review*

Under Executive Order 12866, the EPA must determine whether the regulatory action is “significant” and therefore, subject to OMB review and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to lead to 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 in State, local, or tribal governments or communities;

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

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

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

The direct final rule will provide a temporary extension of the compliance dates specified in 40 CFR 63.1311 (b) and (d) for PET affected sources. The direct final rule does not add any additional control requirements.

Therefore, this direct final rule was classified "non-significant" under Executive Order 12866 and was not required to be reviewed by OMB.

#### C. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant impact on a substantial number of small entities because the temporary compliance extension would not impose any economic burden on any regulated entities.

#### D. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under section 205, the EPA must select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that this direct final rule does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

#### E. Submission to Congress and the General Accounting Office

Under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, the EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of this direct final rule in the **Federal Register**. This is not a "major rule" as defined by Subtitle E.

#### List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous

substances, Reporting and recordkeeping requirements.

Dated: May 30, 1997.

**Carol M. Browner,**  
Administrator.

For the reasons set out in the preamble, part 63 of Chapter I of title 40 of the Code of Federal Regulations is amended as follows:

#### PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

1. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 7401 et. seq.

#### Subpart JJJ—National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins.

2. Section 63.1311 is amended by revising paragraphs (b) and (d) introductory text and by adding paragraph (d)(6) to read as follows:

#### § 63.1311 Compliance schedule and relationship to existing applicable rules.

\* \* \* \* \*

(b) New affected sources that commence construction or reconstruction after March 29, 1995 shall be in compliance with this subpart upon initial start-up or September 12, 1996, whichever is later, as provided in § 63.6(b), except that new affected sources whose primary product, as determined using the procedures specified in § 63.1310(f), is PET shall be in compliance with § 63.1331 upon initial start-up or September 12, 1999, whichever is later.

\* \* \* \* \*

(d) Except as provided for in paragraphs (d)(1) through (d)(6) of this section, existing affected sources shall be in compliance with § 63.1331 no later than July 31, 1997 unless a request for a compliance extension is granted pursuant to Section 112(i)(3)(B) of the Act, as discussed in § 63.182(a)(6).

\* \* \* \* \*

(6) Notwithstanding paragraphs (d)(1) through (d)(4) of this section, existing affected sources whose primary product, as determined using the procedures specified in § 63.1310(f), is PET shall be in compliance with § 63.1331 no later than September 12, 1999.

\* \* \* \* \*

[FR Doc. 97-14860 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 63

#### Approval of Section 112(I) Program of Delegation; Indiana

[IN74-2; FRL5833-3]

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule; removal.

**SUMMARY:** On April 1, 1997 (62 FR 15404), the Environmental Protection Agency (EPA) approved a delegation of the Federal air toxics program contained within title 40 of the Code of Federal Regulations parts 61 and 63 to the Indiana Department of Environmental Management (IDEM) through a direct final rule procedure. The USEPA is removing this final rule due to the adverse comment received on this action. In a subsequent final rule EPA will summarize and respond to the comments received and announce final rulemaking action on this requested program delegation.

**DATES:** The direct final rule published at 62 FR 15404 is removed effective June 6, 1997.

**ADDRESSES:** Copies of the documents relevant to this action are available for public inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 5, Regulation Development Branch, 77 West Jackson Boulevard, Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:** Sam Portanova, Permits and Grants Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. Telephone: (312) 886-3189.

#### List of Subjects in 40 CFR Part 63

Environmental protection, Administration practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations.

Dated: June 20, 1997.

**Gail Ginsberg,**

Acting Regional Administrator.

[FR Doc. 97-14580 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION  
AGENCY**
**40 CFR Part 180**

[OPP-300495; FRL-5719-3]

RIN 2070-AB78

**Bifenthrin; Pesticide Tolerances for  
Emergency Exemptions**
**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes time-limited tolerances for residues of the pesticide bifenthrin in or on the raw agricultural commodity crop group, cucurbits (Crop Group 9 - cucumbers, melons, and squash), and in or on the raw agricultural commodity raspberries, in connection with EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of bifenthrin on cucurbits in California, Arizona, and Texas; and use of bifenthrin on raspberries in Oregon and Washington. This regulation establishes maximum permissible levels for residues of bifenthrin on these commodities pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. These tolerances will expire and are revoked on April 30, 1998 (cucurbits) and September 30, 1997 (raspberries).

**DATES:** This regulation becomes effective June 6, 1997. Objections and requests for hearings must be received by EPA on August 5, 1997.

**ADDRESSES:** Written objections and hearing requests, identified by the docket control number, [OPP-300495], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the document control number, [OPP ], should be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: oppdocket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP-300495]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

**FOR FURTHER INFORMATION CONTACT:** By mail: Andrea Beard, Registration Division (7505W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail: Sixth Floor, Crystal Station #1, 2800 Jefferson Davis Highway, Arlington, VA 22202. (703) 308-8791, e-mail: beard.andrea@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing tolerances for residues of the pesticide ((2-methyl [1,1'-biphenyl]-3-yl) methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl) -2,2-dimethylcyclopropanecarboxylate), also referred to in this document as bifenthrin, in or on cucurbits at 1.0 ppm, and in or on raspberries at 3.0 ppm. These tolerances will expire and be revoked on April 30, 1998 (cucurbits) and September 30, 1997 (raspberries). EPA will publish documents in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

**I. Background and Statutory Authority**

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104-170) was signed into law August 3, 1996. FQPA amends both the FFDCA, 21 U.S.C. 301 et seq., and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 et seq. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance

associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996) (FRL-5572-9).

New section 408(b)(2)(A)(i) allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue...."

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that "emergency conditions exist which require such exemption". This provision was not amended by FQPA. EPA has established regulations governing such emergency exemptions in 40 CFR part 166. Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

Because decisions on section 18-related tolerances must proceed before EPA reaches closure on several policy issues relating to interpretation and implementation of the FQPA, EPA does not intend for its actions on such tolerances to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

**II. Emergency Exemptions for  
Bifenthrin and FFDCA Tolerances**

*Bifenthrin on cucurbits.* From November 1996 - January 1997, requests were received from the California Department of Pesticide Regulation, and the Arizona and Texas Departments of Agriculture, (hereafter referred to as the Applicants) for specific exemptions under FIFRA section 18 for the use of

bifenthrin to control whiteflies in cucurbits. The Applicants state that an emergency situation is present due to this recently introduced pest, its devastating effects on the cucurbit crop, and its resistance to registered alternatives. The Applicants state that this pest can have devastating effects on growers' production and revenue. After having reviewed their submission, EPA concurs that an emergency condition exists. EPA has authorized under FIFRA section 18, the use of bifenthrin on cucurbits for control of whiteflies.

**Bifenthrin on raspberries.** In February 1997, requests were received from the Oregon and Washington Departments of Agriculture (hereafter referred to as the Applicants) for specific exemptions under FIFRA section 18 for the use of bifenthrin to control weevils in raspberries. The Applicants state that an emergency situation is present due to these pests developing resistance to available alternatives, and the low tolerance for weevil contamination in raspberries. Rejection by the processors of contaminated raspberries can lead to significant losses in revenue for the growers. After having reviewed their submission, EPA concurs that an emergency condition exists. EPA has authorized under FIFRA section 18, the use of bifenthrin on raspberries for control of weevils.

As part of its assessment of these emergency exemptions, EPA assessed the potential risks presented by residues of bifenthrin in or on cucurbits and raspberries. In doing so, EPA considered the new safety standard in FFDC section 408(b)(2), and EPA decided that the necessary tolerances under FFDC section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. These tolerances for bifenthrin will permit the marketing of cucurbits and raspberries treated in accordance with the provisions of the section 18 emergency exemptions. Consistent with the need to move quickly on the emergency exemptions, in order to address urgent non-routine situations, and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment under section 408(e) as provided in section 408(l)(6). Although these tolerances will expire and are revoked on April 30, 1998 (cucurbits) and September 30, 1997 (raspberries), under FFDC section 408(l)(5), residues of bifenthrin not in excess of the amount specified in the tolerances remaining in or on cucurbits or raspberries after the dates specified above will not be unlawful, provided the pesticide is applied during the term of, and in

accordance with all the conditions of, the emergency exemptions. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

EPA has not made any decisions about whether bifenthrin meets the requirements for registration under FIFRA section 3 for use on cucurbits and raspberries, or whether permanent tolerances for these uses would be appropriate. This action by EPA does not serve as a basis for registration of bifenthrin by a State for special local needs under FIFRA section 24(c). Nor does this action serve as the basis for any State other than those specified in this document to use this product on cucurbits or raspberries under section 18 of FIFRA without following all provisions of section 18 as identified in 40 CFR 180.166. For additional information regarding the emergency exemptions, contact the Agency's Registration Division at the address provided above.

### III. Risk Assessment and Statutory Findings

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. For many of these studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the "no-observed effect level" or "NOEL").

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a "safety factor") of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the

potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter-term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This hundredfold MOE is based on the same rationale as the hundredfold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

In examining aggregate exposure, FFDC section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, and other non-occupational exposures, such as where residues leach into groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. The TMRC is a "worst case" estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC

exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

#### IV. Aggregate Risk Assessment and Determination of Safety

##### A. Toxicological Profile

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of these actions. EPA has evaluated the available toxicology data and considered its validity, completeness, and reliability as well as the relationship of the result of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by bifenthrin are discussed below.

1. *Acute risk.* The maternal NOEL of 1 mg/kg/day from the oral developmental toxicity study in rats is used for acute dietary risk estimates. The maternal LEL of this study of 2 mg/kg/day was based on tremors from day 7-17 of dosing. This acute dietary endpoint is used to determine acute dietary risks to all population subgroups.

2. *Short- and intermediate-term risk.* The maternal NOEL of 1 mg/kg/day from the oral developmental toxicity study in rats is also used for short- and intermediate-term MOE calculations (as well as acute, discussed in (1) above). The maternal LEL of this study of 2 mg/kg/day was based on tremors from day 7-17 of dosing.

3. *Chronic risk.* Based on available chronic toxicity data, the OPP has established the RfD for bifenthrin at 0.015 mg/kg/day. The RfD is based on a 1-year oral feeding study in dogs with a NOEL of 1.5 mg/kg/day and an uncertainty factor of 100, based on intermittent tremors observed at the LEL of 3 mg/kg/day.

4. *Cancer risk.* OPP classified bifenthrin as a Group C chemical (possible human carcinogen) based upon urinary bladder tumors in mice, but did not recommend assignment of a Q<sub>s</sub>.

##### B. Aggregate Exposure

In examining aggregate exposure, FQPA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures. The primary non-food sources of exposure the Agency looks at include drinking water (whether from groundwater or surface water), and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children.

Tolerances for residues of bifenthrin are currently expressed as 2-methyl [1,1'-biphenyl]-3-yl) methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl) 2,2-dimethylcyclopropanecarboxylate. Tolerances currently exist for residues on hops; strawberries; corn grain, forage and fodder; cotton seed; and livestock commodities of cattle, goats, hogs, horses, sheep, and poultry (see 40 CFR 180.442).

1. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. Drinking water is also considered a component of the acute dietary exposure; however, EPA generally will not include residential or other non-dietary exposure as a component of the acute exposure assessment. Theoretically, it is also possible that a residential, or other non-dietary exposure could be combined with the acute total dietary exposure from food and water. However, the Agency does not believe that aggregating multiple exposure to large amounts of pesticide residues in the residential environment via multiple products and routes for a one day exposure is a reasonably probable event. It is highly unlikely that, in one day, an individual would have multiple high-end exposures to the same pesticide by treating their lawn and garden, treating their house via crack and crevice application, swimming in a pool, and be maximally exposed in the food and water consumed. Additionally, the concept of an acute exposure as a single exposure does not allow for including post-application exposures, in which residues decline over a period of days after application. Therefore, the Agency believes that residential exposures are more appropriately included in the short-term exposure scenario. Thus, the Agency estimates acute risk from dietary exposure only. EPA concluded that

aggregate dietary risk (food plus drinking water) would not exceed levels of concern.

2. *Short- and intermediate-term exposure.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure) plus indoor and outdoor residential exposure. The only use that could result in a residential exposure is the one registered use for bifenthrin as a termiticide. EPA evaluated information contained in a risk characterization document produced by the California Environmental Protection Agency, concerning the use of bifenthrin as a subterranean termiticide. This document characterized the risks to residents of houses treated with bifenthrin, from aggregate residential and acute dietary exposure. Exposure was calculated based on exposure data collected from indoor air monitoring data, with the absorbed dose from residential exposure converted to an oral equivalent, for comparison with the NOEL derived from an oral dosing study. Dietary exposure assessment assumed maximum anticipated residue levels resulting from the registration on cotton, and secondary meat/milk/poultry expected residue levels were extrapolated based on feeding studies. Although the California risk assessment document did not include dietary exposure resulting from bifenthrin use on corn and hops, because of the low tolerance for corn grain (0.05 ppm) and low consumption for hops and strawberries, it is the best scientific judgment of EPA scientists that addition of these commodities would not sufficiently lower the MOEs to levels of concern. Based on this risk characterization document produced by the California Environmental Protection Agency, aggregate short- and intermediate-term risks do not exceed EPA's level of concern.

3. *Chronic exposure.* The Agency identified chronic exposure as appropriate for aggregate risk assessment. The aggregate chronic risk is equal to the sum of the chronic risk from exposure from food + water + residential (indoor + outdoor) uses.

i. *Dietary food exposure.* For purposes of assessing the potential dietary exposure under this tolerance, EPA used tolerance level residues and 100% of crop treated to estimate the TMRC from all established food uses for bifenthrin and the proposed uses on cucurbits and raspberries. There are no cucumber or raspberry animal feed items so no additional dietary livestock dietary burden will result from these section 18

uses. Therefore, existing meat/milk/poultry tolerances are adequate.

ii. *Drinking water exposure.* Based on the available studies used in EPA's assessment of environmental risk, bifenthrin is moderately persistent and not mobile. There is no established Maximum Concentration Level for residues of bifenthrin in drinking water. No health advisory levels for bifenthrin in drinking water have been established. The "Pesticides in Groundwater Database" (EPA 734-12-92-001, September 1992) does not contain any information for bifenthrin.

Because the Agency lacks sufficient water-related exposure data to complete a comprehensive drinking water risk assessment for many pesticides, EPA has commenced and nearly completed a process to identify a reasonable yet conservative bounding figure for the potential contribution of water-related exposure to the aggregate risk posed by a pesticide. In developing the bounding figure, EPA estimated residue levels in water for a number of specific pesticides using various data sources. The Agency then applied the estimated residue levels, in conjunction with appropriate toxicological endpoints (RfD's, cancer potency factors (Q\*s), acute dietary NOEL's) and assumptions about body weight and consumption, to calculate, for each pesticide, the increment of aggregate risk contributed by consumption of contaminated water. While EPA has not yet pinpointed the appropriate bounding figure for consumption of contaminated water, the ranges the Agency is continuing to examine are all well below the level that would cause bifenthrin to exceed the RfD if the tolerances being considered in this document were granted. The Agency has therefore concluded that the potential exposures associated with bifenthrin in water, even at the higher levels the Agency is considering as a conservative upper bound, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the tolerances are granted.

iii. *Non-dietary, non-occupational exposure.* Bifenthrin is not registered for any residential outdoor uses so no exposure from this route is expected. However, bifenthrin is registered for residential use as a termiticide, and the Agency has concluded that a chronic exposure scenario may exist with respect to this use. The Agency estimates that aggregate risk (food plus drinking water plus residential) would not exceed the RfD for bifenthrin.

### *C. Cumulative Exposure to Substances with Common Mechanism of Toxicity*

Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." The Agency believes that "available information" in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether bifenthrin has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative

risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, bifenthrin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, EPA has considered only risks from bifenthrin. Therefore, EPA has not assumed that bifenthrin has a common mechanism of toxicity with other substances.

### *D. Safety Determinations for U.S. Population*

1. *Acute risk.* The acute risk assessment used anticipated residues for all commodities having bifenthrin tolerances, except for cucurbits and raspberries, for which proposed tolerance level residues were used. Additionally, the assessment assumed that 100% of the commodities for which there are tolerances, would contain residues of bifenthrin at these levels. For the most highly exposed population subgroup, children 1 - 6 years old, the high-end exposure results in a dietary (food only) MOE of 40; at the 97th percentile the MOE is 111. For infants <1 year old, the high-end exposure MOE is 50; at the 98th percentile it is 111. For the U.S. population, the high-end exposure MOE is 67; at the 99th percentile it is 111. The major portion of the estimated dietary exposure from bifenthrin is contributed through the tolerances for field corn and secondary residues in animal commodities resulting from feeding of the treated field corn. This assessment used the extremely conservative assumption that 100% of the field corn and livestock commodities would contain residues of bifenthrin. However, available data show that of the total field corn crop grown in the U.S., only about 0.45 percent was actually treated with bifenthrin in 1994-96 (3-year average); it is expected that a similar percentage will be treated for the current year (1997), since this figure has generally remained consistent for the past three years. Therefore, it is unlikely that the actual exposure is considerably less than the conservative estimates given here; if these estimates were refined using actual percent of crop treated figures, EPA scientists believe that the MOEs would be increased to acceptable levels for the high-end consumer.

2. *Short- and intermediate-term risk.* The short- and intermediate-term risk assessment used maximum anticipated residue levels for cotton, extrapolated residue levels for meat/milk/poultry/eggs, and air monitoring data collected from 15 homes in four states. Based on this data, the MOEs for children are

calculated to be 280 for the average consumer and 250 for the high-end consumer. The MOEs for adults are calculated to be 450 for the average consumer and 390 for the high-end consumer. EPA generally has no concern for MOEs greater than 100, and thus these do not exceed EPA's level of concern.

3. *Chronic risk.* Using the conservative TMRC exposure assumptions described above, EPA has concluded that aggregate dietary exposure to bifenthrin will utilize 25% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is Non-Nursing Infants (<1 year old), at 58% of the RfD. This is further discussed below in the section on infants and children. EPA generally has no concern for exposure below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to bifenthrin in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to bifenthrin residues.

#### *E. Determination of Safety for Infants and Children*

In assessing the adequacy of the standard uncertainty factor for bifenthrin, EPA considered data from developmental toxicity studies in the rat and rabbit, and a two-generation reproductive study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from pesticide exposure during prenatal development to one or both parents. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE (usually 100x for combined inter- and

intra-species variability) and not the additional tenfold MOE/uncertainty when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

1. *Developmental toxicity studies—*a. *Rabbit study.* In the rabbit developmental study, there were no developmental effects observed in the fetuses exposed to bifenthrin. The maternal NOEL was 2.67 mg/kg/day based on head and forelimb twitching at the LOEL of 4 mg/kg/day.

b. *Rat study.* In the rat developmental study, the maternal NOEL was 1 mg/kg/day, based on tremors at the LOEL of 2 mg/kg/day. The developmental (pup) NOEL was also 1 mg/kg/day, based upon increased incidence of hydroureter at the LOEL 2 mg/kg/day. There were 5/23 (22%) litters affected (5/141 fetuses since each litter only had one affected fetus) in the 2 mg/kg/day group, compared with zero in the control, 1, and 0.5 mg/kg/day groups. According to recent historical data (1992–1994) for this strain of rat, incidence of distended ureter averaged 11% with a maximum incidence of 90%.

c. *Pre-natal sensitivity.* Since there was not a dose-related finding of hydroureter in the rat developmental study and in the presence of similar incidences in the recent historical control data, the marginal finding of hydroureter in rat fetuses at 2 mg/kg/day (in the presence of maternal toxicity) is not considered a significant developmental finding. Nor does it provide sufficient evidence of a special dietary risk (either acute or chronic) for infants and children which would require an additional safety factor. Based on the above, EPA concludes that reliable data support use of the standard hundredfold MOE/uncertainty factor, and that an additional MOE/uncertainty factor is not needed to protect the safety of infants and children.

2. *Reproductive toxicity study—*a. *Rat study.* In the rat reproduction study, parental toxicity occurred as decreased body weight at 5.0 mg/kg/day with a NOEL of 3.0 mg/kg/day. There were no developmental (pup) or reproductive effects up to 5.0 mg/kg/day (highest dose tested).

b. *Post-natal sensitivity.* Based on the absence of pup toxicity up to dose levels which produced toxicity in the parental animals, there is no evidence of special post-natal sensitivity to infants and children in the rat reproduction study.

3. *Acute risk.* The EPA believes that residential exposures are more appropriately included in the short-term exposure scenario, and thus estimates acute risk from dietary exposure only. EPA concluded that aggregate dietary acute risk (food plus drinking water) would not exceed levels of concern. Acute risk is discussed in detail in Units IV.B.1 and IV.D.1 of this document.

4. *Short- and intermediate-term risk.* The estimated short- and intermediate-term risk do not exceed EPA's levels of concern for children. MOEs for children are calculated to be 280 for the average consumer and 250 for the high-end consumer. This is discussed in greater detail in Units IV.B.2. and IV.D.2. of this document.

5. *Chronic risk.* EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure in drinking water, EPA has concluded that the percentage of the RfD that will be utilized by dietary exposure (including drinking water exposure) to residues of bifenthrin does not exceed 100% for any of the population subgroups. Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to bifenthrin from food will utilize 58% of the RfD for Non-Nursing Infants, the population subgroup with the largest percentage of the RfD occupied. Therefore, taking into account the completeness and reliability of the toxicity data and the conservative exposure assessment, EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to bifenthrin residues.

## **V. Other Considerations**

### *A. Metabolism in Plants and Animals*

The metabolism of bifenthrin in cucurbits, raspberries, and animal commodities is adequately understood for the purposes of these tolerances. The residue of concern is the parent compound only.

### *B. Analytical Enforcement Methodology*

There is a practical analytical method for detecting and measuring levels of bifenthrin in or on food with a limit of detection that allows monitoring of food with residues at or above the levels set in this tolerance (Gas Chromatography with Electron Capture Detection (GC/ECD) analytical method P-2132M, PP10E3921, MRID141658601). EPA has provided information on this method to

FDA. The method is available to anyone who is interested in pesticide residue enforcement from: By mail, Calvin Furlow, Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St. SW., Washington, DC 20460. Office location and telephone number: Crystal Mall #2, Rm. 1128, 1921 Jefferson Davis Hwy., Arlington, VA, 703-305-5805.

#### C. Magnitude of Residues

Residues of bifenthrin are not likely to exceed 1.0 ppm in or on cucurbits, or 3.0 ppm in or on raspberries, as a result of the proposed uses. No animal feed items are associated with either use; therefore, no secondary residues in meat, milk, poultry, and eggs are expected to result.

#### D. Rotational Crop Restrictions

The confined rotational crop data requirements for bifenthrin have been satisfied. The following rotation instructions are required:

a. Leafy vegetables and root crops may be rotated 30 days following the final application of bifenthrin.

b. Crops for which bifenthrin tolerances exist may be rotated at any time.

c. All other crops may be rotated seven months following the final application of bifenthrin. There are no rotational crop considerations associated with raspberries.

#### E. International Residue Limits

There are no Codex, Canadian, or Mexican residue limits for residues of bifenthrin in or on cucurbits or raspberries.

### VI. Conclusion

Therefore, tolerances in connection with the FIFRA section 18 emergency exemptions are established for residues of bifenthrin in or on cucurbits at 1.0 ppm, and raspberries at 3.0 ppm.

### VII. Objections and Hearing Requests

The new FFDC section 408(g) provides essentially the same process for persons to "object" to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use

those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by August 5, 1997, file written objections to any aspect of this regulation (including the automatic revocation provision) and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as Confidential Business Information (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

### VIII. Public Docket

The official record for this rulemaking, as well as the public version, has been established for this rulemaking under docket control number [OPP-300495] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m.,

Monday through Friday, excluding legal holidays. The official rulemaking record is located at the Virginia address in ADDRESSES at the beginning of this document.

Electronic comments can be sent directly to EPA at:  
opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number [OPP-300495]. Electronic comments on this rule may be filed online at many Federal Depository Libraries.

### IX. Regulatory Assessment Requirements

Under Executive Order 12566 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and, since this action does not impose any information collection requirements as defined by the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, it is not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, or contain any unfunded mandates as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), or require prior consultation with state officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), entitled Enhancing the Intergovernmental Partnership, or special considerations as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

Because FFDC section 408(l)(6) permits establishment of this regulation without a notice of proposed rulemaking, the regulatory flexibility analysis requirements of the Regulatory Flexibility Act, 5 U.S.C. 604(a), do not apply. Nonetheless, the Agency has previously assessed whether establishing tolerances or exemptions from tolerance, raising tolerance levels, or expanding exemptions adversely impact small entities and concluded, as a generic matter, that there is no adverse impact. (46 FR 24950, May 4, 1981).

Under 5 U.S.C. 801(a)(1)(A) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Title II of Pub. L. 104-121, 110 Stat. 847), EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**.

This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

Dated: May 22, 1997.

2. By revising § 180.442 to read as follows:

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and record keeping requirements.

**James Jones,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR Chapter I is amended as follows:

**§ 180.442 Bifenthrin; tolerances for residues.**

(a) *General.* Tolerances are established for residues of the pyrethroid bifenthrin, (2-methyl (1,1-biphenyl)-3-yl) methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl) -2,2-dimethylcyclopropanecarboxylate, in or on the following commodities:

**PART 180—[AMENDED]**

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

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

Commodity	Parts per million	Expiration/Revocation Date
Cattle, fat	1.0	11/15/97
Cattle, mbyop	0.10	11/15/97
Cattle, meat	0.5	11/15/97
Corn, fodder	5.0	11/15/97
Corn, forage	2.0	11/15/97
Corn, grain (field, seed, and pop)	0.05	11/15/97
Cottonseed	0.5	11/15/97
Eggs	0.05	11/15/97
Goats, fat	1.0	11/15/97
Goats, mbyop	0.10	11/15/97
Goats, meat	0.5	11/15/97
Hogs, fat	1.0	11/15/97
Hogs, mbyop	0.10	11/15/97
Hogs, meat	0.5	11/15/97
Hops, dried	10.0	11/15/97
Horses, fat	1.0	11/15/97
Horses, mbyop	0.10	11/15/97
Horses, meat	0.5	11/15/97
Milk, fat (reflecting 0.1 ppm in whole milk)	1.0	11/15/97
Poultry, fat	0.05	11/15/97
Poultry, mbyop	0.05	11/15/97
Poultry, meat	0.05	11/15/97
Sheep, fat	1.0	11/15/97
Sheep, mbyop	0.10	11/15/97
Sheep, meat	0.5	11/15/97
Strawberries	3.00	None

(b) *Section 18 emergency exemptions.* Time limited tolerances are established for residues of the insecticide bifenthrin ((2-methyl [1,1'-biphenyl]-3-yl)

methyl-3-(2-chloro-3,3,3-trifluoro-1-propenyl) -2,2-dimethylcyclopropanecarboxylate), in connection with use of the pesticide

under section 18 emergency exemptions granted by EPA. The tolerances will expire and are revoked on the dates specified in the following table.

Commodity	Parts per million	Expiration/Revocation Date
Broccoli	0.1	1/31/98
Cauliflower	0.05	1/31/98
Raspberries	3.0	9/30/97
Vegetables, cucurbits	1.0	4/30/98

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 97-14721 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-F

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR 24**

[DA 97-1152]

**Personal Communications Services; Licenses in C Block (Broadband PCS)**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final Rule; Waiver request.

**SUMMARY:** On June 2, 1997, the Wireless Telecommunications Bureau of the Federal Communications Commission released a Public Notice requesting comment on several requests for waiver of the 7 percent interest rate imposed on C block broadband Personal Communications Services (PCS) installment plan notes. The Public Notice summarizes the requests for waiver and announces that comments are due on or before June 23, 1997, and

that reply comments are due on or before July 8, 1997.

**DATES:** Comments are due on or before June 23, 1997. Reply comments are due on or before July 8, 1997.

**ADDRESSES:** Comments should be filed with the Secretary at 1919 M Street, N.W., Room 222, Washington, D.C. 20554, and a copy should be delivered to: Auctions Division, Wireless Telecommunications Bureau, Room 5322, Federal Communications Commission, Washington, D.C. 20554.

**FOR FURTHER INFORMATION CONTACT:** Sande Taxali or Josh Roland, Wireless Telecommunications Bureau, (202) 418-0660.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Public Notice released on June 2, 1997. The complete Public Notice is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., 20554, and also may be purchased from the Commission's copy contractor, International Transcription Services, (202) 857-3800, 2100 M Street, N.W., Washington, D.C. 20037. The complete Public Notice is also available on the Commission's Internet home page (<http://www.fcc.gov>).

#### Summary of the Public Notice

Comment Requested on 7 Percent Interest Rate; Imposed on C Block Installment Payment Plan Notes

*Comment Due Date:* June 23, 1997.

*Reply Comment Due Date:* July 8, 1997.

The Wireless Telecommunications Bureau ("Bureau") has received several requests for waiver of the Federal Communications Commission's ("Commission") rules imposing a 7 percent interest rate on eligible broadband PCS C block licensees whose licenses were conditionally granted on September 17, 1996, and who elected to utilize the Commission's installment payment plan. See *Omnipoint Corporation, Broadband PCS Block C Installment Plan Interest Rate for Small Business Licensees—Request for Rule Waiver* (December 16, 1996). In addition, the Bureau has received informal requests for waiver of § 24.711(b)(3) filed by the following parties: Alpine PCS, Communications Venture PCS Limited Partnership, Eldorado Communications, L.L.C., Horizon Infotech, Inc., KMTel, L.L.C., Mercury PCS, L.L.C., Miccom Associates, Northern Michigan PCS Consortium, L.L.C., PCSouth, Inc., Savannah Independent PCS Corp.,

SouthEast Telephone, Ltd., Southern Wireless, L.P., Wireless 2000, Inc.

Section 24.711(b)(3) of the Commission's Rules provides that, for small businesses, interest on installment payments "shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted." 47 CFR 24.711(b)(3). For licenses conditionally granted on September 17, 1996, the applicable interest rate is 7 percent. However, due to varying factors used to establish Treasury note obligations, licenses granted after the September 17 date are subject to a 6.5 percent interest rate. Those parties seeking a waiver of § 24.711(b)(3) request a reduction in the interest rate on their installment payment plan notes from 7 percent to 6.5 percent.

Comment is solicited on all aspects of the requests for waiver discussed above. We also seek comment on whether, if the Bureau determines that a waiver of § 24.711(b)(3) is appropriate, such relief should be granted to all similarly situated parties, whether or not they have filed a request for waiver.

Comments should specifically reference this Public Notice (DA 97-1152) and must be filed on or before June 23, 1997. Reply comments may be filed on or before July 8, 1997. Comments should be filed with the Secretary at 1919 M Street, N.W., Room 222, Washington, D.C. 20554, and a copy should be delivered to: Auctions Division, Wireless Telecommunications Bureau, Room 5322, Federal Communications Commission, Washington, D.C. 20554. Copies of waiver requests, comments, oppositions and replies may be obtained from the Commission's duplicating contractor, International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are also available for public inspection during regular business hours in Room 5608, 2025 M Street, N.W., Washington, D.C. 20554. When requesting copies, please refer to DA 97-1152.

Pursuant to the Commission's *ex parte* rules, waiver requests become restricted proceedings upon the filing of formal oppositions. See 47 CFR 1.1202(e)(1) and 1.1208(c)(1)(i)(B). *Ex parte* presentations are prohibited in restricted proceedings until the Commission's final disposition is no longer subject to reconsideration or judicial review.

For further information, contact Sande Taxali or Josh Roland, Wireless Telecommunications Bureau at (202) 418-0660.

Dated: June 2, 1997.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

[FR Doc. 97-14954 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 61

[CC Docket No. 92-135, FCC 97-41]

#### Regulatory Reform for Small and Mid-Size Local Exchange Carriers Subject to Rate-of-Return Regulation

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; petition for reconsideration.

**SUMMARY:** In this Order, the Commission considers petitions for reconsideration and clarification concerning regulatory reform for local exchange carriers subject to rate of return regulations (*Small Telco Reform Order*). In particular, the Order eliminates the two year notice period that local exchange carriers must provide before exiting the incentive plan, clarifies the rules consistent with the *Small Telco Reform Order*, and amends the rules and clarifies several matters raised by the petitioners. The Commission's action is intended to eliminate any ambiguities and inconsistencies in the Commission's rules and the *Small Telco Reform Order*.

**EFFECTIVE DATE:** July 7, 1997.

**FOR FURTHER INFORMATION CONTACT:** Dan Abeyta, (202) 418-1538.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Order on Reconsideration in CC Docket No. 92-135 (FCC 97-41) adopted on February 10, 1997 and released on February 18, 1997. The full text of this Order on Reconsideration is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20037.

The complete text may also be obtained through the World Wide Web, at <http://www.fcc.gov/Bureau/Common/Carrier/Order/fcc9741.wp> or may be purchased from the Commission's copy contractor, International Transcription Services, Inc. (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

#### Regulatory Flexibility Analysis

No significant impact.

**Paperwork Reduction Act**

No significant impact.

**Synopsis of Report and Order**

On February 18, 1997, after reviewing petitions for reconsideration and clarification filed by American Telephone and Telegraph Company, the National Exchange Carriers Association, and the United States Telephone Association (hereinafter, Petitioners), the Commission released an Order on Reconsideration in CC Docket No. 92-135. Petitioners sought reconsideration and clarification of several issues addressed in the *Small Telco Reform Order*. Petitioners (1) request that the Commission reconsider reducing the two year notice period that LECs must provide before exiting the incentive plan; (2) argue that the prohibition against reentry into the pools violates pool neutrality and the voluntary nature of pools; (3) seek reconsideration of the provision in the incentive plan that allows LECs rate adjustments of 10% within each service category over each two-year tariff period because Petitioners believe the rule could be interpreted to allow LECs using the incentive plan to recover 110% of their costs; (4) request that the incentive plan's streamlined filing requirements for new services be extended to apply to new services in territories where the "geographically closest" (but not bordering) price cap LEC offers the same service; and (5) request that the Commission delete the infrastructure reporting requirements for the incentive plan, arguing that such reports are not required for voluntary price cap LECs and should not be required for incentive plan LECs. In response to these requests for revisions, the Commission eliminated the two-year exit notice requirement, but otherwise declined to make the requested revisions to the *Small Telco Reform Order*.

The Petitioners also sought clarification of several issues addressed in the *Small Telco Reform Order*. Petitioners argued that the rules embodying the common line rate structures for the incentive plan and small company rules are inconsistent with the text of the *Small Telco Reform Order*, and should be clarified. In response, the Commission believes the rules are consistent with the *Small Telco Reform Order*, but nonetheless has redrafted the rules as formulae to eliminate any inconsistencies in the *Small Telco Reform Order's* application. Petitioners requested that we add a clarifying statement concerning the relative burden on incentive plan participants that seek to increase their

rates by making mid-term corrections to their tariffs. The Commission believes the *Small Telco Reform Order* is clear and therefore denies this request for clarification. Petitioners requested that the Commission codify the incentive plan's mechanism for exogenous cost adjustment. The Commission agrees, and amends its rules to codify the *Small Telco Reform Order's* provisions that incentive plan LECs may adjust their rates (either in the biennial tariff filing or during the two-year tariff period) to reflect exogenous cost changes for costs deemed exogenous for price cap LECs. Finally, Petitioners requested that to remove potential ambiguities, the Commission should make certain minor, non-substantive revisions to the sections of the *Small Telco Reform Order* concerning voluntary biennial filings, the base period for end user common line calculations, and rate change indexes. This *Order on Reconsideration* amends the *Small Telco Reform Order* to clarify those matters.

**List of Subjects in 47 CFR Part 61**

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

**Shirley S. Suggs,**

*Chief, Publications Branch.*

**Rule Changes**

Accordingly part 61 of title 47 is amended as follows:

**PART 61—TARIFFS**

1. The authority citation for part 61 continues to read as follows:

**Authority:** Secs. 1, 4(i), 4(j), 201-205, and 403 of the Communications Act of 1934, as amended; 47 U.S.C. 151, 154(i), 154(j), 210-205, and 403, unless otherwise noted.

2. Section 61.39 is amended by revising paragraphs (b)(3)(i), (b)(3)(ii), (b)(4)(i) and (b)(4)(ii) to read as follows:

**§ 61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after April 1, 1989, by local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in § 69.602.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(i) For the first biennial filing, the common line revenue requirement shall be determined by a cost of service study for the most recent 12-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{\text{CCL Rev Req}}{\text{CCL MOU}_b * (1 + h/2)^2}$$

where:

$$h = \frac{\text{CCL MOU}_1}{\text{CCL MOU}_0} - 1$$

And where:

*CCL Rev Req* = carrier common line revenue requirement for the most recent 12-month period;

*CCL MOU<sub>b</sub>* = carrier common line minutes of use for the most recent 12-month period;

*CCL MOU<sub>1</sub>* = *CCL MOU<sub>b</sub>*; and

*CCL MOU<sub>0</sub>* = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(ii) For subsequent biennial filings, the common line revenue requirement shall be determined by a cost of service study for the most recent 24-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{\text{CCL Rev Req}}{\text{CCL MOU}_b * (1 + h/2)^{5/2}}$$

Where:

$$h = \frac{\text{CCL MOU}_1}{\text{CCL MOU}_0} - 1$$

And where:

*CCL Rev Req* = carrier common line revenue requirement for the most recent 24-month period;

*CCL MOU<sub>b</sub>* = carrier common line minutes of use for the most recent 24-month period;

*CCL MOU<sub>1</sub>* = carrier common line minutes of use for the 12-month period; and

*CCL MOU<sub>0</sub>* = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(4) \* \* \*

(i) For the first biennial filings, the common line revenue requirement shall be determined by the local exchange carrier's most recent annual Common Line settlement from the National Exchange Carrier Association. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{\text{CCL Rev Req}}{\text{CCL MOU}_b * (1 + h/2)^2}$$

Where:

$$h = \frac{CCL\ MOU_1}{CCL\ MOU_0} - 1$$

And where:

*CCL Rev Req* = carrier common line settlement for the most recent 12-month period;

*CCL MOU<sub>b</sub>* = carrier common line minutes of use for the most recent 12-month period;

*CCL MOU<sub>l</sub>* = *CCL MOU<sub>b</sub>*; and

*CCL MOU<sub>o</sub>* = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(ii) For subsequent biennial filings, the common line revenue requirement shall be an amount calculated to reflect the average schedule pool settlements the carrier would have received if the carrier had continued to participate in the carrier common line pool, based upon the average schedule Common Line formulas developed by the National Exchange Carrier Association for the most recent 24-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{CCL\ Rev\ Req}{CCL\ MOU_b * (1 + h/2)^{5.2}}$$

Where:

$$h = \frac{CCL\ MOU_1}{CCL\ MOU_0} - 1$$

And where:

*CCL Rev Req* = carrier common line settlement for the most recent 24-month period;

*CCL MOU<sub>b</sub>* = carrier common line minutes of use for the most recent 24-month period;

*CCL MOU<sub>l</sub>* = carrier common line minutes of use for the most recent 12-month period; and

*CCL MOU<sub>o</sub>* = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

\* \* \* \* \*

3. Section 61.50 is amended by revising paragraphs (h)(1) and (k) and adding new paragraphs (h)(3) and (i)(3) to read as follows:

**§ 61.50 Scope: Optional incentive regulation for rate of return local exchange carriers.**

\* \* \* \* \*

(h)(1) In connection with any optional incentive plan tariff filing proposing rate changes, the carrier must calculate an index for each affected basket as

determined by the Common Carrier Bureau.

\* \* \* \* \*

(3) Local exchange carriers subject to this section shall file tariff revisions that reflect rate changes due to exogenous costs, as defined in § 61.45(d)(1), either in the biennial tariff filing or at the time the event causing the exogenous costs occurs during the two-year period.

(i) \* \* \*

(3) All filings for new services other than those described in paragraph (i) shall be supported using prospective data, as required by § 61.38 of these rules.

\* \* \* \* \*

(k) For a tariff change, a local exchange carrier that is a cost schedule carrier must propose Common Line rates based on the following:

(1) For the first biennial filing, the common line revenue requirement shall be determined by a cost of service study for the most recent 12-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{CCL\ Rev\ Req}{CCL\ MOU_b * (1 + h/2)^2}$$

Where:

$$h = \frac{CCL\ MOU_1}{CCL\ MOU_0} - 1$$

And where:

*CCL Rev Req* = carrier common line settlement for the most recent 12-month period;

*CCL MOU<sub>b</sub>* = carrier common line minutes of use for the most recent 12-month period;

*CCL MOU<sub>l</sub>* = *CCL MOU<sub>b</sub>*; and

*CCL MOU<sub>o</sub>* = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(2) For the subsequent biennial filings, the common line revenue requirement shall be determined by a cost of service study for the most recent 24-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{CCL\ Rev\ Req}{CCL\ MOU_b * (1 + h/2)^{5.2}}$$

where:

$$h = \frac{CCL\ MOU_1}{CCL\ MOU_0} - 1$$

and where:

*CCL Rev Req* = carrier common line revenue requirement for the most recent 24-month period;

*CCL MOU<sub>b</sub>* = carrier common line minutes of use for the most recent 24-month period;

*CCL MOU<sub>l</sub>* = carrier common line minutes of use for the most recent 12-month period; and

*CCL MOU<sub>o</sub>* = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(3) For End User Common Line charges included in a tariff pursuant to this section, the local exchange carrier must provide supporting information for the two-year historical period with its letter of transmittal in accordance with § 61.38.

[FR Doc. 97-14649 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

[MM Docket No. 97-13; RM-8915]

**Radio Broadcasting Services; Franklin, ID**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allots Channel 249A to Franklin, Idaho, as that community's first local aural transmission service in response to a petition filed by Mountain Tower Broadcasting. See 62 FR 3854, January 27, 1997. Coordinates used for Channel 249A at Franklin are 42-06-39 and 111-46-40. With this action, the proceeding is terminated.

**DATES:** Effective July 14, 1997. The window period for filing applications for Channel 249A at Franklin, Idaho, will open on July 14, 1997, and close on August 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 249A at Franklin, Idaho, should be addressed to the Audio Services Division, (202) 418-2700.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 97-13, adopted May 21, 1997, and released May 30, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference

Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

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

**Authority:** Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

#### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by adding Franklin, Channel 249A.

Federal Communications Commission.

**John A. Karousos,**

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

[FR Doc. 97-14799 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Part 73

[MM Docket No. 97-37; RM-8975]

#### Radio Broadcasting Services; Victor, ID

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allots Channel 222A to Victor, Idaho, as that community's second local aural transmission service in response to a petition filed by West Wind Broadcasting. See 62 FR 5789, February 7, 1997. Coordinates used for Channel 222A at Victor are 43-36-12 and 111-06-36. See also, Supplementary Information, infra. With this action, the proceeding is terminated.

**DATES:** Effective July 14, 1997. The window period for filing applications for Channel 222A at Victor, Idaho, will open on July 14, 1997, and close on August 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for

Channel 222A at Victor, Idaho, should be addressed to the Audio Services Division, (202) 418-2700.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 97-37, adopted May 21, 1997, and released May 30, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

Channel 282A was allotted recently to Victor, Idaho, as that community's first local aural transmission service, in MM Docket No. 97-33, in response to a petition filed on behalf of Victor Broadcasting of Idaho. See 62 FR 4225, January 29, 1997.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

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

**Authority:** Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

#### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by adding Channel 222A at Victor.

Federal Communications Commission.

**John A. Karousos,**

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

[FR Doc. 97-14798 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Part 73

[MM Docket No. 97-29; RM-8921]

#### Radio Broadcasting Services; Grass Valley, CA

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allots Channel 277A to Grass Valley, California, as that

community's third local FM service in response to a petition filed on behalf of Knight Monument Broadcasting. See 62 FR 4226, January 29, 1997. Coordinates used for Channel 277A at Grass Valley are 39-12-31 and 120-59-02. With this action, the proceeding is terminated.

**DATES:** Effective July 14, 1997. The window period for filing applications for Channel 277A at Grass Valley, California, will open on July 14, 1997, and close on August 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 277A at Grass Valley, California, should be addressed to the Audio Services Division, (202) 418-2700.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 97-29, adopted May 21, 1997, and released May 30, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

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

**Authority:** Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

#### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Channel 277A at Grass Valley.

Federal Communications Commission.

**John A. Karousos,**

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

[FR Doc. 97-14797 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[MM Docket No. 97-33; RM-8937]

**Radio Broadcasting Services; Victor, ID**

AGENCY: Federal Communications Commission.

ACTION: Final rule.

**SUMMARY:** This document allots Channel 282A to Victor, Idaho, as that community's first local aural transmission service in response to a petition filed on behalf of Victor Broadcasting of Idaho. See 62 FR 4225, January 29, 1997. Coordinates used for Channel 282A at Victor are 43-36-12 and 111-06-36. With this action, the proceeding is terminated.

**DATES:** Effective July 14, 1997. The window period for filing applications for Channel 282A at Victor, Idaho, will open on July 14, 1997, and close on August 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 282A at Victor, Idaho, should be addressed to the Audio Services Division, (202) 418-2700.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 97-33, adopted May 21, 1997, and released May 30, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 73—[AMENDED]**

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

**Authority:** Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by adding Victor, Channel 282A.

Federal Communications Commission.

**John A. Karousos,**

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

[FR Doc. 97-14796 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[MM Docket No. 96-258; RM-8967]

**Radio Broadcasting Services; Valdez, AK**

AGENCY: Federal Communications Commission.

ACTION: Final rule.

**SUMMARY:** This document allots Channel 227A to Valdez, Alaska, as that community's first local FM transmission service in response to a petition filed on behalf of North Wave Communications, Inc. See 62 FR 373, January 3, 1997. Coordinates used for Channel 227A at Valdez are 61-07-00 and 146-16-00. With this action, the proceeding is terminated.

**DATES:** Effective July 14, 1997. The window period for filing applications for Channel 227A at Valdez, Alaska, will open on July 14, 1997, and close on August 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 227A at Valdez, Alaska, should be addressed to the Audio Services Division, (202) 418-2700.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 96-258, adopted May 21, 1997, and released May 30, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 73—[AMENDED]**

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

**Authority:** Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under Alaska, is amended by adding Valdez, Channel 227A.

Federal Communications Commission.

**John A. Karousos,**

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

[FR Doc. 97-14795 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[MM Docket No. 97-2; RM-8955]

**Radio Broadcasting Services; Naches, WA**

AGENCY: Federal Communications Commission.

ACTION: Final rule.

**SUMMARY:** The Commission, at the request of Sela Valley Broadcasting, allots Channel 257A at Naches, Washington, as the community's second local FM transmission service. See 62 FR 3653, January 24, 1997. Channel 257A can be allotted at Naches in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.4 kilometers (7.7 miles) northwest to avoid short-spacings to the licensed sites of Station KAYO-FM, Channel 257C1, Aberdeen, Washington, and Station KZTA-FM, Channel 259C3, Yakima, Washington. The coordinates for Channel 257A at Naches are North Latitude 46-49-09 and West Longitude 120-47-55. Since Naches is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. With this action, this proceeding is terminated.

**DATES:** Effective July 14, 1997. The window period for filing applications for Channel 257A at Naches, Washington, will open on July 14, 1997, and close on August 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 97-2, adopted May 21, 1997, and released

May 30, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

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

**Authority:** Sections 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

#### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Washington, is amended by adding Channel 257A at Naches.

Federal Communications Commission.

**John A. Karousos,**

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

[FR Doc. 97-14794 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

#### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Part 73

[MM Docket No. 95-49; RM-8558]

#### Radio Broadcasting Services; Llano and Marble Falls, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of Maxagrid Broadcasting Corporation, licensee of Station KBAE, Llano, Texas, substitutes Channel 285C3 for Channel 284C3, reallots Channel 285C3 from Llano to Marble Falls, Texas, modifies Station KBAE's license accordingly. See 60 FR 22021, May 4, 1995. In addition, the Commission allots Channel 242A at Llano, Texas. See 61 FR 42230, August 14, 1996. Channel 285C3 and Channel 242A can be allotted to Marble Falls and Llano, respectively, in compliance with the Commission's minimum distance separation requirements. The coordinates for Channel 285C3 at

Marble Falls, Texas, are 30-26-45 and 98-11-45. The coordinates for Channel 242A at Llano, Texas, are 30-49-57 and 98-40-44. Since Marble Falls and Llano are located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government has been obtained for these allotments. With this action, this proceeding is terminated.

**DATES:** Effective July 14, 1997. The window period for filing applications for Channel 242A at Llano, Texas, will open on July 14, 1997, and close on August 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 95-49, adopted May 14, 1997, and released May 30, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857-3800, 2100 M Street, NW, Suite 140, Washington, DC 20037.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

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

**Authority:** Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

#### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 284C3 and adding Channel 242A at Llano, and by adding Marble Falls, Channel 285C3.

Federal Communications Commission.

**John A. Karousos,**

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

[FR Doc. 97-14801 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

#### DEPARTMENT OF TRANSPORTATION

#### National Highway Traffic Safety Administration

#### 49 CFR Part 571

[Docket No. 95-87, Notice 3]

#### Denial of Petition for Reconsideration; Federal Motor Vehicle Safety Standard No. 108; Lamps, Reflective Devices, and Associated Equipment

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

**ACTION:** Denial of petition for reconsideration.

**SUMMARY:** This document denies a petition from Koito Manufacturing Co., LTD. (Koito) to reconsider a final rule implementing new photometric performance for motorcycle headlamps. Koito requested that the upper beam maximum intensity limit be removed or increased from 75,000 cd. to 112,500 cd. Koito also requested that the foreground (4D-V) limit increase from 7,500 cd. to 12,000 cd. No safety reason for these changes was claimed. Because of existing research raising concerns about increasing maximum upper beam intensity because of glare problems, and because of safety concerns about making foreground light too bright in comparison to H-V (down the road) light, the agency has decided to deny the Koito petition for reconsideration.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jere Medlin, Office of Crash Avoidance Standards, NHTSA, 400 Seventh Street, SW, Washington, D.C. 20590. Mr. Medlin's telephone number is: (202) 366-5276. His facsimile number is (202) 366-4329.

**SUPPLEMENTARY INFORMATION:** By letter dated September 20, 1996, Koito petitioned the agency to change two requirements in the final rule on motorcycle photometric requirements (Docket 95-87 Notice 2). Koito wants these new limits to make the design and manufacture of headlamps with two dual filament light sources easier. Koito stated that mainstream motorcycles in the United States are equipped with a single headlamp incorporating two, dual-filament light sources. Koito states that such two-bulb headlamp designs will exceed the new upper beam intensity limits. Koito therefore requested that, for the ease of design and manufacture, certain upper beam intensity limits be removed or changed to be similar to those in the Economic Commission for Europe Regulation No. 48 (ECE R48).

Specifically, Koito requested amending two requirements in Federal Motor Vehicle Safety Standard No. 108, Figure 32 "Motorcycle and Motor-Driven Cycle Headlamp Photometric Requirements." First, the upper beam maximum intensity limit of 75,000 cd. "anywhere" in the pattern would be removed entirely, or alternatively, its value would be replaced with 112,500 cd. "anywhere." Koito says that this value is one-half of the 225,000 cd. upper beam maximum restriction placed on vehicles regulated under ECE R48, and represents the limit for a single headlamp.

The agency notes that Standard No. 108 requires that upper beam headlamps for vehicles other than motorcycles have a minimum H-V axis intensity of 25,000 cd. to a maximum of 75,000 cd. for some lamp types and 40,000 cd. to 75,000 cd. for others when measured at a test voltage of 12.8 Volts. Figure 32 for motorcycles beam is aimed slightly downward, but essentially has a minimum intensity of 17,500 cd. near the center of the beam and the mentioned 75,000 cd. limit anywhere in the beam. Koito's petition to allow 112,500 cd. is based on a test voltage of 12.0 volts, the protocol in ECE regulations. When converted to a test voltage of 12.8, the protocol in U.S. standards, the Koito request becomes 140,000 cd.

Addressing essentially the same issue of increasing the maximum intensity permitted for upper beam headlamps to the same level, the agency has recently denied a petition for rulemaking from Robert Bosch Corporation. In that denial (61 FR 54981) the agency stated that the lighting standard was amended in 1978 when the upper beam headlamp maximum intensity was increased from 37,500 cd. to 75,000 cd. The agency stated in the Bosch denial that its research has demonstrated that an increase in upper beam intensity to a maximum value of 75,000 cd. (150,000 cd. per vehicle) will enhance seeing ability without any significant increase in glare, but that upper beam intensity exceeding 75,000 cd. results in only a marginal increase in visibility with an increase in glare. At that time, the agency decided that there was no valid reason to have an upper beam intensity limit above 75,000 cd. The agency has not done similar research work on upper beam headlamps since nor is it aware of other safety research in this area. The petitioner, Robert Bosch Corporation did not address the increase of glare, and its effect on safety, that a grant of the petition might create.

In addition, other factors have presented themselves in the 19 years

that have passed since NHTSA's statements on increased intensity upper beam headlamps. These factors influencing NHTSA's decision for denial are:

1. State laws specify the distances from other vehicles when upper beam headlamps must be dimmed. These distances were set at a time when upper beam headlamps had 37,500 cd. maximums. With the doubling in 1978 of upper beam intensity and a redoubling that would result from the change proposed by the petitioner, the dimming distances to prevent blinding oncoming motorists may have to increase dramatically. Most States have 500 foot approaching, 200 foot following dimming distances. Because the illumination at the eye is proportional to the lamp's intensity and inversely proportional to the square of the distance, an estimate can be made for how dimming laws would need to be changed if States desired to compensate for increases in maximum upper beam intensity. The dimming distances would need to about double to 970 feet (approaching) and 390 feet (following) to achieve the same glare level as that resulting from the State dimming laws of 500/200 feet, established when upper beam intensity was limited to 37,500 cd. In order to minimize new glare problems, States might need to change their laws to accommodate a greater range of upper beam intensities, and drivers of vehicles with brighter headlamps would have to change their driving behavior. Both consequences are problematic for NHTSA because it cannot compel States to change their laws, and it would be difficult for either NHTSA or the states to cause drivers to change established dimming habits.

2. The number of aging, glare-sensitive U.S. drivers is at an all time high and increasing. Members of this population often complain that glare from existing headlamps and auxiliary lamps already is too high. This population is the most sensitive to glare and roadway illumination effects. Glare resistance reduces markedly as drivers age. In general, having more intense upper beams may help older drivers see better, but they would also be blinded more often by other drivers choosing to use upper beams without dimming them at greater distances.

While the Koito single headlamp system for a motorcycle would not exceed the 150,000 cd limit existing for a vehicle's headlamp system, motorcycle manufacturers are not constrained to have only one headlamp. Thus, as with vehicles other than motorcycles, if the Koito petition were to be accepted, motorcycles could be

made with two Koito type headlamps and easily have vehicle intensities that could approach 280,000 cd. Thus, the situation is analogous to that of the recent Bosch petition, and the rationale of the agency's denial of that petition is equally applicable in this instance. Consequently, the part of the Koito petition requesting higher H-V intensity is denied.

NHTSA recognizes that this denial has an impact on the agency's efforts to harmonize our safety standards with other countries' safety standards. As correctly noted by the petitioner, the European countries generally permit higher intensity upper beams than NHTSA does for the United States. By denying this request, NHTSA is continuing to have non-identical performance requirements for motorcycle headlamp upper beams.

There are two factors that make this result appropriate. First, there is already substantial harmonization between the US and European standards for upper beam performance. The European specification has a much wider allowable range, but an upper beam that complies with the current US motorcycle performance requirements is completely acceptable for the European regulations. Thus, motorcycle headlamps can use the same design and be sold in both the US and Europe, although the upper beams would be less intense than is generally provided in Europe.

Second, NHTSA is pursuing harmonization with other countries' safety standards only when such harmonization can be accomplished without lessening the overall safety protection afforded to the American public. As stated above, NHTSA knows of some 1978 research that found more intense upper beams result in only marginal increases in visibility, but notable increases in glare. NHTSA has done no similar research work in this area since 1978, nor is it aware of any other safety research in this area. Koito provided no such data in its petition. Absent any data that are more compelling than the research that formed the basis for the existing upper beam intensity limits, NHTSA has no reason to change those limits.

The second change that Koito requested is an increase of the maximum value for the foreground intensity test point (4D-V) limit from 7,500 cd. to 12,000 cd. Koito pointed out that the SAE Standard J584 April 1964 Motorcycle Headlamps, presently referenced by Standard No. 108, does not have any requirement for foreground light. Koito stated that, especially with headlamps with two light sources, the

final rule's limit of 7,500 cd. is difficult to meet. It recommended a limit of 12,000 cd., as used in Figure 17 of Standard No. 108.

The agency's concern is two-fold. The SAE's current motorcycle headlamp standard was achieved by a consensus of industry engineers. This group of persons determined that, relative to the whole beam pattern, 7,500 cd. for the foreground intensity limit was appropriate. The changing of a consensus standard is not an endeavor that the agency would choose to do unless there were some overriding element of safety that is pertinent. Additionally, foreground light characterized by the 4D-V test point affects a driver's ability to see objects much further down the road. High levels of foreground illumination tend to draw a driver's attention away from the distant road scene to the foreground because the foreground light appears brighter than the road scene further away. Also high foreground intensities cause eye adaptation to brightness, reducing the ability to see dimly illuminated objects further down the road. Thus, limits on foreground intensity are appropriate for safe driving.

These limits have been based generally on certain ratios of minimum H-V illumination to maximum foreground illumination. When the foreground light intensity of Figure 17 (a variant of Figure 15) was established by the agency in 1985 (50 FR 19986), the agency chose not to decrease the ratio, (i.e., a lower numerical ratio than that existing in headlamp photometric requirements). For Figures 15 and 17, with H-V minimums of 40,000 cd., this achieved a 4D-V value of 12,000 cd. For Figure 32, the minimum value at H-V is 12,500 cd., and for 0.5D-V (the highest minimum in the pattern), it is 20,000 cd. To assure that the foreground is not too intense, using the same ratio of H-V to 4D-V in Figures 15 and 17 and applying that to Figure 32's 4D-V point would achieve a maximum of 3,600 cd. Using the Figure 15 and 17 ratio on Figure 32's 0.5D-V minimum of 20,000 cd. would achieve a 4D-V value of 6,000 cd. This is very close to the consensus value of the current SAE J584 and Figure 32 of 7,500 cd. It would not be wise for the agency to allow an increase to 12,000 cd. for the 4D-V point in Figure 32 when the minimum allowable intensities at H-V and at the 0.5D-V point are only 12,500 cd. and 20,000 cd., respectively. While Koito may not have anticipated a foreground problem because its desired intensity at H-V is so high, the requested change would allow others to manufacture

headlamps without concern for foreground bias. Consequently, that part of the Koito petition requesting higher foreground intensity is denied.

In accordance with 49 CFR part 553, this completes the agency's review of the petition. For the reasons explained above, the agency finds no reason to change its position in connection with a recent denial of a similar request to increase upper, nor to change the established ratio of foreground-to-H-V light. Therefore, this petition for reconsideration is hereby denied.

**Authority:** 49 U.S.C. 30103, 30162; delegation of authority at 49 CFR 1.50 and 501.8.

Issued: June 2, 1997.

**L. Robert Shelton,**

*Associate Administrator for Safety Performance Standards.*

[FR Doc. 97-14807 Filed 6-5-97; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 961126334-7025-02; I.D. 053097B]

#### Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish of the Gulf of Alaska; Pollock in the Western Regulatory Area

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

**ACTION:** Inseason adjustment; request for comments.

**SUMMARY:** NMFS issues an inseason adjustment prohibiting directed fishing for pollock by vessels catching pollock for processing by the inshore component in the Western Regulatory Area of the Gulf of Alaska (GOA). This adjustment closes the fishery 18 hours after its scheduled opening at 1200 hrs, Alaska local time (A.l.t.), June 1, 1997, and is necessary to prevent the underharvest of the pollock total allowable catch (TAC) in the Western Regulatory Area.

**DATES:** Effective 0600 hrs, A.l.t., June 2, 1997, through 1200 hrs, A.l.t., July 1, 1997. Comments must be received at the following address no later than 4:30 p.m., A.l.t., June 18, 1997.

**ADDRESSES:** Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK

99802-1668, Attn. Lori Gravel, or be delivered to the fourth floor of the Federal Building, 709 West 9th Street, Juneau, AK.

**FOR FURTHER INFORMATION CONTACT:** Mary Furuness, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** The groundfish fishery in the GOA exclusive economic zone is managed by the NMFS according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Fishing by U.S. vessels is governed by regulations implementing the FMP at subpart H of 50 CFR part 600 and 50 CFR part 679.

As of May 17, 1997, 3,905 metric tons (mt) of pollock remain in the second season allowance of the inshore allocation of the Western Regulatory Area of the GOA pollock TAC. That amount would normally be available for harvest at 1200 hrs, A.l.t., June 1, 1997. In accordance with § 679.23(d)(2)(ii), directed fishing for pollock in the Western Regulatory Area of the GOA is scheduled from 1200 hrs, A.l.t., June 1, through 1200 hrs, A.l.t., July 1, or until the TAC is reached, whichever occurs first.

Section 679.23(b) specifies that the time of all openings and closures of fishing seasons other than the beginning and end of the calendar fishing year is 1200 hrs, A.l.t. NMFS has determined that a fishery opening must be a minimum of 24 hours. Current information shows the catching capacity of vessels catching pollock for processing by the inshore component is in excess of 9,600 mt per day. The Administrator, Alaska Region, NMFS, has determined that the remaining portion of the TAC allocated to the inshore component would be exceeded if a 24-hour fishery were allowed to occur. NMFS intends that the TAC should not be exceeded and will not allow a 24-hour directed fishery.

NMFS in accordance with § 679.25(a)(1)(i), is adjusting the season for pollock by vessels catching pollock for processing by the inshore component in the Western Regulatory Area of the GOA by allowing the scheduled opening of the directed fishery at 1200 hrs, A.l.t., June 1, 1997. The fishery will remain open until 0600 hrs, A.l.t., June 2, 1997, at which time directed fishing will be prohibited. This action has the effect of opening the fishery for 18 hours. NMFS is taking this action to allow a controlled fishery to occur, thereby preventing either the

underharvest or overharvest of the pollock TAC allocated to the inshore component as authorized by § 679.25(a)(2)(i). In accordance with § 679.25(a)(2)(iii), NMFS has determined that prohibiting directed fishing at 0600 hrs, A.l.t., June 2, 1997, after an 18-hour opening, is the least restrictive management adjustment to achieve the second season allowance of the pollock TAC allocated to the inshore component and will allow other fisheries to continue in noncritical areas and time periods.

#### Classification

The Assistant Administrator for Fisheries, NOAA, finds for good cause that providing prior notice and public comment or delaying the effective date of this action is impracticable and contrary to the public interest (5 U.S.C. 553(b)(B) and (d)(3)). Without this inseason adjustment, NMFS could not allow this fishery, and the second season allowance of the pollock TAC in the Western Regulatory Area of the GOA would not be harvested in accordance with the regulatory schedule, resulting in a seasonal loss of more than \$1.0

million. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until June 13, 1997.

This action is required by § 679.25 and is exempt from review under E.O. 12866.

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

Dated: June 2, 1997.

**Richard W. Surdi,**  
*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
[FR Doc. 97-14781 Filed 6-3-97; 1:21 pm]

BILLING CODE 3510-22-F

# Proposed Rules

Federal Register

Vol. 62, No. 109

Friday, June 6, 1997

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

### Agricultural Marketing Service

#### 7 CFR Part 1205

[CN-97-003]

#### 1997 Proposed Amendment to Cotton Board Rules and Regulations Adjusting Supplemental Assessment on Imports

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Agricultural Marketing Service (AMS) is proposing to amend the Cotton Board Rules and Regulations by lowering the value assigned to imported cotton for the purpose of calculating supplemental assessments collected for use by the Cotton Research and Promotion Program. This adjustment is required by this regulation on an annual basis to ensure that the assessments collected on imported cotton and the cotton content of imported products remain similar to those paid on domestically produced cotton. As a result of changes in the 1997 Harmonized Tariff Schedule (HTS), numbering changes in the import assessment table are proposed. Eleven HTS numbers are proposed to be eliminated from the assessment table because negligible assessments have been collected on these numbers and their elimination would contribute to reducing the overall burden to importers.

**DATES:** Comments must be submitted on or before July 7, 1997.

**ADDRESSES:** Comments may be mailed to USDA, AMS, Cotton Division, STOP 0224, 1400 Independence Ave. SW., Washington DC 20250-0224. All comments received will be available for public inspection at this address during the hours 8 a.m. to 4 p.m. Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Craig Shackelford, (202) 720-2259.

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This proposed rule has been determined to be "not significant" for purposes of Executive Order 12866, and, therefore, has not been reviewed by the Office of Management and Budget.

##### Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This proposed rule would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Cotton Research and Promotion Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 12 of the Act, any person subject to an order may file with the Secretary a petition stating that the order, any provision of the plan, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such person is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the District Court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling, provided a complaint is filed within 20 days from the date of the entry of the ruling.

##### Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) AMS has considered the economic impact of this action on small entities and has determined that its implementation will not have a significant economic impact on a substantial number of small businesses.

There are an estimated 16,000 importers who are presently subject to rules and regulations issued pursuant to the Cotton Research and Promotion Order. This proposed rule will affect importers of cotton and cotton-containing products. The majority of these importers are small businesses under the criteria established by the Small Business Administration. This proposed rule would lower the assessments paid by the importers

under the Cotton Research and Promotion Order. Even though the assessment would be lowered, the decrease is small and will not significantly affect small businesses.

Also, as a result of changes in the 1997 HTS, numbering changes in the Import Assessment table would be made. These changes present no economic impact to persons subject to this regulation.

When the assessment table in the regulation containing HTS numbers was published in 1992 it included about 700 of approximately 2,500 available HTS cotton containing classifications. These HTS numbers represented approximately 97 percent of the annual volume of imported cotton containing textiles and apparel. The other classifications comprising about three percent of the annual import volume were omitted from the assessment table in order to accomplish the goal of the program to maximize assessment collection while, at the same time, minimizing the overall administrative burden involved.

In this proposal, eleven additional HTS numbers would be removed from the table because assessments collected on these numbers have been insignificant. Their removal would be consistent with the overall intent of the program. The assessments levied on the cotton content of these HTS numbers have accounted for an average of 0.11 percent or \$17,383 of the total assessments collected over the last three years. Total assessment collections for the same period averaged \$16,169,969. Collections on the four numbers in Chapter 53 averaged \$12,000 over the last three years and collections on the seven numbers in Chapter 54 averaged \$22,000 for the same period.

The current assessment on imported cotton is \$0.012874 per kilogram of imported cotton. The proposed assessment is \$0.012412, a decrease of \$0.000462 or a 3.6 percent decrease from the current assessment. From January through December 1996 approximately \$19,003,626 was collected at the \$0.012874 per kilogram rate. Should the volume of cotton products imported into the U.S. remain at the same level in 1997, one could expect the decreased assessment to generate \$18,319,495 or a 3.6 percent decrease from 1996.

The combined effect of the elimination of the eleven HTS numbers and the reduction in the value of imported cotton for the purpose of the assessment mechanism is expected to result in an annual reduction in assessment collections of approximately \$718,131.

### Paperwork Reduction

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. 3501 *et seq.*) the information collection requirements contained in the regulation to be amended have been previously approved by OMB and were assigned control number 0581-0093.

### Background

The Cotton Research and Promotion Act Amendments of 1990 enacted by Congress under Subtitle G of Title XIX of the Food, Agriculture, Conservation and Trade Act of 1990 on November 28, 1990, contained two provisions that authorized changes in the funding procedures for the Cotton Research and Promotion Program.

These provisions are: (1) The assessment of imported cotton and cotton products; and (2) termination of the right of cotton producers to demand a refund of assessments.

An amended Cotton Research and Promotion Order was approved by producers and importers voting in a referendum held July 17-26, 1991. Proposed rules implementing the amended Order were published in the **Federal Register** on December 17, 1991, (56 FR 65450). The final implementing rules were published on July 1 and 2, 1992, (57 FR 29181) and (57 FR 29431), respectively.

This proposed rule would decrease the value assigned to imported cotton in the Cotton Board Rules and Regulations (7 CFR 1205.510(b)(2)). This value is used to calculate supplemental assessments on imported cotton and the cotton content of imported products. Supplemental assessments are the second part of a two-part assessment. The first part of the assessment is levied on the weight of cotton produced or imported at a rate of \$1 per bale of cotton which is equivalent to 500 pounds or \$1 per 226.8 kilograms of cotton.

Supplemental assessments are levied at a rate of five-tenths of one percent of the value of domestically produced cotton, imported cotton, and the cotton content of imported products. The agency has adopted the practice of assigning the calendar year average

price received by U.S. farmers for Upland cotton to represent the value of imported cotton. This is done so that the assessment on domestically produced cotton and the assessment on imported cotton and the cotton content of imported products remain similar. The source for the average price statistic is "Agricultural Prices", a publication of the National Agricultural Statistics Service (NASS) of the Department of Agriculture. Use of the average price figure in the calculation of supplemental assessments on imported cotton and the cotton content of imported products yields an assessment that approximates assessments paid on domestically produced cotton in the prior calendar year.

The current value of imported cotton as published in the **Federal Register** (61 FR 31817) on June 21, 1996 for the purpose of calculating supplemental assessments on imported cotton is \$1.6931 per kilogram. This number was calculated using the annual average price received by farmers for Upland cotton during the calendar year 1995 which was \$0.768 per pound and multiplying by the conversion factor 2.2046. Using the Average Price Received by U.S. farmers for Upland cotton for the calendar year 1996, which is \$0.726 per pound, the new value of imported cotton would be \$1.6005 per kilogram. The amended value would be \$0.0926 per kilogram less than the previous value.

An example of the complete assessment formula and how the various figures are obtained is as follows:  
One bale is equal to 500 pounds.  
One kilogram equals 2.2046 pounds.  
One pound equals 0.453597 kilograms.

#### *One Dollar Per Bale Assessment Converted to Kilograms*

A 500 pound bale equals 226.8 kg.  
(500 × .453597).  
\$1 per bale assessment equals \$0.002000  
per pound (1 ÷ 500) or \$0.004409 per  
kg. (1 ÷ 226.8)

#### *Supplemental Assessment of 5/10 of One Percent of the Value of the Cotton Converted to Kilograms*

The 1996 calendar year average price received by producers for Upland cotton is \$0.726 per pound or \$1.6005 per kg.  
(0.726 × 2.2046) = 1.6005.

Five tenths of one percent of the average price in kg. equals \$0.008003  
per kg. (1.6005 × .005).

#### *Total Assessment*

The total assessment per kilogram of raw cotton is obtained by adding the \$1 per bale equivalent assessment of \$0.004409 per kg. and the supplemental

assessment \$ 0.008003 per kg. which equals \$0.012412 per kg.

The current assessment on imported cotton is \$0.012874 per kilogram of imported cotton. The amended assessment would be \$0.012412, a decrease of \$0.000462 per kilogram. This decrease reflects the decrease in the Average Price of Upland Cotton Received by U.S. Farmers during the period January through December 1996.

Since the value of cotton is the basis of the supplemental assessment calculation and the figures shown in the right hand column of the Import Assessment Table 1205.510(b)(3) are a result of such a calculation, the figures in this table are proposed to be revised. These figures indicate the total assessment per kilogram due for each Harmonized Tariff Schedule (HTS) number subject to assessment.

As a result of changes in the Harmonized Tariff Schedule, numbering revisions to the Import Assessment Table used in the Cotton Research and Promotion program were necessary. These changes are as follows:

#### Numbers Changed:

Old No.	New No.	Comment
5209110030	5209110035	Use same conversion factor.
5209316030	5209316035	Use same conversion factor.
5211210030	5211210035	Use same conversion factor.
6104622010	6104622011	Use same conversion factor.
6104622015	6104622021	Use same conversion factor.
6104622025	6104622028	Use same conversion factor.
6104632010	6104632011	Use same conversion factor.
6104632025	6104632028	Use same conversion factor.

The Cotton Board, the cotton producer and cotton importer board of directors that assist the Secretary in administering the import assessment, has requested that AMS remove certain HTS numbers from the assessment table. AMS has accepted this recommendation and is proposing to remove 11 HTS numbers from the assessment table. Once removed from the assessment table, these numbers would no longer be subject to assessment.

The 1990 Amendments to the Cotton Research and Promotion Act provided

authority to implement exemptions from assessments for de minimus values or quantities of cotton. The Act amendments further provided exemption from assessment for industrial products made of cotton. The Agency implemented the first assessment table on July 1, 1992 (56 FR 29181) and stated that in determining which of approximately 2,500 cotton containing HTS numbers to include, the primary objective was to meet the intent of the 1990 Act amendments by maximizing assessment collection and at the same time minimize the burden of administering the assessment provision.

It was determined that approximately 97 percent of the annual volume of imported textiles and apparel were classified under approximately 700 HTS numbers. The agency determined that limiting assessments to these approximate 700 HTS numbers would accomplish the objective of maximizing assessment collection and minimizing administrative burden. At the same time, the vast majority of the volume of imported cotton textiles and apparel would be assessed.

The agency has determined that an additional reduction in the number of HTS numbers assessed is consistent with the concept of excluding from assessment de minimus amounts of cotton and is also consistent with the objective of maximizing assessment collections while minimizing administrative burdens.

Eleven numbers found in the HTS chapter 53 (man-made fiber filaments) and chapter 54 (other vegetable fibers) are proposed to be removed. These assessments levied on the cotton content of these HTS numbers have accounted for an average of 0.11 percent or \$17,383 of the total assessments collected over the last three years. Total assessment collections for the same period averaged \$16,169,969. Collections on the four numbers in Chapter 53 averaged \$12,000 over the last three years and collections on the seven numbers in Chapter 54 averaged \$22,000 for the same period.

It is the view of the Cotton Board and AMS that elimination of these 11 numbers would reduce the number of HTS numbers subject to assessment without any appreciable decrease in the total assessments collected. Eliminating these numbers also would contribute to lowering the overall administrative burden of processing and collecting the assessments.

The HTS numbers proposed for elimination from the assessment table are as follows:

Numbers Deleted

- 5309214010
- 5309214090
- 5309294010
- 5311004020
- 5407810010
- 5407810030
- 5407912020
- 5408312020
- 5408329020
- 5408349020
- 5408349090

List of Subjects in 7 CFR Part 1205

Advertising, Agricultural research, Cotton, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1205 is proposed to be amended as follows:

PART 1205—COTTON RESEARCH AND PROMOTION

1. The authority citation for part 1205 continues to read as follows:

Authority: 7 U.S.C. 2101–2118.

2. In § 1205.510, paragraphs (b)(2) and the table in paragraph (b)(3)(ii) are proposed to be revised to read as follows:

§ 1205.510 Levy of assessments.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(2) The 12-month average of monthly average prices received by U.S. farmers will be calculated annually. Such average will be used as the value of imported cotton for the purpose of levying the supplemental assessment on imported cotton and will be expressed in kilograms. The value of imported cotton for the purpose of levying this supplemental assessment is \$1.6005 per kilogram.

(3) \* \* \*

(i) \* \* \*

(ii) \* \* \*

IMPORT ASSESSMENT TABLE

[Raw Cotton Fiber]

HTS No.	Conv. fact.	Cents/kg.
5201000500	0	1.2412
5201001200	0	1.2412
5201001400	0	1.2412
5201001800	0	1.2412
5201002200	0	1.2412
5201002400	0	1.2412
5201002800	0	1.2412
5201003400	0	1.2412
5201003800	0	1.2412
5204110000	1.1111	1.3791
5204200000	1.1111	1.3791
5205111000	1.1111	1.3791
5205112000	1.1111	1.3791

IMPORT ASSESSMENT TABLE—

Continued

[Raw Cotton Fiber]

HTS No.	Conv. fact.	Cents/kg.
5205121000	1.1111	1.3791
5205122000	1.1111	1.3791
5205131000	1.1111	1.3791
5205132000	1.1111	1.3791
5205141000	1.1111	1.3791
5205210000	1.1111	1.3791
5205220000	1.1111	1.3791
5205230000	1.1111	1.3791
5205240000	1.1111	1.3791
5205310000	1.1111	1.3791
5205320000	1.1111	1.3791
5205330000	1.1111	1.3791
5205340000	1.1111	1.3791
5205410000	1.1111	1.3791
5205420000	1.1111	1.3791
5205440000	1.1111	1.3791
5206120000	0.5556	0.6896
5206130000	0.5556	0.6896
5206140000	0.5556	0.6896
5206220000	0.5556	0.6896
5206230000	0.5556	0.6896
5206240000	0.5556	0.6896
5206310000	0.5556	0.6896
5207100000	1.1111	1.3791
5207900000	0.5556	0.6896
5208112020	1.1455	1.4218
5208112040	1.1455	1.4218
5208112090	1.1455	1.4218
5208114020	1.1455	1.4218
5208114060	1.1455	1.4218
5208114090	1.1455	1.4218
5208118090	1.1455	1.4218
5208124020	1.1455	1.4218
5208124040	1.1455	1.4218
5208124090	1.1455	1.4218
5208126020	1.1455	1.4218
5208126040	1.1455	1.4218
5208126060	1.1455	1.4218
5208126090	1.1455	1.4218
5208128020	1.1455	1.4218
5208128090	1.1455	1.4218
5208130000	1.1455	1.4218
5208192020	1.1455	1.4218
5208192090	1.1455	1.4218
5208194020	1.1455	1.4218
5208194090	1.1455	1.4218
5208196020	1.1455	1.4218
5208196090	1.1455	1.4218
5208224040	1.1455	1.4218
5208224090	1.1455	1.4218
5208226020	1.1455	1.4218
5208226060	1.1455	1.4218
5208228020	1.1455	1.4218
5208230000	1.1455	1.4218
5208292020	1.1455	1.4218
5208292090	1.1455	1.4218
5208294090	1.1455	1.4218
5208296090	1.1455	1.4218
5208298020	1.1455	1.4218
5208312000	1.1455	1.4218
5208321000	1.1455	1.4218
5208323020	1.1455	1.4218
5208323040	1.1455	1.4218
5208323090	1.1455	1.4218
5208324020	1.1455	1.4218
5208324040	1.1455	1.4218
5208325020	1.1455	1.4218
5208330000	1.1455	1.4218
5208392020	1.1455	1.4218

IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]			IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]			IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]		
HTS No.	Conv. fact.	Cents/kg.	HTS No.	Conv. fact.	Cents/kg.	HTS No.	Conv. fact.	Cents/kg.
5208392090	1.1455	1.4218	5209516050	1.1455	1.4218	5516930090	0.4009	0.4976
5208394090	1.1455	1.4218	5209520020	1.1455	1.4218	5601210010	1.1455	1.4218
5208396090	1.1455	1.4218	5209590020	1.1455	1.4218	5601210090	1.1455	1.4218
5208398020	1.1455	1.4218	5209590040	1.1455	1.4218	5601300000	1.1455	1.4218
5208412000	1.1455	1.4218	5209590090	1.1455	1.4218	5602109090	0.5727	0.7108
5208416000	1.1455	1.4218	5210114020	0.6873	0.8531	5602290000	1.1455	1.4218
5208418000	1.1455	1.4218	5210114040	0.6873	0.8531	5602906000	0.526	0.6529
5208421000	1.1455	1.4218	5210116020	0.6873	0.8531	5604900000	0.5556	0.6896
5208423000	1.1455	1.4218	5210116040	0.6873	0.8531	5607902000	0.8889	1.1033
5208424000	1.1455	1.4218	5210116060	0.6873	0.8531	5608901000	1.1111	1.3791
5208425000	1.1455	1.4218	5210118020	0.6873	0.8531	5608902300	1.1111	1.3791
5208430000	1.1455	1.4218	5210120000	0.6873	0.8531	5609001000	1.1111	1.3791
5208492000	1.1455	1.4218	5210192090	0.6873	0.8531	5609004000	0.5556	0.6896
5208494020	1.1455	1.4218	5210214040	0.6873	0.8531	5701104000	0.0556	0.069
5208494090	1.1455	1.4218	5210216020	0.6873	0.8531	5701109000	0.1111	0.1379
5208496010	1.1455	1.4218	5210216060	0.6873	0.8531	5701901010	1.0444	1.2963
5208496090	1.1455	1.4218	5210218020	0.6873	0.8531	5702109020	1.1	1.3653
5208498090	1.1455	1.4218	5210314020	0.6873	0.8531	5702312000	0.0778	0.0966
5208512000	1.1455	1.4218	5210314040	0.6873	0.8531	5702411000	0.0722	0.0896
5208516060	1.1455	1.4218	5210316020	0.6873	0.8531	5702412000	0.0778	0.0966
5208518090	1.1455	1.4218	5210318020	0.6873	0.8531	5702421000	0.0778	0.0966
5208523020	1.1455	1.4218	5210414000	0.6873	0.8531	5702913000	0.0889	0.1103
5208523040	1.1455	1.4218	5210416000	0.6873	0.8531	5702991010	1.1111	1.3791
5208523090	1.1455	1.4218	5210418000	0.6873	0.8531	5702991090	1.1111	1.3791
5208524020	1.1455	1.4218	5210498090	0.6873	0.8531	5703900000	0.4489	0.5572
5208524040	1.1455	1.4218	5210514040	0.6873	0.8531	5801210000	1.1455	1.4218
5208524060	1.1455	1.4218	5210516020	0.6873	0.8531	5801230000	1.1455	1.4218
5208525020	1.1455	1.4218	5210516040	0.6873	0.8531	5801250010	1.1455	1.4218
5208530000	1.1455	1.4218	5210516060	0.6873	0.8531	5801250020	1.1455	1.4218
5208592020	1.1455	1.4218	5211110090	0.6873	0.8531	5801260020	1.1455	1.4218
5208592090	1.1455	1.4218	5211120020	0.6873	0.8531	5802190000	1.1455	1.4218
5208594090	1.1455	1.4218	5211190020	0.6873	0.8531	5802300030	0.5727	0.7108
5208596090	1.1455	1.4218	5211190060	0.6873	0.8531	5804291000	1.1455	1.4218
5209110020	1.1455	1.4218	5211210035	0.4165	0.517	5806200010	0.3534	0.4386
5209110035	1.1455	1.4218	5211210050	0.6873	0.8531	5806200090	0.3534	0.4386
5209110090	1.1455	1.4218	5211290090	0.6873	0.8531	5806310000	1.1455	1.4218
5209120020	1.1455	1.4218	5211320020	0.6873	0.8531	5806400000	0.4296	0.5332
5209120040	1.1455	1.4218	5211390040	0.6873	0.8531	5808107000	0.5727	0.7108
5209190020	1.1455	1.4218	5211390060	0.6873	0.8531	5808900010	0.5727	0.7108
5209190040	1.1455	1.4218	5211490020	0.6873	0.8531	5811002000	1.1455	1.4218
5209190060	1.1455	1.4218	5211490090	0.6873	0.8531	6001106000	1.1455	1.4218
5209190090	1.1455	1.4218	5211590020	0.6873	0.8531	6001210000	0.8591	1.0663
5209210090	1.1455	1.4218	5212146090	0.9164	1.1374	6001220000	0.2864	0.3555
5209220020	1.1455	1.4218	5212156020	0.9164	1.1374	6001910010	0.8591	1.0663
5209220040	1.1455	1.4218	5212216090	0.9164	1.1374	6001910020	0.8591	1.0663
5209290040	1.1455	1.4218	5309214010	0.2864	0.3555	6001920020	0.2864	0.3555
5209290090	1.1455	1.4218	5309214090	0.2864	0.3555	6001920030	0.2864	0.3555
5209313000	1.1455	1.4218	5309294010	0.2864	0.3555	6001920040	0.2864	0.3555
5209316020	1.1455	1.4218	5311004020	0.9164	1.1374	6002203000	0.8681	1.0775
5209316035	1.1455	1.4218	5407810010	0.5727	0.7108	6002206000	0.2894	0.3592
5209316050	1.1455	1.4218	5407810030	0.5727	0.7108	6002420000	0.8681	1.0775
5209316090	1.1455	1.4218	5407912020	0.4009	0.4976	6002430010	0.2894	0.3592
5209320020	1.1455	1.4218	5408312020	0.4009	0.4976	6002430080	0.2894	0.3592
5209320040	1.1455	1.4218	5408329020	0.4009	0.4976	6002921000	1.1574	1.4366
5209390020	1.1455	1.4218	5408349020	0.4009	0.4976	6002930040	0.1157	0.1436
5209390040	1.1455	1.4218	5408349095	0.4009	0.4976	6002930080	0.1157	0.1436
5209390060	1.1455	1.4218	5509530030	0.5556	0.6896	6101200010	1.0094	1.2529
5209390080	1.1455	1.4218	5509530060	0.5556	0.6896	6101200020	1.0094	1.2529
5209390090	1.1455	1.4218	5513110020	0.4009	0.4976	6102200010	1.0094	1.2529
5209413000	1.1455	1.4218	5513110040	0.4009	0.4976	6102200020	1.0094	1.2529
5209416020	1.1455	1.4218	5513110060	0.4009	0.4976	6103421020	0.8806	1.093
5209416040	1.1455	1.4218	5513110090	0.4009	0.4976	6103421040	0.8806	1.093
5209420020	1.0309	1.2796	5513120000	0.4009	0.4976	6103421050	0.8806	1.093
5209420040	1.0309	1.2796	5513130020	0.4009	0.4976	6103421070	0.8806	1.093
5209430030	1.1455	1.4218	5513210020	0.4009	0.4976	6103431520	0.2516	0.3123
5209430050	1.1455	1.4218	5513310000	0.4009	0.4976	6103431540	0.2516	0.3123
5209490020	1.1455	1.4218	5514120020	0.4009	0.4976	6103431550	0.2516	0.3123
5209490090	1.1455	1.4218	5516420060	0.4009	0.4976	6103431570	0.2516	0.3123
5209516030	1.1455	1.4218	5516910060	0.4009	0.4976	6104220040	0.9002	1.1173

IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]			IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]			IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]		
HTS No.	Conv. fact.	Cents/kg.	HTS No.	Conv. fact.	Cents/kg.	HTS No.	Conv. fact.	Cents/kg.
6104220060	0.9002	1.1173	6110202020	1.1837	1.4692	6201999060	0.2574	0.3195
6104320000	0.9207	1.1428	6110202025	1.1837	1.4692	6202121000	0.9372	1.1633
6104420010	0.9002	1.1173	6110202030	1.1837	1.4692	6202122010	1.1064	1.3733
6104420020	0.9002	1.1173	6110202035	1.1837	1.4692	6202122025	1.3017	1.6157
6104520010	0.9312	1.1558	6110202040	1.1574	1.4366	6202122050	0.8461	1.0502
6104520020	0.9312	1.1558	6110202045	1.1574	1.4366	6202122060	0.8461	1.0502
6104622006	0.8806	1.093	6110202065	1.1574	1.4366	6202134005	0.2664	0.3307
6104622016	0.8806	1.093	6110202075	1.1574	1.4366	6202134020	0.333	0.4133
6104622026	0.8806	1.093	6110909022	0.263	0.3264	6202921000	1.0413	1.2925
6104622030	0.8806	1.093	6110909024	0.263	0.3264	6202921500	1.0413	1.2925
6104622060	0.8806	1.093	6110909030	0.3946	0.4898	6202922026	1.3017	1.6157
6104632006	0.3774	0.4684	6110909040	0.263	0.3264	6202922061	1.0413	1.2925
6104632026	0.3774	0.4684	6110909042	0.263	0.3264	6202922071	1.0413	1.2925
6104632030	0.3774	0.4684	6111201000	1.2581	1.5616	6202931000	0.3124	0.3878
6104632060	0.3774	0.4684	6111202000	1.2581	1.5616	6202935011	0.2603	0.3231
6104692030	0.3858	0.4789	6111203000	1.0064	1.2491	6202935021	0.2603	0.3231
6105100010	0.985	1.2226	6111205000	1.0064	1.2491	6203122010	0.1302	0.1616
6105100020	0.985	1.2226	6111206010	1.0064	1.2491	6203221000	1.3017	1.6157
6105100030	0.985	1.2226	6111206020	1.0064	1.2491	6203322010	1.2366	1.5349
6105202010	0.3078	0.382	6111206030	1.0064	1.2491	6203322040	1.2366	1.5349
6105202030	0.3078	0.382	6111206040	1.0064	1.2491	6203332010	0.1302	0.1616
6106100010	0.985	1.2226	6111305020	0.2516	0.3123	6203392010	1.1715	1.4541
6106100020	0.985	1.2226	6111305040	0.2516	0.3123	6203399060	0.2603	0.3231
6106100030	0.985	1.2226	6112110050	0.7548	0.9369	6203422010	0.9961	1.2364
6106202010	0.3078	0.382	6112120010	0.2516	0.3123	6203422025	0.9961	1.2364
6106202030	0.3078	0.382	6112120030	0.2516	0.3123	6203422050	0.9961	1.2364
6107110010	1.1322	1.4053	6112120040	0.2516	0.3123	6203422090	0.9961	1.2364
6107110020	1.1322	1.4053	6112120050	0.2516	0.3123	6203424005	1.2451	1.5454
6107120010	0.5032	0.6246	6112120060	0.2516	0.3123	6203424010	1.2451	1.5454
6107210010	0.8806	1.093	6112390010	1.1322	1.4053	6203424015	0.9961	1.2364
6107220015	0.3774	0.4684	6112490010	0.9435	1.1711	6203424020	1.2451	1.5454
6107220025	0.3774	0.4684	6114200005	0.9002	1.1173	6203424025	1.2451	1.5454
6107910040	1.2581	1.5616	6114200010	0.9002	1.1173	6203424030	1.2451	1.5454
6108210010	1.2445	1.5447	6114200015	0.9002	1.1173	6203424035	1.2451	1.5454
6108210020	1.2445	1.5447	6114200020	1.286	1.5962	6203424040	0.9961	1.2364
6108310010	1.1201	1.3903	6114200040	0.9002	1.1173	6203424045	0.9961	1.2364
6108310020	1.1201	1.3903	6114200046	0.9002	1.1173	6203424050	0.9238	1.1466
6108320010	0.2489	0.3089	6114200052	0.9002	1.1173	6203424055	0.9238	1.1466
6108320015	0.2489	0.3089	6114200060	0.9002	1.1173	6203424060	0.9238	1.1466
6108320025	0.2489	0.3089	6114301010	0.2572	0.3192	6203431500	0.1245	0.1545
6108910005	1.2445	1.5447	6114301020	0.2572	0.3192	6203434010	0.1232	0.1529
6108910015	1.2445	1.5447	6114303030	0.2572	0.3192	6203434020	0.1232	0.1529
6108910025	1.2445	1.5447	6115198010	1.0417	1.293	6203434030	0.1232	0.1529
6108910030	1.2445	1.5447	6115929000	1.0417	1.293	6203434040	0.1232	0.1529
6108920030	0.2489	0.3089	6115936020	0.2315	0.2873	6203498045	0.249	0.3091
6109100005	0.9956	1.2357	6116101300	0.3655	0.4537	6204132010	0.1302	0.1616
6109100007	0.9956	1.2357	6116101720	0.8528	1.0585	6204192000	0.1302	0.1616
6109100009	0.9956	1.2357	6116926420	1.0965	1.361	6204198090	0.2603	0.3231
6109100012	0.9956	1.2357	6116926430	1.2183	1.5122	6204221000	1.3017	1.6157
6109100014	0.9956	1.2357	6116926440	1.0965	1.361	6204223030	1.0413	1.2925
6109100018	0.9956	1.2357	6116928800	1.0965	1.361	6204223040	1.0413	1.2925
6109100023	0.9956	1.2357	6117809010	0.9747	1.2098	6204223050	1.0413	1.2925
6109100027	0.9956	1.2357	6117809040	0.3655	0.4537	6204223060	1.0413	1.2925
6109100037	0.9956	1.2357	6201121000	0.948	1.1767	6204223065	1.0413	1.2925
6109100040	0.9956	1.2357	6201122010	0.8953	1.1112	6204292040	0.3254	0.4039
6109100045	0.9956	1.2357	6201122050	0.6847	0.8498	6204322010	1.2366	1.5349
6109100060	0.9956	1.2357	6201122060	0.6847	0.8498	6204322030	1.0413	1.2925
6109100065	0.9956	1.2357	6201134030	0.2633	0.3268	6204322040	1.0413	1.2925
6109100070	0.9956	1.2357	6201921000	0.9267	1.1502	6204423010	1.2728	1.5798
6109901007	0.3111	0.3861	6201921500	1.1583	1.4377	6204423030	0.9546	1.1848
6109901009	0.3111	0.3861	6201922010	1.0296	1.2779	6204423040	0.9546	1.1848
6109901049	0.3111	0.3861	6201922021	1.2871	1.5975	6204423050	0.9546	1.1848
6109901050	0.3111	0.3861	6201922031	1.2871	1.5975	6204423060	0.9546	1.1848
6109901060	0.3111	0.3861	6201922041	1.2871	1.5975	6204522010	1.2654	1.5706
6109901065	0.3111	0.3861	6201922051	1.0296	1.2779	6204522030	1.2654	1.5706
6109901090	0.3111	0.3861	6201922061	1.0296	1.2779	6204522040	1.2654	1.5706
6110202005	1.1837	1.4692	6201931000	0.3089	0.3834	6204522070	1.0656	1.3226
6110202010	1.1837	1.4692	6201933511	0.2574	0.3195	6204522080	1.0656	1.3226
6110202015	1.1837	1.4692	6201933521	0.2574	0.3195	6204533010	0.2664	0.3307

IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]			IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]			IMPORT ASSESSMENT TABLE— Continued [Raw Cotton Fiber]		
HTS No.	Conv. fact.	Cents/kg.	HTS No.	Conv. fact.	Cents/kg.	HTS No.	Conv. fact.	Cents/kg.
6204594060	0.2664	0.3307	6209205035	0.9749	1.21	6302319010	0.8182	1.0155
6204622010	0.9961	1.2364	6209205040	1.2186	1.5125	6302319020	0.8182	1.0155
6204622025	0.9961	1.2364	6209205045	0.9749	1.21	6302319040	0.8182	1.0155
6204622050	0.9961	1.2364	6209205050	0.9749	1.21	6302319050	0.8182	1.0155
6204624005	1.2451	1.5454	6209303020	0.2463	0.3057	6302322020	0.4091	0.5078
6204624010	1.2451	1.5454	6209303040	0.2463	0.3057	6302322040	0.4091	0.5078
6204624020	0.9961	1.2364	6210109010	0.2291	0.2844	6302402010	0.9935	1.2331
6204624025	1.2451	1.5454	6210403000	0.0391	0.0485	6302511000	0.5844	0.7254
6204624030	1.2451	1.5454	6210405020	0.4556	0.5655	6302512000	0.8766	1.088
6204624035	1.2451	1.5454	6211111010	0.1273	0.158	6302513000	0.5844	0.7254
6204624040	1.2451	1.5454	6211111020	0.1273	0.158	6302514000	0.8182	1.0155
6204624045	0.9961	1.2364	6211118010	1.1455	1.4218	6302600010	1.1689	1.4508
6204624050	0.9961	1.2364	6211118020	1.1455	1.4218	6302600020	1.052	1.3057
6204624055	0.9854	1.2231	6211320007	0.8461	1.0502	6302600030	1.052	1.3057
6204624060	0.9854	1.2231	6211320010	1.0413	1.2925	6302910005	1.052	1.3057
6204624065	0.9854	1.2231	6211320015	1.0413	1.2925	6302910015	1.1689	1.4508
6204633510	0.2546	0.316	6211320030	0.9763	1.2118	6302910025	1.052	1.3057
6204633530	0.2546	0.316	6211320060	0.9763	1.2118	6302910035	1.052	1.3057
6204633532	0.2437	0.3025	6211320070	0.9763	1.2118	6302910045	1.052	1.3057
6204633540	0.2437	0.3025	6211330010	0.3254	0.4039	6302910050	1.052	1.3057
6204692510	0.249	0.3091	6211330030	0.3905	0.4847	6302910060	1.052	1.3057
6204692540	0.2437	0.3025	6211330035	0.3905	0.4847	6303110000	0.9448	1.1727
6204699044	0.249	0.3091	6211330040	0.3905	0.4847	6303910000	0.6429	0.798
6204699046	0.249	0.3091	6211420010	1.0413	1.2925	6304111000	1.0629	1.3193
6204699050	0.249	0.3091	6211420020	1.0413	1.2925	6304190500	1.052	1.3057
6205202015	0.9961	1.2364	6211420025	1.1715	1.4541	6304191000	1.1689	1.4508
6205202020	0.9961	1.2364	6211420060	1.0413	1.2925	6304191500	0.4091	0.5078
6205202025	0.9961	1.2364	6211420070	1.1715	1.4541	6304192000	0.4091	0.5078
6205202030	0.9961	1.2364	6211430010	0.2603	0.3231	6304910020	0.9351	1.1606
6205202035	1.1206	1.3909	6211430030	0.2603	0.3231	6304920000	0.9351	1.1606
6205202046	0.9961	1.2364	6211430040	0.2603	0.3231	6505901540	1.181	1.4659
6205202050	0.9961	1.2364	6211430050	0.2603	0.3231	6505902060	0.9935	1.2331
6205202060	0.9961	1.2364	6211430060	0.2603	0.3231	6505902545	0.5844	0.7254
6205202065	0.9961	1.2364	6211430066	0.2603	0.3231			
6205202070	0.9961	1.2364	6212105020	0.2412	0.2994	* * * * *		
6205202075	0.9961	1.2364	6212109010	0.9646	1.1973	Dated: June 2, 1997.		
6205302010	0.3113	0.3864	6212109020	0.2412	0.2994	<b>Lon Hatamiya,</b>		
6205302030	0.3113	0.3864	6212200020	0.3014	0.3741	<i>Administrator, Agricultural Marketing</i>		
6205302040	0.3113	0.3864	6212900030	0.1929	0.2394	<i>Service.</i>		
6205302050	0.3113	0.3864	6213201000	1.1809	1.4657	[FR Doc. 97-14878 Filed 6-5-97; 8:45 am]		
6205302070	0.3113	0.3864	6213202000	1.0628	1.3191	<b>BILLING CODE 3410-02-P</b>		
6205302080	0.3113	0.3864	6213901000	0.4724	0.5863			
6206100040	0.1245	0.1545	6214900010	0.9043	1.1224			
6206303010	0.9961	1.2364	6216000800	0.2351	0.2918			
6206303020	0.9961	1.2364	6216001720	0.6752	0.8381	<b>DEPARTMENT OF AGRICULTURE</b>		
6206303030	0.9961	1.2364	6216003800	1.2058	1.4966	<b>Food Safety and Inspection Service</b>		
6206303040	0.9961	1.2364	6216004100	1.2058	1.4966	<b>9 CFR Part 381</b>		
6206303050	0.9961	1.2364	6217109010	1.0182	1.2638	<b>[Docket No. 95-011P]</b>		
6206303060	0.9961	1.2364	6217109030	0.2546	0.316	<b>RIN 0583-AB95</b>		
6206403010	0.3113	0.3864	6301300010	0.8766	1.088	<b>Continuous Chilling of Split Poultry</b>		
6206403030	0.3113	0.3864	6301300020	0.8766	1.088	<b>Portions</b>		
6206900040	0.249	0.3091	6302100010	1.1689	1.4508	<b>AGENCY: Food Safety and Inspection</b>		
6207110000	1.0852	1.347	6302215010	0.8182	1.0155	<b>Service, USDA.</b>		
6207199010	0.3617	0.4489	6302215020	0.8182	1.0155	<b>ACTION: Proposed rule.</b>		
6207210010	1.1085	1.3759	6302217010	1.1689	1.4508			
6207210030	1.1085	1.3759	6302217020	1.1689	1.4508			
6207220000	0.3695	0.4586	6302217050	1.1689	1.4508			
6207911000	1.1455	1.4218	6302219010	0.8182	1.0155			
6207913010	1.1455	1.4218	6302219020	0.8182	1.0155			
6207913020	1.1455	1.4218	6302219050	0.8182	1.0155			
6208210010	1.0583	1.3136	6302222010	0.4091	0.5078			
6208210020	1.0583	1.3136	6302222020	0.4091	0.5078			
6208220000	0.1245	0.1545	6302313010	0.8182	1.0155			
6208911010	1.1455	1.4218	6302313050	1.1689	1.4508			
6208911020	1.1455	1.4218	6302315050	0.8182	1.0155			
6208913010	1.1455	1.4218	6302317010	1.1689	1.4508			
6209201000	1.1577	1.4369	6302317020	1.1689	1.4508			
6209203000	0.9749	1.21	6302317040	1.1689	1.4508			
6209205030	0.9749	1.21	6302317050	1.1689	1.4508			

chilling of whole carcasses or "major portions," including front or rear portions, resulting from trimming or salvage. This proposal would define "major portions" to include the front or rear portions of transversely-split carcasses, without identifying the operation creating the portions. The proposed change would afford additional flexibility to poultry establishments in adopting efficient production techniques, such as on-line carcass splitting, that meet food safety performance standards. This proposal is compatible with FSIS initiatives addressing fecal contamination and moisture absorption of raw poultry products.

**DATES:** Comments must be received on or before August 5, 1997.

**ADDRESSES:** Send an original and two copies of comments to FSIS Docket Clerk, DOCKET #95-011P, Room 3806, 1400 Independence Avenue, SW, Washington, DC 20250-3700. Reference material cited in this document and any comments received will be available for public inspection in the FSIS Docket Room from 8:30 a.m. to 1 p.m. and from 2 p.m. to 4:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Dr. Alice Thaler, Chief, Concepts and Design Branch, Inspection Methods Development Division, Office of Policy, Program Development, and Evaluation, (202) 720-3219.

**SUPPLEMENTARY INFORMATION:**

**Background**

The existing regulations governing the chilling of poultry carcasses and parts were developed in the late 1960's, when the most popular form of ready-to-cook poultry consumed in the United States was the whole bird. Since that time, the market demand and the variety of poultry products have greatly expanded. With that expansion, the demand for poultry parts and further processed products relative to whole poultry carcasses has increased. To illustrate this change: in 1969, when over 2 billion pounds of young chickens were federally inspected and passed, 71 percent of the chickens were marketed as whole carcasses, 25 percent were cut up or sold as parts, and 4 percent were further processed. In 1992, when 21 billion pounds were inspected and passed, 15 percent were marketed as whole carcasses, while 55 percent were sold as parts, and 30 percent were further processed.

The trend continues. In 1995, when 23 billion pounds were produced, 10.7 percent were sold as whole birds, 53 percent were cut-up, and 36.3 percent

were further processed. It is estimated that currently only 10 percent of young chickens is being marketed whole, while 53 percent is "cut up" and 37 percent is further processed.

The poultry industry has sought ways of improving production efficiency to meet the steadily increasing demand. One improvement involves splitting the dressed poultry carcasses transversely, into front and rear sections, after evisceration.

After chilling, the split carcasses can be routed to the cut-up operation in the same establishment or they can be packaged and shipped. All raw poultry products, whether white meat or dark meat, must be chilled to a safe temperature before being shipped from the establishment. For those split carcass portions that are shipped directly after chilling, the establishment avoids some in-plant handling costs and reduces the time-to-market for the split carcass portions. If the split portions are to be cut up or further processed on the same premises, the establishment gains some production flexibility that is related to the different characteristics of the front and rear portions. The front portion, including the breast and wings, is mostly white meat; the rear section, including the lower back and legs, is mostly dark meat. The front portion is commonly chilled on the bone to prevent a condition known as "cold shortening," a contraction of the muscle tissues that would make hand deboning prior to chilling infeasible. If deboned before being chilled, the resulting poultry meat would be too tough for many uses. Chilling on the bone limits the muscle tissue contraction and preserves the tenderness of the meat.

The rear, or dark-meat portion, however, is less susceptible to cold shortening, and can either be routed to the cutting room and "hot-deboned," i.e., deboned without first being chilled, or it can be run through the chiller before being packaged and shipped. The dark meat is used in a variety of popular products, including salami and turkey ham. There is an obvious advantage to the establishment in having the dark raw poultry meat available for further processing without the delay of chilling. In any event, hot-deboned product is chilled within two hours of the time of slaughter and dressing.

There is a potential food safety advantage to splitting poultry carcasses. Since the smaller the object to be cooled, the faster its temperature drops, a split carcass portion can be cooled more quickly than a whole carcass. Decreasing the cooling time significantly diminishes the period in which the carcass portion is in the

"danger zone," the temperature range favorable for the growth of microbial populations.

Another potential food safety advantage from transversely splitting the carcass is that the interior of split carcass portions is more visible than the interior of whole carcasses. Federal inspectors and establishment employees would be able to conduct a better visual inspection of the interior cavity of split carcasses than of whole carcasses. In this regard, the establishment could situate the splitting operation on the production line before the location where the required pre-chill finished product standards (FPS) tests are performed. With a better view of the carcass interior, the establishment could conduct more effective FPS tests. Long-term improvements in process control as well as a better, safer product could result.

One particular advantage of transversely splitting carcasses could be an improved chance, while conducting the FPS test, of observing contamination by feces or extraneous material and of acting to prevent such contamination. This would be especially helpful in carrying out regulations FSIS recently published (62 FR 4139, February 4, 1997) that establish a "zero tolerance" for feces on raw poultry carcasses entering the chiller. The "zero tolerance" will be applied during pre-chill FPS tests on both split carcasses and whole carcasses.

Section 381.66(c)(2)(iv) of the regulations permits the continuous chilling of "parts of major size, either front or rear portions, wherein the major portion of the poultry carcass remains intact," as long as such portions were created by trimming or salvage operations. Trimming operations remove some part of a poultry carcass. For example, a broken wing may be trimmed from a breast. Salvage operations, on the other hand, are intended to save a portion of the carcass by cutting it away from an unacceptable portion. An example of a salvage procedure is the splitting of the carcass into front and rear portions to save the breast portion while condemning the rear portion that has become adulterated. Section 381.66(c)(2)(iv) of the current poultry products inspection regulations permits such major portions resulting from partial trimming or salvage operations to be chilled in a continuous chiller.

Some have interpreted the regulations as not permitting the immersion chilling of split poultry portions that were created other than by trimming or salvage. The regulations were developed during the late 1960's and reflect the

production and market conditions of that period. In those days, as stated above, poultry industry operations were oriented primarily toward the marketing of whole birds. The regulations provide for the handling of useable portions of carcasses that cannot be marketed as whole birds. The "parts of major size" or "major portions" referred to in the regulations were typically the result of a trimming or salvage procedure and were available for sale as parts or for further processing, which at that time constituted the smaller part of the raw poultry market.

The regulations governing the chilling of poultry parts, including the provisions addressing "major portions," were intended to prevent the marketing of products containing excessive moisture. This form of adulteration might occur if individual poultry parts, such as drumsticks, thighs, split breasts, or split halves (carcasses split longitudinally along the sternum into "mirror image" portions) were permitted to be cooled in continuous immersion chillers. Under most current processing conditions, such individual parts are likely to absorb more water than "major portions." These individual parts may be cooled only in the air, in ice, or under a spray of water with continuous draining.

On the other hand, whole carcasses and major portions of carcasses may be cooled in continuous chillers, provided that the moisture absorption limits prescribed in the regulations are not exceeded. Like the whole carcass, the front or rear portions of transversely split carcasses absorb incidental amounts of moisture when placed in continuous chillers. This is true whether the portion was created by trimming, salvage operation, or a procedure such as on-line carcass-splitting.

Establishments that have tested split-carcass processing methods under FSIS supervision have achieved favorable results in keeping water absorption low, in chilling product rapidly to a safe temperature, and in maintaining product wholesomeness. Proper application of these carcass splitting methods yields product that is not adulterated.

FSIS has determined that the regulatory provision for chilling major portions should be reworded to specifically include transversely split carcass portions, as described above, regardless of the operation which created the portions. The Agency is proposing to modify the definition of "major portion" to include these split-carcasses and carcasses from which small pieces have been removed. This

proposal would not affect the existing regulatory restrictions on the chilling of individual parts.

This proposal concerns the application of existing moisture retention and absorption standards to split carcass portions, rather than the standards, themselves. FSIS is developing proposed regulations addressing the current regulatory limits on moisture absorption and retention in dressed poultry carcasses and parts.

This proposed rule is limited to clarifying the regulations to accommodate the processing of splitting poultry carcasses. The proposal would amend the chilling requirement at § 381.66(b)(2) to apply both to whole carcasses and to major portions, as defined at proposed § 381.170(b)(22) to include transversely-split carcasses. Section 381.66(b)(2) would also be amended to refer to the new § 381.170(b)(22) rather than to § 381.66(c)(2)(iv).

This proposed rule would also amend § 381.66(c)(2)(iv) by removing the word "carcasses" from the term "split carcasses" and replacing it with "halves." "Split halves" is a term widely used in the poultry industry to denote the left and right halves of a poultry carcass divided lengthwise. The amended paragraph would continue to prohibit the continuous chilling of split halves.

FSIS would continue to require establishments creating split carcass portions to meet the same moisture absorption and retention limits for split as for whole carcasses. These limits are set forth in 9 CFR 381.66(d)(3), Table 3, and 381.66(d)(4)(ii).

Finally, FSIS is proposing, at proposed § 381.170(b)(22), to define "major portions" as carcasses from which small parts may be missing, or the front or rear portions of transversely split carcasses. As mentioned, the amended § 381.66(b)(2) would refer to the new definition.

#### **Executive Order 12866**

This proposed rule has been determined to be not significant and was not reviewed by the Office of Management and Budget under Executive Order 12866.

#### **Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. States and local jurisdictions are preempted by the Poultry Products Inspection Act (PPIA) from imposing any marking or packaging requirements on federally inspected poultry products that are in addition to, or different than, those

imposed under the PPIA. States and local jurisdictions may, however, exercise concurrent jurisdiction over poultry products that are outside official establishments for the purpose of preventing the distribution of poultry products that are misbranded or adulterated under the PPIA, or, in the case of imported articles, which are not at such an establishment, after their entry into the United States.

This proposed rule is not intended to have retroactive effect.

There are no applicable administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this proposed rule. However, the administrative procedures specified in 9 CFR 381.35 must be exhausted prior to any judicial challenge of the application of the provisions of this proposed rule, if the challenge involves any decision of an FSIS employee relating to inspection services provided under the PPIA.

#### **Effect on Small Entities**

The Administrator has made an initial determination that this proposed rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). This proposed rule will not impose any additional requirements on poultry processors. Compliance with this proposed rule is voluntary; poultry processors that intentionally split poultry carcasses into major portions as a result of a trimming or salvage operation do not have to cool the product using ice and water in a continuous chiller. They may cool major portions using air, ice, or under a spray of water with continuous drainage. Poultry processors opting to chill major parts resulting from production techniques such as on-line carcass-splitting could do so in a continuous ice and water chiller. This would allow them to appropriately handle the separated carcass portions immediately after splitting. The white meat portion could immediately be chilled to the proper temperature for further processing or direct sale to consumers, while the dark meat portion, which is usually processed, could be directly deboned and used in further processed cooked products.

#### **List of Subjects in 9 CFR Part 381**

Poultry and poultry products.

For the reasons set forth in the preamble, FSIS is proposing to amend 9 CFR part 381 as follows:

**PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS**

1. The authority citation for part 381 would continue to read as follows:

**Authority:** 7 U.S.C. 138f; 7 U.S.C. 450; 21 U.S.C. 451-470; 7 CFR 2.18, 2.53.

2. Section 381.66 is amended by revising the first sentence of paragraph (b)(2); by revising the first and second sentences of paragraph (c)(2)(iv) and, in the last sentence of (c)(2)(iv), by removing the words "from salvage operations," and by replacing the word "carcasses" with the word "halves" to read as follows:

**§ 381.66 Temperatures and chilling and freezing procedures.**

\* \* \* \* \*

(b) \* \* \*

(2) Major portions of poultry carcasses, as defined in § 381.170(b)(22), and poultry carcasses shall be chilled to 40° F. or lower within the times specified below: \* \* \*

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iv) Major portions of poultry carcasses, as defined in § 381.170(b)(22), may be chilled in water and ice, including chilling in continuous chillers. \* \* \*

\* \* \* \* \*

3. Paragraph (b)(22) is added to § 381.170 to read as follows:

**§ 381.170 Standards for kinds and classes, and for cuts of raw poultry.**

\* \* \* \* \*

(b) \* \* \*

(22) "Major portions" of eviscerated poultry carcasses are either carcasses from which parts may be missing, or the front or rear portions of transversely split carcasses.

Done at Washington, DC, on May 29, 1997.

**Thomas J. Billy,**  
*Administrator.*

[FR Doc. 97-14875 Filed 6-5-97; 8:45 am]

BILLING CODE 3410-DM-P

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 767 series airplanes. The proposal would require replacement of the existing retaining bolt of the attendant seat lap belt with a new bolt and a washer. This proposal is prompted by a report indicating that, due to a missing washer, the belt end fittings of the double flight attendant seats can become loose. The actions specified by the proposed AD are intended to ensure that a washer between the bolt head and bushing is installed. A missing washer could allow movement of the belt end fittings, which can cause the restraint belts to release and, consequently, result in injury to the flight attendants.

**DATES:** Comments must be received by July 17, 1997.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 96-NM-206-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Monica Nemecek, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (425) 227-2773; fax (425) 227-1181.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 96-NM-206-AD." The postcard will be date stamped and returned to the commenter.

**Availability of NPRMs**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 96-NM-206-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

**Discussion**

The FAA has received a report indicating that, on certain Boeing Model 767 series airplanes, the restraint anchor configuration is incorrect for the lap restraint belts of the double flight attendant seats that are wall mounted. Investigation revealed that certain types of restraint belts do not have a washer between the bolt head and bushing as part of the anchor configuration. Without the washer, movement of the belt end fittings can cause the restraint belts to release. This condition, if not corrected, could result in injury to the flight attendants.

**Explanation of Relevant Service Information**

The FAA has reviewed and approved Boeing Service Bulletin 767-25-0217, dated January 13, 1994, which describes procedures for replacement of the existing retaining bolt of the attendant seat lap belt with a new bolt and a washer. Accomplishment of these actions will ensure that the restraint belts of the double flight attendant seats that are wall mounted cannot inadvertently come loose from the end fittings.

**Explanation of Requirements of Proposed Rule**

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, for certain airplanes, the proposed AD would require

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 96-NM-206-AD]

RIN 2120-AA64

**Airworthiness Directives; Boeing Model 767 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

replacement of the existing retaining bolt of the attendant seat lap belt with a new bolt and a washer. The actions would be required to be accomplished in accordance with the service bulletin described previously.

#### Cost Impact

There are approximately 55 double flight attendant seats installed on 35 Boeing Model 767 series airplanes of the affected design in the worldwide fleet. Each of these airplanes has 1 or 2 seats. The FAA estimates that 40 double flight attendant seats installed on 20 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per seat to accomplish the proposed actions, and that the average labor rate is \$60 per work hour. Required parts would cost approximately \$1 per seat. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be \$61 per seat.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

#### Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

##### § 39.13 [Amended]

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

**Boeing:** Docket 96-NM-206-AD.

**Applicability:** Model 767 series airplanes, as listed in Boeing Service Bulletin 767-25-0217, dated January 13, 1994; equipped with a seat base assembly having part number 414T2025; certificated in any category:

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

**Compliance:** Required as indicated, unless accomplished previously.

To ensure that a washer between the bolt head and bushing is installed in the restraint anchor configuration of the double flight attendants seats that are wall mounted, accomplish the following:

(a) Within 90 days after the effective date of this AD, replace the existing retaining bolt of the attendant seat lap belt with a new bolt and a washer, in accordance with Boeing Service Bulletin 767-25-0217, dated January 13, 1994.

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

**Note 2:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to

a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on May 30, 1997.

**Darrell M. Pederson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 97-14770 Filed 6-5-97; 8:45 am]

BILLING CODE 4910-13-U

#### DEPARTMENT OF TRANSPORTATION

#### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 97-NM-50-AD]

RIN 2120-AA64

#### Airworthiness Directives; Boeing Model 767-200 and -300 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 767-200 and -300 series airplanes. This proposal would require a one-time inspection for worn or broken wire bundles in the ceiling above the main passenger door and repair, if necessary; and relocation of the wire bundles to prevent chafing. This proposal is prompted by a report indicating that the opening of the main passenger door caused the door liner and a ceiling panel to chafe and ultimately break a wire installed in this area. The actions specified by the proposed AD are intended to prevent these wires from becoming worn or breaking, which could lead to the failure of several systems, such as the fuel shutoff valves that allow the flight crew to stop the flow of fuel in the event of an engine fire.

**DATES:** Comments must be received by July 17, 1997.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-50-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be

examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Stephen Oshiro, Aerospace Engineer, Systems and Equipment Branch, ANM-130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (425) 227-2793; fax (425) 227-1181.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-NM-50-AD." The postcard will be date stamped and returned to the commenter.

**Availability of NPRMs**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-50-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

**Discussion**

The FAA has received a report indicating that a broken wire was detected in the ceiling above the main passenger door on a Boeing Model 767 series airplane. An investigation revealed that the opening of this door causes the upper liner of the door and the moveable ceiling panel in this area to chafe wire bundles, which can lead to worn and broken wires.

Because these wires are connected to such safety systems as the fuel shutoff valves for the engines, oxygen deployment for passengers, emergency lighting, passenger signs, and the signal for emergency evacuation, worn or broken wires can cause one or more of these systems to fail. Such failure of the fuel shutoff valves, for example, would prevent the flight crew from stopping the flow of fuel to the engines in the event of a fire.

**Explanation of Relevant Service Information**

The FAA has reviewed and approved Boeing Service Bulletin 767-33-0052, Revision 1, dated December 8, 1994, which describes procedures for a one-time inspection to detect worn or broken wires in the wire bundles located above the main passenger door; repair of any worn or broken wires; and relocation of these wire bundles inboard of this door. Such relocation of the wire bundles will prevent worn or broken wires due to chafing by the upper liner of the door or the moveable ceiling panel.

**Explanation of Requirements of Proposed Rule**

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require a one-time inspection to detect worn or broken wires in the wire bundles located above the main passenger door; repair of any worn or broken wires; and relocation of the wire bundles inboard of this door. The actions would be required to be accomplished in accordance with the service bulletin described previously.

**Cost Impact**

There are approximately 403 Boeing Model 767-200 and -300 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 142 airplanes of U.S. registry would be affected by this proposed AD.

It would take approximately 1 work hour per airplane to accomplish the proposed inspection, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the proposed inspection on U.S. operators is estimated to be \$8,520, or \$60 per airplane.

It would take approximately 57 work hours per airplane to accomplish the proposed relocation of the wire bundles, at an average labor rate of \$60 per work hour. Required parts would cost approximately \$200 per airplane. Based on these figures, the cost impact of the proposed relocation of the wire bundles

on U.S. operators is estimated to be \$514,040, or \$3,620 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

**Regulatory Impact**

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

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

**PART 39—AIRWORTHINESS DIRECTIVES**

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

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

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

**Boeing:** Docket 97-NM-50-AD.

*Applicability:* Model 767-200 and -300 series airplanes; as listed in Boeing Service Bulletin 767-33-0052, Revision 1, dated

December 8, 1994; certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

**Compliance:** Required as indicated, unless accomplished previously.

To prevent wires in the area above the main passenger door from becoming worn or breaking, which could lead to the failure of several systems, such as the fuel shutoff valves that allow the flight crew to stop the flow of fuel in the event of an engine fire, accomplish the following:

(a) Within 12 months after the effective date of this AD, conduct a one-time inspection to detect worn or broken wires in the wire bundles installed above the main passenger door, in accordance with Boeing Service Bulletin 767-33-0052, Revision 1, dated December 8, 1994. Prior to further flight, repair any worn or broken wires and relocate the wire bundles inboard of this door, in accordance with the service bulletin. Thereafter, no further action is required by this AD.

**Note 2:** Inspection; repair, if necessary; and relocation of the wire bundles accomplished prior to the effective date of this AD in accordance with Boeing Service Bulletin 767-33-0052, dated April 2, 1992, is considered acceptable for compliance with the requirements of paragraph (a) of this AD.

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

**Note 3:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on May 30, 1997.

**Darrell M. Pederson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*  
[FR Doc. 97-14771 Filed 6-5-97; 8:45 am]

BILLING CODE 4910-13-U

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 812

[Docket No. 95N-0342]

#### Export Requirements for Medical Devices; Withdrawal of Proposed Rule

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The Food and Drug Administration (FDA) is withdrawing a proposed rule that appeared in the **Federal Register** of November 27, 1995 (60 FR 58308). The proposed rule would have amended FDA's regulations for exporting devices for investigational use. FDA is withdrawing the proposed rule because recent statutory changes have made the rulemaking unnecessary.

**FOR FURTHER INFORMATION CONTACT:** Philip L. Chao, Office of Policy (HF-23), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20850, 301-827-3380.

**SUPPLEMENTARY INFORMATION:** At present, two statutory provisions in the Federal Food, Drug, and Cosmetic Act (the act) govern the export of devices that are not approved for marketing in the United States.

The first provision, at section 801(e)(2) of the act (21 U.S.C. 381(e)(2)), became law as part of the Medical Device Amendments Act of 1976 (Pub. L. 94-295) and required FDA approval of certain exports of unapproved devices. The second provision, section 802 of the act (21 U.S.C. 382), was the result of the FDA Export Reform and Enhancement Act of 1996 (Pub. L. 104-134, and amended by Pub. L. 104-180) (Export Act of 1996).

Before the latter provision became law, FDA had undertaken a program to streamline the requirements for the exportation of unapproved devices under section 801(e) of the act. FDA issued a proposed rule to simplify the agency's export approval process for certain unapproved devices (60 FR 58308). The proposed rule was intended, in part, to respond to concerns in the device industry that the statutory requirement of FDA approval of device exports may undermine a firm's ability to compete in international markets and may represent an unnecessary regulatory barrier. (It should be emphasized, however, that FDA's approval times for device export applications have decreased significantly, from an average of 91 days

per request in 1992, to 10 days in 1995, and further decreased to 8 days in fiscal year 1996.) The proposed rule was also intended to implement part of the President's and Vice-President's "National Performance Review" pertaining to the exportation of unapproved devices (as announced in an April, 1995 report entitled, "Reinventing Drug and Device Regulations"). Under the National Performance Review initiative, the agency would permit the export of unapproved devices to certain advanced industrialized countries without prior FDA review and approval, provided that the device complied with the importing country's laws. The report also stated that the Administration would seek the necessary legislative changes and would consult Congress on the appropriate list of advanced industrialized countries.

The report also stated that FDA would initiate administrative changes to permit exports to countries that are not on the list of advanced industrialized countries "if the exporter has an Investigational Device Exemption (IDE) permitting testing on humans in the United States, the importing country has given FDA a letter providing blanket approval for IDE-type devices, and the device is in compliance with the importing country's laws." Consequently, FDA proposed to amend 21 CFR 812.18 to state that a person who wishes to export an investigational device subject to part 812 (21 CFR part 812) (investigational devices) must comply with the requirements at section 801(e)(1) of the act, but that, for purposes of section 801(e)(2) of the act, prior FDA approval would be unnecessary if the investigational device to be exported is the subject of an approved IDE (including nonsignificant risk devices which, under FDA regulations, are considered to have an approved IDE) and "will be marketed or used in clinical trials in the foreign country for the same intended use as that in the approved IDE and is to be exported to a country that has expressed its approval of the importation of investigational devices" that are the subject of an approved IDE. The proposed rule also stated that, if the device is the subject of an approved IDE and has received a "CE" mark from the European Union (EU), the device may be exported to any country in the European Economic Area (EEA).

The proposed rule also would have FDA make available a list of countries that have approved the importation of investigational devices that are the subjects of approved IDE's. Additionally, the proposal would require prior FDA approval to export an

investigational device if FDA withdrew approval of the IDE or the sponsor terminated any or all parts of investigations because unanticipated adverse device effects present an unreasonable risk to subjects.

In the preamble to the proposed rule, FDA also stated that it would amend the proposed rule to reflect any legislative changes (60 FR 58308 at 58309).

The agency received 7 comments on the proposed rule. Most comments supported the rule, but recommended expanding the rule to explicitly mention certain devices (such as intraocular lenses and certain in vitro diagnostic devices), amending the rule so that a CE mark would permit exportation of the device to any country, or amending the rule to consider marketing authorization by developed countries as permitting exportation to any country. One comment questioned the likelihood that a country would agree to the importation of all devices having approved IDE's.

The Export Act of 1996 amended, among other things, sections 801 and 802 of the act. The Export Act of 1996 amended section 801(e)(2) of the act to state, in part, that export of an unapproved device could occur only if the agency has determined that exportation of the device is not contrary to the public health and safety and has the approval of the country to which it is intended for export or "the device is eligible for export under section 802" of the act. Section 802 of the act, as amended, authorizes exports of unapproved drugs and devices if certain conditions or requirements are met. Under section 802(b)(1) of the act, an unapproved device may be exported to any country if the device complies with the laws of that country and has valid marketing authorization in Australia, Canada, Israel, Japan, New Zealand, Switzerland, South Africa, or in any country in the EU or the EEA (often referred to as the "listed countries"). At present, the EU countries are Austria, Belgium, Denmark, Germany, Greece, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The EEA countries are the EU countries, plus Iceland, Liechtenstein, and Norway. As new countries join the EU or the EEA, they will automatically be treated as listed countries without any need for FDA action. Additionally, the Secretary of Health and Human Services may designate additional countries to be added to the list if certain requirements are met.

Another provision of the Export Act of 1996 pertains specifically to drugs and devices exported for investigational

use. Section 802(c) of the act states that a drug or device intended for investigational use in any country described in section 802(b)(1)(A)(i) or (b)(1)(A)(ii) of the act "may be exported in accordance with the laws of that country and shall be exempt from regulation under section 505(i) or 520(g)" of the act. Thus, under section 802(c) of the act, as amended, a device may be exported for investigational use to any of the listed countries without prior FDA approval and without compliance with the IDE regulations at part 812.

However, all devices exported under section 802 of the act are subject to certain requirements, under section 802(f) and (g) of the act. For example, the device must be manufactured, processed, packaged, and held in substantial conformity with current good manufacturing practice requirements or meet international standards as certified by an international standards organization recognized by the agency; must not be adulterated under section 501(a)(1), (2)(A), or (3) or section 501(c) of the act; and must comply with section 801(e)(1)(A) through (e)(1)(D) of the act (which requires the device to accord to the foreign purchaser's specifications, not be in conflict with the laws of the foreign country to which the device is being exported, be labeled on the outside of the shipping package that the device is intended for export, and not be sold or offered for sale in domestic commerce). Further, exporters must maintain records of products exported.

The Export Act of 1996 affected the proposed rule in several ways. First, it accomplished some changes to the proposed rule that the comments requested, particularly those comments that requested that FDA expand the proposed rule to cover other devices and other FDA-regulated products or requested FDA to permit exportation to any country if a device received marketing authorization in the EU or marketing authorization in a "developed country." Second, the Export Act of 1996 also distinguished between exports under section 801(e) of the act and exports under section 802 of the act. For example, when FDA published the proposed rule on November 27, 1995, devices were subject only to the requirements in section 801(e) of the act. The Export Act of 1996 gave firms an option whether to export a device under section 801(e) of the act or under section 802 of the act, and assigned different requirements to exports under each section.

Finally, as stated earlier, section 802(b)(1)(A) of the act authorizes export

of an unapproved device to any country if the device complies with the laws of the importing country and the device has a valid marketing approval in any of the countries identified in the act. Devices exported under section 802(b)(1)(A) of the act are neither required to obtain prior FDA approval (although they are subject to certain notification and recordkeeping requirements) nor are they required to have an IDE. In contrast, the proposed rule's reference to exports of investigational devices for marketing purposes would have been limited to devices exported under section 801(e)(2) of the act and presumed that the person exporting the device has an IDE or is considered to have an approved IDE.

Section 802(c) of the act, as revised by the Export Act of 1996, also had a significant impact on the proposed rule. Under section 802(c) of the act, devices exported for investigational use to any listed country are not subject to the IDE requirements and can be exported without prior FDA approval. In comparison, the proposed rule would have required the exported device to have an approved IDE or to be a nonsignificant risk device and be considered to have an approved IDE, and the streamlined requirements described in the proposal would have applied only to exports to countries that had notified FDA of their willingness to accept IDE devices.

Considering these changes in the export authority for devices and their effect on the proposed rule, FDA published a notice in the **Federal Register** on January 7, 1997 (62 FR 953) to reopen the comment period for the proposed rule and to solicit public comment on whether the proposed rule was still necessary. The agency received three comments in response to its notice, and all three comments agreed that the statutory changes eliminated the need for the proposed rule. FDA agrees with the comments, and, through this notice, is withdrawing the proposed rule that appeared in the **Federal Register** on November 27, 1995.

In the **Federal Register** of May 13, 1997 (62 FR 26228), the agency amended § 812.18 to state that "A person exporting an investigational device subject to this part shall obtain FDA's prior approval as required by section 801(e) of the act or shall comply with the applicable export requirements in section 802 of the act." This amendment reflects the correct statutory references. At this time the agency believes that no further amendment to these regulations is necessary.

Therefore, under the Federal Food, Drug and Cosmetic Act (secs. 301, 501,

502, 503, 505, 506, 507, 510, 513-516, 518-520, 701, 702, 704, 721, 801, 802, and 803) and under 21 CFR 5.10, the proposed rule published in the **Federal Register** of November 27, 1995 (60 FR 58308), is withdrawn.

Dated: May 29, 1997.

**William K. Hubbard,**

*Associate Commissioner for Policy  
Coordination.*

[FR Doc. 97-14749 Filed 6-5-97; 8:45 am]

BILLING CODE 4160-01-F

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 9, 122, 123, 131, and 132

[FRL-5836-4]

#### Final Water Quality Guidance for the Great Lakes System Draft Mercury Permitting Strategy

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability of document for public review and comment.

**SUMMARY:** EPA is making a draft of the Mercury Permitting Strategy ("Strategy") available for public review and comment for a 60-day period. The purpose of the Strategy is to identify how the Final Water Quality Guidance for the Great Lakes System ("Guidance") provides for implementation of mercury water quality standards though National Pollutant Discharge Elimination System ("NPDES") permits for point sources, focusing on the flexibility States or Tribes have for adjusting point source controls to account for non-point sources of mercury. The draft Strategy also addresses several permit implementation issues related to mercury data.

**DATES:** Written comments on this draft Strategy will be accepted until August 5, 1997.

**ADDRESSES:** Comments on the draft Mercury Permitting Strategy should be addressed to Debora Clovis, U.S. EPA, Permits Division (4203), 401 M Street, S.W., Washington, D.C. 20460. EPA will also accept comments electronically. Comments should include the sender's name, address, and telephone number and be sent to the following E-Mail address: clovis.debora@epamail.epa.gov. Copies of the draft Mercury Permitting Strategy are available from the following EPA Regional Offices:

*Philip Sweeney*—Region 2, Water Management Division, 212-637-3873; fax: 212-637-3887;

*Chuck Sapp*—Region 3, Water Management Division, 215-566-5725; fax: 215-566-2301;

*Mary Jackson-Willis*—Region 5, Water Quality Branch, 312-886-3717; fax: 312-886-7804;

Copies may also be obtained by calling Mildred Thomas at (202) 260-6054.

EPA will place this notice and the draft Strategy on the Internet for public review and downloading at the following location: [www.epa.gov/owm/wm030000.htm](http://www.epa.gov/owm/wm030000.htm). Users with access to computer bulletin boards may view and download the draft Strategy on PIPES, the Point Source Information Provisions and Exchange System. The bulletin board service phone number is (703) 749-9216. [Modem settings should be set at 8-N-1/; terminal emulation should be "ANSI" or "VT-100.]"

**FOR FURTHER INFORMATION CONTACT:**

Debora Clovis, Permits Division (4203), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 260-9519.

**SUPPLEMENTARY INFORMATION:** On March 23, 1995, EPA published the Final Water Quality Guidance for the Great Lakes System ("Guidance") (60 FR 15366). As required by Section 118(c)(2) of the Clean Water Act, the Guidance establishes minimum water quality criteria, methodologies, policies, and procedures for the Great Lakes System. States and Tribes in the Great Lakes Basin are required to adopt provisions into their water quality standards and National Permit Discharge Elimination System (NPDES) permit programs that are consistent with the Guidance within two years after publication of the Guidance (March 23, 1997). A major purpose of the Guidance is to establish consistent, enforceable, long-term protection for fish and shellfish in the Great Lakes and their tributaries, as well as for the people and wildlife who consume them.

In developing the Guidance, EPA recognized that control of mercury releases to the environment to achieve water quality standards could be a particularly difficult challenge. Mercury is persistent, ubiquitous, and harmful to human health and the environment at relatively low levels. Mercury finds its way to the water column from point and non-point sources. Non-point sources, particularly air deposition, are considered to be the most significant remaining contributors of mercury to the Great Lakes System. For these reasons, several stakeholders in the Great Lakes Basin advocated in their comments on the proposed Guidance that any additional controls on point

source discharges of mercury effectively be suspended. In response, EPA stated that the Guidance contained appropriate flexibility to address the unique problems posed by mercury. It also committed to developing a mercury permitting strategy.

Today, EPA is making its draft Mercury Permitting Strategy ("Strategy") available for public review and comment for a 60-day period. The purpose of the Strategy is to identify how the Guidance provides for implementation of mercury water quality standards though NPDES permits for point sources, focusing on the flexibility States or Tribes have for adjusting point source controls to account for non-point sources of mercury. The draft Strategy also addresses several permit implementation issues related to mercury data.

Dated: May 29, 1997.

**Robert Perciasepe,**

*Assistant Administrator, Office of Water.*

[FR Doc. 97-14858 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[AZ 69-0012; FRL-5836-9]

#### Approval and Promulgation of Implementation Plans; Arizona— Maricopa County PM-10 Nonattainment Area

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve in part and disapprove in part the final *Plan for Attainment of the 24-hour PM-10 Standard—Maricopa County PM-10 Nonattainment Area*, (May 1997) (plan or microscale plan) submitted by the Arizona Department of Environmental Quality on May 7, 1997. The microscale plan evaluates attainment of the 24-hour particulate matter (PM-10) national ambient air quality standard at four monitoring locations in the Maricopa County (Phoenix), Arizona, PM-10 nonattainment area. EPA is proposing to approve the attainment and reasonable further progress (RFP) demonstrations for two of these sites (Salt River and Maryvale) and disapprove them for two other sites (West Chandler and Gilbert). EPA is also proposing to approve the reasonably available control measure/best available control measure (RACM/BACM) demonstrations in the

microscale plan for some significant source categories of PM-10, but disapprove them for others.

**DATES:** Comments on this proposal must be received in writing by June 20, 1997.

**ADDRESSES:** Comments should be addressed to the contact listed below.

Copies of the State's submittals, the technical support document, and other information are contained in the docket for this rulemaking. A copy of this notice and the TSD are also available in the air programs section of EPA Region 9's website, <http://www.epa.gov/region09>. The docket is available for inspection during normal business hours at the following locations:

U.S. Environmental Protection Agency, Region 9, Office of Air Planning, Air Division, 17th Floor, 75 Hawthorne Street, San Francisco, California 94105, (415) 744-1248.

Arizona Department of Environmental Quality, Office of Outreach and Information, First Floor, 3033 N. Central Avenue, Phoenix, Arizona 85012, (602) 207-2217.

Maricopa County Environmental Services Department, Technical Services Division, 1001 N. Central Avenue, Suite 201, Phoenix, Arizona 85004, (602) 506-6010.

**FOR FURTHER INFORMATION CONTACT:**

Frances Wicher, Office of Air Planning (AIR-2), U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California 94105. (415) 744-1248.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Clean Air Act Requirements*

1. Designation and Classification

On the date of enactment of the 1990 Clean Air Act Amendments, PM-10 areas meeting the conditions of section 107(d) of the Act, including portions of Maricopa County (the Maricopa County PM-10 nonattainment area), were designated nonattainment for the PM-10 national ambient air quality standards (NAAQS)<sup>1</sup> by operation of law. Once an area is designated nonattainment, section 188 of the Clean Air Act (CAA) outlines the process for classification of the area and establishes the area's attainment date. In accordance with section 188(a), at the time of designation, all PM-10 nonattainment areas were initially classified as "moderate" by operation of law. 56 FR 11101 (March 15, 1991).

A moderate area could subsequently be reclassified as "serious" under CAA

section 188(b)(1), if at any time, EPA determined that the area could not practicably attain the PM-10 NAAQS by the applicable attainment date for moderate areas, December 31, 1994. Moreover, a moderate area was reclassified by operation of law if EPA determined after the applicable attainment date that, based on actual air quality data, the area was not in attainment after that date. CAA section 188(b)(2).

On May 10, 1996, EPA published a final reclassification of the Maricopa County PM-10 nonattainment area as a serious PM-10 nonattainment area based on actual air quality data. 61 FR 21372. Having been reclassified, the area is required to meet the serious area requirements in the CAA, including a demonstration that the area will attain the PM-10 NAAQS as expeditiously as practicable but no later than December 31, 2001. CAA sections 188(c)(2) and 189(b). Pursuant to section 189(b)(2), the State of Arizona must submit a serious area plan addressing both PM-10 NAAQS for the area by December 10, 1997.

2. Moderate Area Planning Requirements

The air quality planning requirements for PM-10 nonattainment areas are set out in subparts 1 and 4 of title I of the Clean Air Act. EPA has issued a "General Preamble"<sup>2</sup> describing EPA's preliminary views on how the Agency intends to review SIPs and SIP revisions submitted under Title I of the Act, including those state submittals containing moderate PM-10 nonattainment area SIP provisions.

Those states containing initial moderate PM-10 nonattainment areas were required to submit, among other things, the following provisions by November 15, 1991:

(a) Provisions to assure that reasonably available control measures (RACM) (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT)) shall be implemented no later than December 10, 1993 (CAA sections 172(c)(1) and 189(a)(1)(C));

(b) Provisions to assure implementation of RACT on major stationary sources of PM-10 precursors except where EPA has determined that such sources do not contribute significantly to exceedances of the PM-10 standards (CAA section 189(e));

<sup>2</sup> See "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992).

(c) Either a demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 1994 or a demonstration that attainment by that date is impracticable (CAA sections 188(c)(1) and 189(a)(1)(B));

(d) For plan revisions demonstrating attainment, quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress (RFP) toward attainment by December 31, 1994 (CAA section 189(c));<sup>3</sup> and

(e) For plan revisions demonstrating impracticability, such annual incremental reductions in PM-10 emissions as are required by part D of the Act or may reasonably be required by the Administrator for the purpose of ensuring attainment of the PM-10 NAAQS by the applicable attainment date (CAA sections 172(c)(2) and 171(1)).

Moderate area plans were also required to meet the generally applicable SIP requirements for reasonable notice and public hearing under section 110(l), necessary assurances that the implementing agencies have adequate personnel, funding and authority under section 110(a)(2)(E)(i) and 40 CFR § 51.280; and the description of enforcement methods as required by 40 CFR § 51.111, and EPA guidance implementing these sections.

3. Serious Area Planning Requirements

EPA has issued an Addendum to the General Preamble (Addendum) describing the Agency's preliminary views on how it intends to review SIPs and SIP revisions containing serious area plan provisions.<sup>4</sup>

Moderate PM-10 areas that have been reclassified to serious, such as the Maricopa area, in addition to meeting the moderate area requirements outlined above, must submit a plan that includes provisions addressing additional requirements. The additional serious area requirements that are relevant to this proposed action include:

(a) Provisions to assure that the best available control measures (BACM)

<sup>3</sup> As will be seen below, the moderate area PM-10 plan for the Maricopa area did not demonstrate attainment by December 31, 1994, but rather included the alternative demonstration that attainment by that date is impracticable. Therefore, section 189(c) did not apply to the State's moderate area plan.

<sup>4</sup> See "State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 59 FR 41998 (August 16, 1996).

<sup>1</sup> There are two PM-10 NAAQS, a 24-hour standard and an annual standard. 40 CFR 50.6.

(including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of best available control technology (BACT)) for the control of PM-10 shall be implemented no later than 4 years after the area is reclassified (CAA section 189(b)(1)(B));

(b) Provisions to assure implementation of BACT on major stationary sources of PM-10 precursors except where EPA has determined that such sources do not contribute significantly to exceedances of the PM-10 standards (CAA section 189(e));

(c) A demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 2001 (CAA sections 188(c)(2) and 189(b)(1)(A)(i));<sup>5</sup> and

(d) For plan revisions demonstrating attainment, quantitative milestones which are to be achieved every 3 years and which demonstrate RFP toward attainment by December 31, 2001 (CAA section 189(c)).

As discussed above in connection with the moderate area plan requirements, SIPs submitted to meet the CAA's serious area requirements must conform to general requirements applicable to all SIPs.

#### B. EPA Approval of Arizona's Moderate Area PM-10 Plan

On July 28, 1994, EPA proposed to approve the State's moderate area PM-10 implementation plan revision for the Maricopa area. 59 FR 38402. Among other elements in that plan, EPA proposed to approve the State's RFP and RACM demonstrations as meeting the requirements of sections 171(1), 172(c)(1), 172(c)(2), and 189(a)(1)(C) of the CAA. Based on its approval of the RACM demonstration, EPA also proposed to approve, as meeting the requirements of section 189(a)(1)(B), the State's demonstration that even with the implementation of all RACM by December 10, 1993, it was impracticable for the Maricopa area to attain the PM-10 NAAQS by December 31, 1994.<sup>6</sup>

During the public comment period on the EPA's proposed action, the Arizona

Center for Law in the Public Interest (ACLPI) submitted lengthy comments on many aspects of EPA's proposed approval of the State's moderate area PM-10 plan. Among ACLPI's comments were claims that the plan as submitted failed in numerous respects to meet the moderate area requirements of the CAA for RACM, RFP and attainment demonstrations. ACLPI further claimed that the State's impracticability and RACM demonstrations were additionally deficient in that the State had failed to address both the annual and 24-hour PM-10 standards as required by the CAA and EPA guidance. In response to this comment, EPA concluded that the State's demonstration that the Maricopa area could not practicably attain the annual standard was sufficient to meet the requirements of section 189(a)(1)(B) and therefore a separate analysis was not necessary for the 24-hour standard.

On April 10, 1995, having considered ACLPI's comments, EPA published a final rule in the **Federal Register** approving the State's moderate area PM-10 SIP for the Maricopa area. 60 FR 18010. In its final action, EPA approved, among other elements of the plan, the State's RACM and RFP demonstrations, and the State's demonstration that even with the implementation of all RACM by December 10, 1993, it was not practicable for the Maricopa area to attain the PM-10 NAAQS by December 31, 1994.

#### C. Ninth Circuit Litigation

On May 1, 1995, ACLPI filed, on behalf of two Phoenix residents, a petition for review, *Ober v. EPA*, No. 95-70352, of EPA's approval of Arizona's moderate area PM-10 plan for the Maricopa area in the United States Court of Appeals for the Ninth Circuit. On May 14, 1996, the court issued its opinion in the *Ober* case vacating EPA's approval of the State's plan.<sup>7</sup>

As it relates to this proposed rulemaking, the court found that the State was required to address in its SIP the moderate area requirements in the CAA regarding RFP, RACM and attainment or impracticability for both the 24-hour and the annual PM-10 NAAQS. The court concluded that because there are two separate NAAQS for PM-10, the CAA requires an

implementation plan to address each of them. In order to remedy the failure of the State to address the required demonstrations for the 24-hour standard, the court required EPA to in turn require the State to submit those demonstrations. 84 F.3d at 311.

#### D. EPA's Response to the *Ober* Opinion

In the wake of the Ninth Circuit's *Ober* opinion, EPA considered how to appropriately implement the court's directive in the context of the State's then prevailing PM-10 planning efforts for the Maricopa area. The Maricopa area was reclassified as a serious PM-10 nonattainment area just days before the case was decided and, as noted above, the State is now required to submit a new PM-10 plan meeting the serious area requirements by December 10, 1997. Simply put, EPA had to reconcile, with respect to both timing and content, the court's mandate that the State submit a plan correcting its moderate area plan deficiencies regarding the 24-hour standard concurrent with its responsibility to submit a plan meeting the serious area requirements for both NAAQS.

##### 1. Timing

As an initial matter, EPA concluded that, given the substantial overlap of the moderate and serious area planning requirements, it would not be in the public interest to require the State to divert its scarce resources into two independent planning exercises. At the same time the Agency recognized that deferring submittal of a plan addressing the moderate area plan deficiencies until the serious area submittal deadline of December 10, 1997 would not constitute a timely response to the court. Therefore EPA, in consultation with the Arizona Department of Environmental Quality (ADEQ) and the Maricopa County Environmental Services Department (MCESD), decided that the State would incorporate the moderate area plan elements for the 24-hour standard into the serious area plan, but would split that planning effort into two related parts. Accordingly, EPA required submittal of a limited, locally-targeted plan (microscale plan) meeting both the moderate and serious area requirements for the 24-hour standard by May 9, 1997 (extended from an original deadline of April 18) and a full regional plan meeting those requirements for both the 24-hour and annual standards by December 10, 1997. Thus, the microscale and regional plans taken together would satisfy both the moderate area requirements mandated by the court and the serious area planning requirements for both

<sup>5</sup> Section 189(b)(1)(A)(ii) provides for an alternative demonstration of impracticability similar to that available for moderate areas. Since the State did not make such a demonstration, this alternative requirement is not addressed in this notice.

<sup>6</sup> The reader should refer to both the proposed approval, 59 FR 38402, and the final rule, 60 FR 18010 (April 10, 1995), for EPA's interpretation of the certain moderate area PM-10 requirements of the CAA and the Agency's application of these interpretations to the State's moderate area PM-10 plan. Those notices should also be consulted for the history of the State's PM-10 plan submittals and EPA's actions concerning them.

<sup>7</sup> The reader is referred to the text of the opinion for the court's disposition of the range of issues raised by ACLPI in its petition. 84 F.3d 304 (9th Cir. 1996). This notice addresses that disposition only as it relates to the 24-hour standard. See also 61 FR 54972 (October 23, 1996) in which EPA preliminarily addresses the court's opinion as it relates to the RACM, RFP and attainment demonstrations for the annual standard.

standards. Therefore, until the regional plan is submitted and reviewed by EPA, it is premature to conclude that the microscale plan fully meets or does not meet the CAA requirements discussed below. The subject of this proposed action is the microscale plan only.

The submittal deadlines and statutory requirements applicable to the microscale plan are contained in letters dated September 18, 1996 and March 5, 1997 from Felicia Marcus, Regional Administrator, EPA Region IX, to Russell Rhoades, Director, ADEQ (Marcus letter).

## 2. Content

As specified in EPA's September 18, 1996 letter to ADEQ, the microscale plan was to address the 24-hour standard violations at five specific monitors and meet the statutory attainment, RACM and RFP requirements for moderate PM-10 areas and EPA guidance. In addition, the microscale plan was to meet the statutory attainment, BACM and RFP requirements for serious PM-10 areas and EPA guidance at 59 FR 41998. Further, the plan was to contain the air quality modeling and emissions inventory information necessary to support these attainment, RFP, RACM, and BACM demonstrations and must meet the general SIP requirements discussed above.

Having concluded that the hybrid moderate/serious plans described above would effectuate the intent of the Ninth Circuit's mandate, EPA then turned to the issue of how to define the moderate area requirements applicable to the microscale plan after the moderate area attainment deadline, December 31, 1994, has passed. The following discussion addresses that issue and the interrelationship of those requirements with the serious area requirements as they apply to that plan.

(a) *Attainment Demonstration.* EPA believes that because the Maricopa area was reclassified from a moderate to a serious nonattainment area, the moderate area requirements (demonstration of impracticability or attainment by no later than December 31, 1994) have been superseded by the serious area attainment requirement (attainment by no later than December 31, 2001) and are therefore now moot. Having reviewed the CAA's moderate and serious area PM-10 attainment provisions, EPA has concluded that when a moderate PM-10 area has been reclassified after the moderate area attainment deadline has passed and been replaced with a new deadline, the moderate area deadline no longer has

any logical, practical or legal significance.

Thus, under this interpretation, there would be no need for the State's microscale plan, to the extent that it is intended to meet the CAA's moderate area requirements, to demonstrate attainment. In other words, such an attainment demonstration would only be required when the State submits in late 1997 the complete serious area plan to comply with the section 189(b)(1) attainment demonstration requirement. EPA believes that its interpretation can be reconciled with the *Ober* court's directive that EPA require the State to address the moderate area attainment requirements for the 24-hour standard and that such an interpretation is reasonable given the legal and factual context in which that case was decided. EPA's reasoning is explained in detail at 61 FR 54972, 54974-54975 (October 23, 1996). Nevertheless, EPA has chosen to comply with the court's remedies regarding the moderate area attainment requirements.<sup>8</sup>

Having determined that it must require the State to meet the CAA's moderate attainment requirements for the 24-hour standard, EPA has concluded that since the December 31, 1994 deadline has passed and the Maricopa area has been reclassified, the only attainment deadline currently applicable to the area is the serious area deadline, that is, no later than December 31, 2001. Thus the attainment deadline for both the moderate and serious area components of the State's microscale PM-10 plan would be as expeditiously as practicable but no later than December 31, 2001. Therefore, if the microscale plan demonstrates attainment of the 24-hour standard at each monitor specified in EPA's September 18, 1996 letter by no later than December 31, 2001, it will be deemed to comply with sections 189(a)(1)(B) and (b)(1)(A) of the CAA.

(b) *RACM/BACM Demonstration.* Sections 172(c)(1) and 189(a)(1)(C) read together require that moderate area PM-10 SIPs include RACM and RACT for existing sources of PM-10. These SIPs were to provide for implementation of

<sup>8</sup> While EPA could have sought clarification from the Ninth Circuit in order to apply its interpretation in the context of compliance with the court's remedies in *Ober*, the Agency did not believe that it would have been in the public interest to do so. Such a review would necessarily have occurred without benefit of a thorough briefing on the issue and in the absence of an administrative record. The Agency does, however, reserve its right to assert its interpretation in any challenge to EPA's implementation of the court's remedies or in the context of other reclassifications. Because EPA is not applying this interpretation in this rulemaking, it does not constitute final agency action.

RACM/RACT no later than December 10, 1993. Since the moderate area deadline for the implementation of RACM/RACT has passed, EPA has concluded that the RACM/RACT required in the State's microscale plan must be implemented as soon as possible. *Delaney v. EPA*, 898 F.2d 687, 691 (9th Cir. 1990).

The methodology for determining RACM/RACT is described in detail in the General Preamble. 57 FR at 13540-13541. In summary, EPA suggests starting to define RACM with the list of available control measures for fugitive dust, residential wood combustion, and prescribed burning contained in Appendices C1, C2, and C3 of the General Preamble and adding to this list any additional control measures proposed and documented in public comments. The state can then cull from the list any measures for insignificant emission sources of PM-10 and any measures that are unreasonable for technological or economic reasons. The General Preamble does not define insignificant except to say that it would be unreasonable to apply controls to sources that are negligible ("de minimis") contributors to ambient concentrations. However, EPA's serious area plan guidance does define, for use in BACM determinations, a "significant contributor" source category as one that contributes 5 µg/m<sup>3</sup> or more of PM-10 to a location of expected 24-hour exceedances. Addendum at 42011. For purposes of the microscale plan only, EPA is proposing to use this same definition to define significant in determining which source categories require the application of RACM.

For any RACM that are rejected by the state, the plan must provide a reasoned justification for the rejection. Once the final list of RACM is defined, each RACM must be converted into a legally enforceable vehicle such as a rule, permit, or other enforceable document. General Preamble at 13541.

Under section 189(b)(2), for moderate areas that have been reclassified as serious, the state must submit BACM 18 months after reclassification, i.e., December 10, 1997 for the Maricopa area, and must implement those measures four years after reclassification, i.e., by June 10, 2000 for the Maricopa area.

BACM is defined as the "maximum degree of emission reduction of PM-10 and PM-10 precursors from a [significant] source [category] which is determined on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, to be achievable for such sources through application of

production processes and available methods, systems, and techniques \* \* \*." Addendum at 42010. BACM/BACT must be determined and documented consistent with the Addendum (59 FR at 42012-14) and must be applied to each significant area-wide source category and individual stationary source. Addendum at 42010, footnote 33. A "significant" source category is defined as one that contributes 5  $\mu\text{g}/\text{m}^3$  or more of PM-10 to a location of expected 24-hour violation. Addendum at 42011.

The state must document its selection of BACM by showing what control measures applicable to each significant source category were considered. See Addendum at 42014. BACM should go beyond existing RACM controls and can include expanded use of RACM controls (e.g., paving more miles of unpaved roads). Addendum at 42013. Additionally, BACM should emphasize prevention of PM-10 emissions where possible over remediation. Addendum at 42013.

For the microscale plan, EPA required that Arizona submit RACM and BACM demonstrations by May 9, 1997 as they relate to exceedances of the 24-hour standard at the five specified monitors. RACM and BACM were to be identified, documented, and realistically evaluated for effectiveness for contributing sources to each modeled exceedance. Marcus letter. Evaluation of RACM/BACM in the microscale plan is limited to controls for sources that are contributing significantly and directly to the localized violations rather than to sources contributing to background PM-10 levels. A full analysis of RACM/BACM for sources that significantly contribute to PM-10 levels in the Maricopa County PM-10 nonattainment area but are not directly implicated in the localized exceedances is to be conducted as part of the regional serious area plan, due December 10, 1997.

(c) *RFP/Quantitative Milestones*. Both PM-10 moderate and serious area nonattainment SIPs demonstrating attainment must include quantitative milestones to be achieved every three years until the area is designated attainment and must demonstrate RFP toward attainment by the applicable date. CAA section 189(c)(1). EPA has addressed these requirements in several guidance documents. See the General Preamble at 13539, the Addendum at 42015-42017, and the memorandum from Sally Shaver, EPA, to EPA Division Directors, "Criteria for Granting 1-Year Extensions of Moderate PM-10 Nonattainment Area Attainment Dates, Making Attainment Determinations, and Reporting on Quantitative Milestones,"

November 14, 1994 (Shaver memorandum). Of these guidance documents, the most comprehensive is the Addendum which discusses both the RFP annual incremental reduction requirement and the appropriate interpretation of the milestone requirement as it relates to moderate areas that have been reclassified to serious.

With respect to RFP, EPA determined that SIPs must indicate the annual emission reductions that correspond to the compliance schedules for the control measures in the plan. EPA then has considerable discretion in reviewing the SIP to determine whether the annual incremental emission reductions to be achieved are reasonable in light of the statutory objective of timely attainment. Addendum at 42015.

With respect to the quantitative milestone requirement, for initial moderate areas, EPA concluded that the SIP should initially address at least two milestones and that the starting point for the first 3-year period would be the SIP submittal due date, i.e. November 15, 1991. EPA further concluded that since the time lag between that date and the December 31, 1994 attainment deadline was *de minimis*, emission reduction progress made between the submittal date and December 31, 1994 would satisfy the first milestone. The second milestone to be addressed by these initial moderate area SIPs was November 15, 1997. General Preamble at 131539, Addendum at 42016, and Shaver memorandum. For moderate areas that are reclassified as serious, the third milestone achievement date is November 15, 2000. Addendum at 42016. The quantitative milestones should consist of elements that allow progress to be quantified or measured, e.g., percent compliance with implemented control measures. Addendum at 42016.

EPA will assess whether an area has achieved RFP in conjunction with determining compliance with the quantitative milestone requirement. Thus a state should address compliance with both requirements in its RFP/milestone reports. The contents of these reports is discussed in the General Preamble, its Addendum, and the Shaver memorandum.

Since the *Ober* court found that Arizona had failed to submit a moderate area SIP addressing the 24-hour PM-10 standard in 1991 and the regional plan addressing both the moderate and serious area requirements for both PM-10 NAAQS is now due on December 10, 1997, EPA believes that it is reasonable to conclude, by applying the *de minimis* reasoning above, that the November 15,

1997 milestone can be satisfied by the December plan submittal. Therefore, the microscale plan need not address the CAA section 189(c)(1) quantitative milestone requirement and it is not discussed further in this notice.

## II. Evaluation of the State's Submittal

The *Plan for Attainment of the 24-hour PM-10 Standard—Maricopa County PM-10 Nonattainment Area* (May, 1997) (microscale plan) was submitted to EPA by the Arizona Department of Environmental Quality (ADEQ) in draft on March 28, 1997 and in final on May 9, 1997. EPA has found both submittals complete pursuant to CAA section 110(k) and 40 CFR part 51, Appendix V. Letter, David P. Howekamp, EPA, to Russell F. Rhoades, ADEQ, May 23, 1997.<sup>9</sup>

EPA has evaluated the plan for compliance with the applicable statutory, regulatory, and policy requirements described above. This evaluation is summarized here, and the detailed analysis can be found in the technical support document which is located in the docket for this proposed rulemaking.

### A. Air Quality Modeling

#### 1. The Microscale Approach

CAA section 189(b)(1)(A)(i) requires serious area plans to include air quality modeling as part of their attainment demonstrations. For the microscale plan, base case air quality modeling was required for exceedances at the (East) Chandler,<sup>10</sup> West Chandler, Gilbert, and Maryvale monitors. For the Salt River monitor, air quality modeling was required for each unique emissions scenario leading to an exceedance. In addition, all modeling inputs had to be fully documented and the air quality

<sup>9</sup>ADEQ requested that EPA propose action on the draft plan in parallel with the State's public comment period (see March 28, 1997 submittal letter); however, the final plan was submitted before EPA could do so. Therefore, EPA's evaluation of the microscale plan, as described in this notice, is based on the final plan and all references in this notice are to that plan.

<sup>10</sup>The East Chandler site was dropped from the microscale plan because there was insufficient source activity information to develop a useable inventory for modeling the exceedances at the site. Plan, Appendix A, p. 3-1. From the information that is available about the East Chandler site, it appears that exceedances there have similar causes to those at the modeled West Chandler site, that is, they are related to windblown dust during high winds from a mix of urban and agricultural sources. See facsimiles, Randy Sedlacek, ADEQ, to Frances Wicher, EPA, May 21, 1997 (found in the docket). The Gilbert site also had similar source characteristics. Plan, Appendix A, p. 4-7. Therefore, RACM/BACM implemented for the West Chandler and Gilbert sites should also contribute to emission reductions at the East Chandler site. Consequently there will be no further reference to this site in this notice.

modeling protocols must conform to EPA guidance or be approved in advance by EPA. Marcus letter.

Base case air quality modeling attempts to replicate observed PM-10 NAAQS exceedances using historical observations of air quality, meteorology, and emissions. The modeling results indicate what sources are contributing to the exceedances and what level of emissions reductions are needed to eliminate these exceedances.

The modeling approach used in the microscale plan is significantly different than default approaches in EPA guidelines and approaches used in other areas. The main concept of the approach used in the microscale plan is that if PM-10 exceedances are caused mainly by relatively nearby sources, then an attainment demonstration can be based on modeling over a relatively small (microscale) geographic domain, i.e., over sub-areas of the nonattainment area. The microscale approach is more fully described in *Microscale Monitoring and Modeling Protocol for the Maricopa PM-10 Nonattainment Area*, Harding Lawson Associates, August 31, 1994.

Normally, attainment demonstrations should address attainment for the entire nonattainment area; however, emission inventory development and modeling for areas with substantial fugitive dust problems, such as the Maricopa area, have proved difficult because of the marked uncertainty and temporal and spatial variability of fugitive dust emissions. Fugitive PM-10 has more localized effects than the other criteria pollutants because it is emitted near ground level and has relatively sharp spatial gradients as dust settles out with distance from the source. These considerations suggest that effort should be focused on intensive inventorying and modeling of small areas and short episodes. The approach in the microscale plan can be viewed as an extension of the microinventory method cited in early EPA guidance on PM-10 (*Receptor Model Technical Series, Volume I, Overview of Receptor Model Application to Particulate Source Apportionment*, EPA-450-4-81-016a, July 1981, p. 27) but goes a step further in using that emission inventory as input into a dispersion model to enable a more precise apportionment of the various sources' effects.

Nevertheless, sources can have effects farther away than is implied by the term "microscale." The finer component of fugitive PM-10 can settle out relatively slowly, and during high wind conditions, at least some of the larger component can be carried long distances. These effects create a regional

component that is not captured in the emissions of a small area near a monitor. This regional component can be dealt with as part of a regional modeling exercise or as part of a "background" to be added to the microscale results. The latter approach is taken in the microscale plan. The fact that the background levels in the plan are relatively high relative compared to the total concentrations indicates a limitation of the microscale approach. Plan, pp. 24-26. On the other hand, since fugitive dust control measures derived from the microscale analysis area to be applied over the entire nonattainment area, the background will likely also be reduced because it too is made up primarily of fugitive dust. Therefore, keeping the background constant between uncontrolled and controlled scenarios, as is done in the microscale plan, makes for a conservative microscale attainment demonstration, partly compensating for shortcomings in the microscale approach.

EPA guidance for ozone and carbon monoxide modeling (e.g., *Guideline for the Regulatory Application of the Urban Airshed Model*, EPA-450/4-91-013, July 1991) describes the selection of pollution episodes to model; there is no comparable guidance for PM-10, but the reasoning would be the same. Basically, the day(s) chosen should be representative of the meteorological conditions and emissions scenarios that lead to NAAQS exceedances and have an adequate database for the development of model inputs. In addition, a microscale approach must ensure that the particular sites chosen for modeling are worst case or representative of PM-10 exceedances in the area.

## 2. Evaluation of the Microscale Plan's Air Quality Modeling

While documentation in the plan is sparse in places, enough information is provided to assess the adequacy of the approaches used. The following summarizes EPA's evaluation of the microscale modeling. The complete evaluation can be found in the TSD.

The rationale for the choice of monitoring sites to model with the microscale approach is given in Appendix A to the plan. Past emission inventory and modeling work for the Maricopa area have identified several fugitive dust source categories as being especially important for PM-10 exceedances including urban lots, highway and other construction activities, agricultural activities, and some industrial sources. Study sites were chosen in areas of high emissions

density: South Phoenix for its mix of urban sources;<sup>11</sup> Salt River for its proximity to industrial sources; West Chandler for its nearby highway construction; and East Chandler for its mix of urban and agricultural sources. The Gilbert and Maryvale sites were later added because they recorded 24-hour exceedances during 1995. These sites are characterized by nearby agricultural land and by park construction/landscaping, respectively.

Together, all these sites present a representative cross-section of the emission sources in the Maricopa area that are suspected of contributing to PM-10 exceedances.

The microscale study took place throughout 1995. In addition to the EPA's standard AP-42 emission methodologies and some other prior special studies for particular source categories, the microscale study included field surveys, aerial photography, examination of activity logs, and interviews with source operators. This study resulted in a substantially better emissions inventory data than is usually available.

To help define the geographic domains to be included in the final modeling, initial screening modeling was performed to determine the distance beyond which sources have an insignificant impact at the monitors. Concentrations observed at neighborhood scale monitors, and information on the land uses that affect these, were used to develop background concentrations for each portion of the modeling domain. Background concentrations were then added to the results of the EPA-recommended ISCST model to yield total predicted concentrations.

Episodes for modeling were chosen from among exceedance days that occurred during the 1995 study. Because of the importance to the microscale approach of an intensive emission inventory database, some days had to be discarded for lack of adequate emission source activity data.

The Sunday, April 9, 1995 high wind episode day was chosen for the Gilbert, West Chandler, and Maryvale sites.<sup>12</sup> For the Salt River site, October 16, 1995

<sup>11</sup> The South Phoenix site was not included in the microscale plan because it did not record any 24-hour PM-10 exceedances in 1995. EPA's criterion for determining which sites were to be analyzed in the microscale plan was whether the site had recorded exceedances of the 24-hour NAAQS during 1995.

<sup>12</sup> For the Gilbert and Maryvale sites, the April 9, 1995 exceedance was the only 24-hour exceedance recorded in 1995. The West Chandler site recorded a second exceedance on July 30, 1995. Plan, p. 15. This exceedance also appears to be related to a high wind event. Plan, Appendix A, p. 3-4.

was selected since all the relevant sources were in operation, the model validated well, and an October day was desirable since many of the exceedances were in that month. Plan, Appendix A, pp. 7-18 to 7-19. Multiple days could have been used and would have been desirable given the seasonal shifts in the daily times of high concentration noted in the plan. However, these varying concentrations were mainly dependent on wind direction, and the chosen October 16, 1995 day exhibits fairly high values in both morning and evening. Thus, the modeled phenomena are similar enough to the other episodes that this single design day is sufficient for the Salt River site.

Overall, the episodes modeled are representative of the conditions under which exceedances of the 24-hour PM-10 NAAQS occur. Model performance was generally good, especially for the Salt River site, and well within what can be expected from the type of model used, a Gaussian dispersion model.

The microscale plan's approach for demonstrating attainment within each sub-area or modeling domain was proportional rollback. The basic assumption in proportional rollback is that a given percentage reduction in emissions yields the same percentage reduction in concentration at the receptor. Every attainment demonstration for a chemically-inert pollutant (that is, a pollutant that does not react in the atmosphere) such as primary PM-10 is implicitly based on proportional rollback, so the plan's approach is acceptable.

Air quality modeling should evaluate the effectiveness of controls throughout the entire modeling domain. A control strategy sufficient for attainment at the monitor or at the maximum modeled receptor might not be sufficient at other receptor points within the domain where source contributions could be different because of the varying distances between the receptors and the sources. For the microscale plan, this variation is probably not important for the Maryvale or Salt River sub-areas, where a single source category at each site is so dominant, but could be important for the Gilbert and West Chandler sub-areas with their more equal mix of sources.<sup>13</sup>

As the sub-areas are representative of the sources and conditions that lead to

<sup>13</sup> The microscale plan does not demonstrate attainment at the Gilbert and West Chandler sites; therefore, this point is moot. When additional controls are analyzed for these sites, an array of points within each modeling domain should be evaluated. Evaluation of controls at a single point will not be adequate for an attainment demonstration.

exceedances, the air quality modeling in the microscale plan is adequate for demonstrating attainment of the 24-hour PM-10 NAAQS for the Maryvale and Salt River sites within the context of the microscale approach.

#### B. Evaluation of RACM/BACM

##### 1. RACM/BACM Analysis

(a) *Maryvale Site.* The Maryvale PM-10 monitoring site is located next to the Desert West Park which was under construction in early 1995. Plan, Appendix A, p. 4-2. The air quality modeling evaluation of the Sunday, April 9, 1995 exceedance at the monitor showed that windblown fugitive dust, all from the area cleared for the park (that is, a disturbed cleared area), was the single largest contributor to the exceedance. Plan, p. 18.

The microscale plan includes a list of potential control measures for the disturbed cleared area category including wind fences, chemical stabilizers, watering to maintain adequate soil moisture, and water to maintain a crust. Plan, p. 22. This source category is also subject to MCESD's Rule 310, Open Fugitive Dust Sources, which requires the application of RACM to open sources of fugitive dust. RACM is defined in the Rule 310 (section 221) and is detailed on the rule's dust control plan checklist and handbook "A Guide for Reducing Air Pollution from Construction." See Plan, Appendix E, Letter, Joy Bell, MCESD, to Joe Gibbs, ADEQ, May 6, 1997 (Bell letter).<sup>14</sup> These measures include EPA's suggested RACM for this source category.<sup>15</sup> See General Preamble, Appendix C1.

The microscale plan also identifies BACM enhancements, including revising the dust control plan checklist to make permit holders aware of the importance of preventing wind-blown dust even when areas are inactive and the requirement to stabilize disturbed surfaces at all times, and revising the handbook to encourage them to plan their projects to minimize the amount of

<sup>14</sup> The Maricopa County Board of Supervisors adopted on May 14, 1997 a resolution committing to implement improvements to the administration of the fugitive dust control program and to foster interagency cooperation to address fugitive dust. The microscale plan included the draft resolution, and ADEQ transmitted the adopted resolution to EPA on May 27, 1997. See letter from Nancy Wrona, ADEQ, to John Kennedy, EPA.

<sup>15</sup> Background concentrations at each of the monitoring sites were substantial (80 to 90 µg/m<sup>3</sup>). Analysis of the causes of the high background levels was not part of the microscale protocol. It is possible, therefore, that there are other significant sources contributing to the exceedances at the monitors that have not been identified because they only contribute to the background.

land disturbed at one time. Plan, p 27. These types of enhancements meet EPA's guidance for BACM by going beyond existing RACM controls, expanding the use of RACM controls, and emphasizing prevention over remediation.

(b) *Salt River Site.* The Salt River monitor is located on the grounds of the City of Phoenix's Salt River Service Center Yard. The site is surrounded by a number of industrial operations (including pre-cast concrete manufacturing and sand and gravel operations), landfills (the 19th Avenue Landfill superfund site and the 27th Avenue Landfill), and other fugitive dust sources such as unpaved parking lots and roads. Plan, Appendix A, pp. 6-3 and 6-4. The modeling showed that fugitive dust from earth moving activities at 19th Avenue Landfill was the single largest contributor to the modeled October 16, 1995 exceedance and was the result of not watering to the depth of the cut during earth moving operations. Plan, pp. 17 and 23. Fugitive dust from unpaved parking lots, industrial haul roads and other unpaved roads also contributed significantly to the exceedance. Plan, p. 17. See also footnote 15 of this notice.

All these significant source categories are subject to the RACM requirements in Rule 310. The microscale plan also includes a list of controls for earth moving and unpaved parking lots,<sup>16</sup> many of which duplicate RACM required by Rule 310. Plan, p. 21. These measures include EPA's suggested RACM for these source categories. General Preamble, Appendix C1.

The microscale plan also identifies an enhancement to RACM for earth moving operations. This enhancement requires watering to the depth of the cut or other equivalent technique. Plan, p. 23. This type of enhancement meets EPA's guidance for BACM by going beyond existing RACM controls, expanding the use of RACM controls, and emphasizing prevention over remediation. The microscale plan does not explicitly identify BACM for unpaved parking lots, industrial haul roads, and unpaved roads although clarifications to Rule 310 to make permit holders aware of the importance of preventing wind-blown dust even when areas are inactive and of the requirement to stabilize disturbed surfaces at all times should improve control on these types of sources when they are located at permitted facilities.

(c) *Gilbert Site.* The Gilbert monitoring site is located on the grounds of the City of Gilbert's

<sup>16</sup> The identified control measures for unpaved parking lots are also applicable to unpaved roads.

wastewater treatment plant and has agriculture fields and aprons to its north, paved and unpaved parking to the north and west, and a city park to the south. Plan, Appendix A, pp. 4–5. The modeling showed that windblown fugitive dust from agriculture aprons and unpaved parking lots was the largest contributor to the Sunday, April 9, 1995 exceedance. Plan, p. 18. Fugitive dust from disturbed cleared areas was also a significant contributor to the exceedance. Plan, p. 18. See also footnote 15 of this notice. All these source categories are subject to the RACM requirements in Rule 310.<sup>17</sup> The RACM in Rule 310 include EPA's suggested RACM for these source category. General Preamble, Appendix C1.

The BACM enhancement identified for these categories are clarifications to the dust control requirements in Rule 310 and improved enforcement of Rule 310. Plan, p. 23. These types of enhancements meet EPA's guidance for BACM by going beyond existing RACM controls, expanding the use of RACM controls, and emphasizing prevention over remediation. The microscale plan also includes development of a partnering process with the U.S. Natural Resources Conservation Service (NRCS) to address fugitive dust from agricultural sources (Plan, p. 36) and with the local jurisdictions in Maricopa County to address unpaved parking (Plan, p. 35); however, no potential controls are identified for these sources, nor is there any analysis as to why controls are not available.

(d) *West Chandler Site.* The West Chandler monitoring site is located near the corner of Price and Frye Roads and is bordered on the west by agriculture fields (which were idle on April 9, 1995) and the right of way for Price Road/Freeway which was under construction in early 1995. Plan, Appendix A, p. 4–4. The modeling showed that windblown fugitive dust, mainly from agricultural fields and road construction (disturbed cleared area), was the largest contributor to the April 9, 1995 exceedance. Fugitive dust from vacant lands and agricultural aprons was also a significant contributor. Plan, p. 19. See also footnote 15 of this notice. All these source categories are subject to the RACM requirements in Rule 310

(see footnote 17 of this notice). These measures include EPA's suggested RACM for all these source category except agricultural fields. General Preamble, Appendix C1.

The BACM enhancements to RACM for these categories are similar to those recommended for Gilbert and Maryvale. Plan, p. 28. These types of enhancements meet EPA's guidance for BACM by going beyond existing RACM controls, expanding the use of RACM controls, and emphasizing prevention over remediation.

(e) *PM-10 Precursors.* CAA section 189(e) states that the control requirements applicable under PM-10 plans for major stationary sources of PM-10 are also applicable to major stationary sources of PM-10 precursors (such as NO<sub>x</sub> and SO<sub>x</sub> sources) except where EPA determines that such sources do not contribute significantly to PM-10 levels. General Preamble at 13541–13542. "Significant" is not defined in the General Preamble, rather for moderate areas, the determination was to be made on a case-by-case basis. General Preamble at 13539. For serious areas, a "significant" source category is defined as one that contributes 5 µg/m<sup>3</sup> or more of PM-10 to a location of expected 24-hour violation. Addendum at 42001. For this rulemaking only, EPA is proposing to apply the serious area definition to both the RACT and BACT necessity determinations.

It is clear from the modeling that primary-emitted PM-10 (i.e., fugitive dust) is the only significant contributor to the 24-hour PM-10 exceedances at the four modeled sites. Based on this evidence, EPA is proposing to determine under section 189(e) that sources of PM-10 precursors do not contribute significantly to PM-10 levels which exceed the 24-hour standard at the Gilbert, West Chandler, Maryvale, and Salt River monitors and therefore no RACM/BACM controls are necessary for these sources. This proposed finding applies only to the microscale plan and will need to be evaluated again for the full regional plan.

## 2. RACM/BACM Implementation

(a) *MCESD Rules and Commitments.* The primary conclusion of the air quality modeling is that the 24-hour PM-10 exceedances at the four evaluated sites are related solely to fugitive dust. The eight source categories of fugitive dust that were identified as significant (that is, had an impact of 5 µg/m<sup>3</sup> or more) at one or more monitoring sites are regulated wholly or in part by MCESD's Rule 310 (Open Sources of Fugitive Dust). See footnote 17 of this notice. These

significant source categories are disturbed cleared area, earth moving, unpaved parking lots, unpaved roads, industrial haul roads, vacant land, agricultural fields, and agricultural aprons.

(i) *Rule 310.* Rule 310 was adopted by Maricopa County in 1988, substantially revised in 1993, and revised again in 1994. The rule was initially submitted to EPA in 1994 as part of the moderate area PM-10 plan for the Maricopa area, and EPA approved the rule on April 10, 1995 (60 FR 18010) in conjunction with its approval of the overall moderate area plan. This plan's approval was subsequently vacated by the Ninth Circuit in *Ober*. Although the court's opinion did not address the SIP approvability of Rule 310, its disposition had the incidental effect of also vacating EPA's approval of Rule 310.

In the 1994 proposed approval of the moderate area plan, EPA found that Rule 310 met the CAA's enforceability requirements and proposed to approve the rule except for a "director's discretion" provision.<sup>18</sup> 59 FR 38402 (July 28, 1994). Several comments questioning the enforceability of Rule 310 were received on the proposal but none changed EPA's conclusion that the rule was enforceable. 60 FR 18018. Neither the rule nor EPA's finding that the rule meets the SIP enforceability criteria has changed since that time. Therefore EPA is reaffirming its previous finding that Rule 310 meets the requirements of CAA sections 110(a)(2)(A) and 172(c)(6) for enforceable emission limitations. As a result, EPA is proposing to reapprove Rule 310 as an element of the Arizona SIP for the Maricopa PM-10 nonattainment area.

*Implementation of Rule 310.* Rule 310 requires the application of reasonably available control measures to open sources of fugitive dust. RACM is defined in the rule (section 221) and is detailed on the dust control plan checklist and in the Rule 310 handbook "A Guide for Reducing Air Pollution from Construction." The microscale plan includes revisions to the checklist and handbook to reflect BACM. Plan, Appendix E, Bell letter. These revisions include making clear that the dust control plan must be implemented throughout the life of the project until all roads and disturbed areas are stabilized and that watering is required to the depth of an earth moving cut.

Rule 310 also requires that an earth moving permit be obtained prior to

<sup>18</sup>This provision was subsequently deleted from the rule.

<sup>17</sup> Application of Rule 310 to agricultural sources including fields and aprons is affected by the provision in section 102 (incorporating A.R.S. 49-504.4) that the rule "shall not be construed so as to prevent normal farm cultural practices." Therefore, applicability of the rule to such sources depends on what dust-generating operation is occurring at the source. In other words, Rule 310 applies to some operations on agricultural fields and aprons and not to others.

engaging in any commercial, industrial or institutional earth moving or dust generating operation that disturbs a total surface area of 0.10 acres or more.<sup>19</sup> Rule 310, section 302 (dust generating operations—permits required). A dust control plan must be submitted with the permit application. Rule 310, section 303 (control plans). Earth moving permits must be renewed every year. Rule 200 (Permit Requirements), section 305.4. No permit is required for other fugitive dust sources regulated by Rule 310 such as unpaved parking lots, unpaved roads, vacant lots, agricultural fields, and agricultural aprons.

To help permit applicants develop dust control plans, MCESD has developed a general dust control plan or checklist that lists RACM by category (e.g., earth moving, disturbed surface areas). Permit applicants can simply check off the RACM they will use but must check off at least one measure per category. Alternatively, applicants may craft their own dust control plans provided they meet the requirements of Rule 310. See Plan, p. 34 (revised dust control plan checklist).

Review of earth moving permit applications and dust control plans as well as the inspection of permitted earth moving sites is done primarily by the MCESD's Earthmoving/Burn Permit Coordinator.<sup>20</sup> Inspections are conducted for all projects greater than 10 acres in size and smaller operations are inspected based on several factors including the compliance history of the contractor/developer or complaints. Some inspections are performed by the Department's regional offices when time allows. Plan, Appendix B, p. 2-5. MCESD inspectors also note earth moving operations when they are out in the field and stop to check if the required permit is posted. Plan, Appendix G, p. 18. Historically, stationary sources have not been inspected for Rule 310 violations even when they have fugitive dust sources subject to the rule.<sup>21</sup> Plan, Appendix B, p. 2-5.

<sup>19</sup> Maricopa County's interpretation of the prohibition in A.R.S. 49-504.4 that county air pollution control agencies cannot "prevent [] normal farm cultural practices which cause dust" has effectively exempted agricultural sources from the permit requirements of Rule 310. Plan, p. 31.

<sup>20</sup> During the fall and winter this Coordinator is also responsible for implementing the County's residential wood burning restriction rule. Given the demonstrated contribution of earth moving sources to Maricopa area PM-10 exceedances, MCESD may want to re-evaluate splitting the Coordinator's time between the fugitive dust and no burn programs.

<sup>21</sup> MCESD is addressing the permitting process for stationary sources subject to dust control plan requirements in a work flow review and analysis of the Department's permitting process. Recommendations from this review (such as revised

MCESD only inspects sources that do not require permits (such as vacant land and unpaved parking lots) on a complaint basis and has no proactive inspection or compliance assurance program for these types of sources. Plan, p. 12.

The microscale plan identifies a number of recommended changes to improve implementation of Rule 310. MCESD has or will undertake a number of internal program modifications to implement these recommendations and will lead a regional program to foster interagency cooperation to reduce particulate pollution.

Some of the internal program modifications the Department has already made are revising a number of documents that support implementation of Rule 310 including the dust control plan, the Rule 310 handbook, the guideline for earth moving inspection checklist, and the standard operating procedures (SOP) for earth moving permit application processing and site inspection. In addition, MCESD is revising the SOP for air pollution inspection procedures.<sup>22</sup> Plan, Appendix E, Bell letter. Other changes include updating staff training on Rule 310 (target completion date: May 31, 1997), initiating a weekend inspection program for Rule 310 sources (target date: May, 1997), and linking the earth moving permit, complaint, and enforcement databases to improve access to information on permitted sources (target completion date: February, 1998). Plan, Appendix E, Bell letter. A complete description of MCESD's commitments can be found in the Plan, Appendix E, Bell letter.

*Regional Program.* MCESD has also committed to a regional program to foster interagency cooperation including designating a MCESD staff person as a coordinator, holding Rule 310 workshops for cities and contractors, creating material on Rule 310 for distributing to City/County staff and contractors, continuing to conduct workshops in 1997 on studying and improving the current dust control program, expanding public awareness programs for particulate pollution, and

permitting procedures) will be implemented in July, 1997. Plan, Appendix E, Bell letter. Improved permitting of these sources should result in better inspections.

<sup>22</sup> EPA recently complete a review of permit files at MCESD. One of the focuses of this file review was to evaluate the effect of the SOPs on the completeness and quality of inspections. The review showed that the SOPs have resulted in more thorough and higher quality inspections. Memorandum, Colleen McKaughan to Doug McDaniel, "File Review at Maricopa County Environmental Services Department April 7-10, 1997" May 19, 1997 (found in the docket).

publicizing MCESD's public complaint line number. The regional program will be fully implemented in 1997. A complete description of MCESD's commitments can be found in the Plan, Appendix E, Bell letter.

In total, MCESD's commitments clearly identify the actions required and the deadlines for those actions and thus constitute enforceable control measures under CAA sections 110(a)(2)(A) and 172(c)(6). EPA, therefore, proposes to approve them as elements of the Arizona SIP.

*Resources for Rule 310 Implementation.* MCESD will continue to implement Rule 310 through a program of reviewing and evaluating dust control plans, inspection of sources with earthmoving permits, and responding to complaints. The Earthmoving/Burn Permit Coordinator has primary responsibility for reviewing dust control plans and inspections and is aided in inspections by four dedicated stationary source inspectors in the main office. In addition, MCESD has recently hired a public involvement coordinator and an assistant to the Earthmoving/Burn Permit Coordinator. Finally, the Department's Small Business Assistance Program also assists in implementing Rule 310 through outreach and compliance assistance. Plan, Appendix E, Bell letter.

Complaints are handled by the appropriate regional office. Each regional office has one supervising inspector and two staff inspectors. The regional offices also do earth moving inspections as time allows during the summer months. These non-complaint inspections are limited to permitted sites from 5 to 10 acres. Plan, Appendix B, pp. 2-4 and 2-5.

In all, there are 1.75 full time equivalent (FTE) positions working directly on Rule 310 implementation, plus the Department has 19 inspectors, aides, engineers, and supervisors available to perform field observations and respond to complaints. Plan, Appendix E, Bell letter. This level of staffing (when combined with the support from the rest of the Department's inspection staff) is sufficient to ensure implementation of Rule 310 at the level assumed and committed to in the microscale plan, that is, a reasonable level of implementation on permitted sources but minimal implementation on nonpermitted sources.<sup>23</sup>

<sup>23</sup> The microscale plan only assumes emission reductions from sources subject to permitting (e.g., earth moving, disturbed cleared areas). No reductions are assumed for nonpermitted sources

(ii) *Rules 311 and 316.* Individual point sources (e.g., several concrete manufacturers and sand and gravel operations) whose emissions are accounted for within several of the source categories at the Salt River site are also covered by MCESD's Rule 311 (Particulate Matter from Process Industries) and Rule 316 (Nonmetallic Mineral Mining and Processing). These rules were approved by EPA as RACT for PM-10 sources as part of the approval of the moderate area plan. 60 FR 18009. While not at issue in the litigation regarding that plan's approval, EPA's approval of these rules was also incidentally vacated by the *Ober* decision. EPA, therefore, will be restoring its approval of these rules in its final action on this proposal.

(b) *City Resolutions.* The microscale plan includes resolutions adopted by the Cities of Phoenix, Tempe, Chandler, Glendale, Scottsdale, and Mesa and the Town of Gilbert (collectively, city or the cities). Plan, Appendix E, "Resolutions Adopted by Various Cities and Towns within Maricopa County" (resolutions). The resolutions commit each city to participate in a regional program led by MCESD to foster interagency cooperation to reduce particulate pollution. This participation requires the city to (1) designate a staff person to coordinate the city's participation in the regional dust control program, (2) participate in workshops (to be held by MCESD) to study current dust control programs and to evaluate options for additional efforts, (3) distribute MCESD information on dust control to grading and certain building permit applicants, (4) ensure appropriate city personnel receive training on Rule 310 requirements, and (5) distribute information on particulate pollution to the public. The resolutions do not commit the cities to adopt any additional dust control requirements.

The cities will undertake these actions using current staffing and funding. Plan, p. 35 and Appendix E, resolutions. Because these actions are easily integrated into on-going city activities, these staffing and funding levels are adequate to implement the commitments. MCESD has complemented the cities' efforts by committing to designate a staff person as the regional program coordinator, to hold workshops, develop material for distribution, and provide training on Rule 310. Plan, Appendix E, Bell letter.

The commitment to address fugitive dust is an important additional step by the cities to help solve Maricopa's PM-

(e.g., vacant lots, unpaved parking). See Plan, pp. 37-40.

10 problem in the long term.<sup>24</sup> The air quality modeling clearly shows that fugitive dust from nonpermitted sources such as vacant lands, unpaved parking lots, and unpaved roads are significant contributors to exceedances. Given the size of the Maricopa PM-10 nonattainment area and MCESD's limited resources, the cities and towns will need to take a more active role in reducing fugitive dust from these nonpermitted sources.

The cities' resolutions clearly identify the actions required and the deadlines for those actions and thus constitute enforceable commitments. As such, EPA proposes to approve them into the Arizona SIP for the Maricopa PM-10 nonattainment area.

(c) *Agricultural Sources.* As discussed previously, the air quality modeling demonstrated that control of fugitive dust from agricultural fields and field aprons is necessary for attainment of the 24-hour PM-10 standard at the Gilbert and West Chandler sites. Rule 310, while nominally applicable to agricultural sources, is not in general enforced against them. Plan, p. 31. See also footnote 17 of this notice. The microscale plan contains no controls for these source categories but does include an agreement by ADEQ, MCESD, and the federal Natural Resources Conservation Services (NRCS) to develop a protocol to address fugitive dust on agricultural land and refine roles, objectives and schedule. Plan, p. 36 and Appendix E, "Agreement of ADEQ, U.S. NRCS, and MCESD" (NRCS agreement).

EPA appreciates the agreement of the three agencies to develop a protocol to address fugitive dust from agricultural sources and fully supports this effort. However, given the impact of these sources on PM-10 levels in the Maricopa area, it is important that the protocol and the work that follows it are focused on getting appropriate RACM and BACM measures in place by the applicable deadlines.

(d) *Proposed Finding on RACM/BACM Implementation.* There are eight source categories of fugitive dust identified in the microscale plan as significant at one or more monitoring sites: disturbed cleared area, earth moving, unpaved parking lots, unpaved roads, industrial haul roads, vacant land, agricultural field aprons, and agricultural fields.<sup>25</sup> Plan, pp. 17-19.

<sup>24</sup> Many of the cities and towns in Maricopa County have already committed to undertake other PM-10 control measures such as paving unpaved roads. See MAG 1991 Particulate Plan.

<sup>25</sup> As noted previously (footnote 15), there may be other significant sources impacting the monitors that were not identified in the microscale modeling

These sources divide into three categories. In the first category are sources subject to permitting: disturbed cleared areas, earth moving, and industrial haul roads.<sup>26</sup> In the second category are sources that are not subject to permitting (i.e., nonpermitted sources): unpaved parking lots, unpaved roads, and vacant land. Finally, in the third category are the two sources that are essentially unregulated by Rule 310: agricultural fields and agricultural aprons.

As discussed above, MCESD has an adequate implementation strategy for dealing with permitted sources including review and approval of dust control plans and proactive inspections and has sufficient resources to carry out that strategy. The Department adopted Rule 310 in 1994 and is already implementing and improving the program. Plan, pp. 7-13 and 32-33. The BACM improvements to the Rule 310 program and the other commitments in the microscale plan will all be fully implemented within one year of submittal of the final plan, with many being implemented within one or two months. Plan, pp. 32-33. EPA, therefore, is proposing to find that the microscale plan assures implementation of RACM as soon as possible and BACM by December 10, 2000 as required by CAA sections 189(a)(1)(C) and 189(b)(1)(B) for the significant source categories of: disturbed cleared areas, earth moving, and industrial haul roads. EPA is proposing to approve the RACM/BACM demonstrations for these source categories.

For nonpermitted sources, MCESD seeks compliance with Rule 310 only when complaints are received. MCESD has adopted RACM controls for these sources in Rule 310 and is committed along with the seven cities to evaluate options to reduce particulate from vacant lands, unpaved roads, and unpaved parking areas. Plan, Appendix E, Bell Letter. The microscale plan, however, contains no commitments to assure RACM/BACM will be implemented for these sources at a meaningful level nor any analysis as to why RACM or BACM implementation on these sources is infeasible. As a result, the microscale plan does not claim any credit in the attainment demonstrations for these nonpermitted sources. Plan, pp. 37-40. EPA, therefore, is proposing to find that the microscale plan does not assure implementation of

because they formed part of the background concentration.

<sup>26</sup> Haul roads are considered permitted sources in the microscale plan because, at the Salt River site where this category was significant, the haul roads are located on permitted sources.

either RACM or BACM as required by CAA sections 189(a)(1)(C) and 189(b)(1)(B) and to disapprove the RACM/BACM demonstrations for the unpaved parking lots, unpaved roads, and vacant land source categories.

As discussed previously, there are currently no effective controls on agricultural sources in the Maricopa area. The microscale plan provides for the development of a partnership to identify appropriate controls but does not contain any actual controls nor is there any analysis as to why RACM/BACM implementation on these sources is infeasible. EPA is, therefore, proposing to find that the microscale plan does not assure implementation of either RACM or BACM as required by CAA sections 189(a)(1)(C) and 189(b)(1)(B) and to disapprove the RACM/BACM demonstrations for these sources.

These proposed findings are applicable only to the microscale plan and thus, if finalized, will not constitute EPA's final decision as to the State's full compliance with the requirements of CAA sections 189(a)(1)(C) and 189(b)(1)(B) for RACM and BACM for the eight source categories. The State will need to re-evaluate appropriate RACM and BACM for these sources in the full regional plan.

### C. Evaluation of Attainment and RFP Demonstrations

#### 1. Salt River Site

As discussed above, attainment of the 24-hour PM-10 standard at the Salt River site requires additional controls for earth moving activities, specifically watering to the depth of the cut or other equivalent techniques, in addition to the existing control provided by Rule 310. Plan, p. 37. These earth moving activities are subject to permitting under Rule 310. MCESD will revise its dust control plan checklist to clarify the earth moving requirement in May, 1997, and will begin including the requirement in all new earth moving permits and permit renewals by June 1, 1997. Plan, Appendix E, Bell letter. Permit renewals are required annually, thus full implementation will occur within one year of the submittal of the final plan. Plan, p. 38.

Attainment is predicted based on acceptable air quality modeling. EPA will be restoring its approval of Rules 311 and 316. EPA is also proposing to reapprove Rule 310 and to approve the additional controls assumed in the attainment demonstration. Finally, EPA is also proposing to find that MCESD has adequate resources, personnel, and authority to assure implementation of

the measures required for attainment at this site. EPA is, therefore, proposing to approve the attainment demonstration at the Salt River monitor pursuant to CAA sections 189(a)(1)(B) and 189(b)(1)(A).

Reasonable further progress is defined in CAA section 171(1) as "such annual incremental reductions in emissions of the relevant air pollutant as \* \* \* may be reasonably be required by the Administrator for the purposes of ensuring attainment of the applicable [NAAQS]." Because attainment will occur within one year of final plan submittal, the RFP and attainment demonstrations at this monitor are the same; that is the annual increment needed for progress toward attainment is the same as the emission reduction needed for attainment. Therefore, EPA is proposing to approve the RFP demonstration at this monitor pursuant to CAA section 189(c).

#### 2. The Maryvale Site

Attainment of the 24-hour PM-10 standard at the Maryvale site requires stabilization of disturbed cleared areas at all times. Plan, p. 38. Disturbed cleared areas is a source category subject to permitting under Rule 310. MCESD has revised its dust control plan checklist for Rule 310 to clarify the requirement to stabilize all disturbed areas at all times and will begin including the requirement in all new earth moving permits and permit renewals by June 1, 1997. Plan, Appendix E, Bell letter. Permit renewals are required annually, thus full implementation and attainment will occur within one year of the submittal of the final plan. Plan, p. 38.

Attainment is predicted based on acceptable air quality modeling. EPA is proposing to reapprove Rule 310 and to approve the additional controls assumed in the attainment demonstration. Finally, EPA is proposing to find that MCESD has adequate resources, personnel, and authority to assure implementation of the measures to the extent required for attainment at this site. EPA is, therefore, proposing to approve the attainment demonstration at the Maryvale monitor pursuant to CAA sections 189(a)(1)(B) and 189(b)(1)(A).

Because attainment will occur within one year of final plan submittal, the RFP and attainment demonstrations at this monitor are essentially the same; that is the annual increment needed for progress toward attainment is the same as the emission reductions needed for attainment. Therefore, EPA is proposing to approve the RFP demonstration at

this monitor pursuant to CAA section 189(c).

#### 3. The Gilbert Site

The microscale plan does not demonstrate attainment or RFP at the Gilbert site because of uncontrolled fugitive dust emissions from agricultural aprons and unpaved parking lots. Plan, p. 38. As noted before, the microscale plan does include strategies to evaluate controls on these sources but, at this time, does not assure implementation of controls for them. EPA is, therefore, proposing to disapprove the attainment and RFP demonstrations for this site.

#### 4. The West Chandler Site

The microscale plan does not demonstrate attainment or RFP for the West Chandler site because of uncontrolled fugitive dust emissions from agricultural fields and aprons and vacant land. Plan, p. 39. As noted before, the microscale plan does include strategies to evaluate controls on these sources but, at this time, does not assure implementation of controls for them. EPA is, therefore, proposing to disapprove the attainment and RFP demonstrations for this site.

These proposed approvals and disapprovals are applicable only to the microscale plan and thus, if finalized, will not constitute EPA's final decision as to the State's full compliance with the requirements of CAA sections 189(a)(1)(B), 189(b)(1)(A) and 189(c)(1) for attainment and RFP demonstrations at the Salt River, Maryvale, Gilbert and West Chandler monitoring sites. Because regional factors may influence attainment at these sites, the State will need to re-evaluate modeling at all four sites as part of the full regional plan.

### D. General SIP Requirements

#### 1. Section 110(l) Finding

CAA section 110(l) states that the "Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress \* \* \* or any other applicable requirement of this Act."

Pursuant to section 110(l) of the Act, EPA proposes to find that its proposed partial approval of the microscale plan does not interfere with any other requirements of the Act applicable to the Maricopa PM-10 nonattainment area including the requirements for attainment and RFP. In fact, the control measures and commitments in the plan are essential elements in the demonstrations of attainment and RFP for the area for the 24-hour PM-10

NAAQS and partially meet the statutory requirement for the adoption and implementation of RACM and BACM.

## 2. Adequate Personnel, Funding, and Authority

Section 110(a)(2)(E)(i) of the Clean Air Act requires that implementation plans provide necessary assurances that the state (or the general purpose local government) will have adequate personnel, funding and authority under state law. Requirements for legal authority are further defined in 40 CFR part 51, subpart L (51.230–232) and for resources in 40 CFR 51.280. States and responsible local agencies must demonstrate that they have the legal authority to adopt and enforce provisions of the SIP and to obtain information necessary to determine compliance. SIPs must also describe the resources that are available or will be available to the State and local agencies to carry out the plan, both at the time of submittal and during the 5-year period following submittal.

*Adequate Personnel and Funding.* For Rule 310, the microscale plan reflects MCESD's current bifurcated implementation strategy of proactive compliance and enforcement on permitted sources and reactive enforcement on nonpermitted sources. This implementation strategy is assumed in the attainment demonstrations in which emission reductions are assumed only from permitted sources and not from nonpermitted sources. Plan, pp. 37–40. MCESD's available resources (both personnel and funding) for carrying out this bifurcated strategy for Rule 310 and its other commitments are discussed above and are adequate. MCESD expects to maintain this level of resource commitment over the next five years of plan implementation. Plan, p. 33.

The cities' resources for implementing their respective commitments are also discussed above and are adequate. Each agency is expected to maintain this level of resource commitment over the next five years of plan implementation. Plan, pp. 35 and 36.

*Adequate Legal Authority.* The primary implementing agency of the controls in the microscale plan is the County of Maricopa through its Environmental Services Department. A.R.S. 49–479 provides that the board of supervisors "shall adopt such rules as it determines are necessary and feasible to control release into the atmosphere of air contaminants. \* \* \*" A.R.S. 49–476.01 provides the County control officer the authority to require sources to monitor, sample, or otherwise quantify their emissions and the board

of supervisors the authority to adopt rules for source monitoring, sampling, etc. These sections provide the County and MCESD with sufficient authority under State law to adopt and enforce the proposed control measures and to obtain the information necessary to determine compliance.

Legal authority for the cities to adopt and implement their resolutions are described in the microscale plan on pp. 35–36 and appears to be adequate.

These proposed findings regarding adequate authority and resources are applicable only to the control strategy and commitments as submitted in the microscale plan.

## 3. Description of Enforcement Methods

Section 110(a)(2)(C) requires SIPs to include a program to provide for the enforcement of SIP measures. The implementing regulation for this section is found at 40 CFR 51.111(a) and requires control strategies to include a description of enforcement methods including (1) procedures for monitoring compliance with each of the selected control measures, (2) procedures for handling violations, and (3) the designation of the agency responsible for enforcement.

Procedures for monitoring compliance (i.e., the inspection strategy) with Rule 310 are discussed in the section on MCESD commitments above. MCESD is the designated agency for enforcing Rule 310. See legal authority section above.

MCESD has developed an Air Enforcement Policy (April 4, 1997). A summary of this strategy can be found in the microscale plan, Appendix E, Bell letter. Currently, the Department issues Notices of Violations (NOVs) whenever violations of rules are observed (Plan, p. 12) and will continue to do so. Orders of abatement will be issued after NOVs when compliance is not attainable within a reasonable time frame.

Additional enforcement actions may be initiated based on several factors including actual or significant potential harm or willful noncompliance. The additional actions include filing criminal or civil complaints.

Appropriate monetary penalties will be sought for criminal or civil complaints and the Department encourages Environmental Community Action Projects as part of settlements. Plan, Appendix E, Bell letter.

EPA has also encouraged MCESD to take more enforcement actions with monetary penalties in order to make clear to the regulated community that compliance with Rule 310 should be a priority and to develop a system for tracking the number of NOVs and monetary penalties. See letter, Frances

Wicher, EPA, to Joe Gibbs, ADEQ, April 30, 1997 (found in the Plan, Appendix D). In all, the Department's Air Enforcement Policy is adequate to meet the requirements of 40 CFR 51.111(a) and CAA section 110(a)(2)(C).

## III. Summary of Proposed Action

### A. Proposed Approvals and Disapprovals

For the reasons discussed above, EPA is proposing to approve:

(1) Under sections 172(c)(1), 189(a)(1)(C) and 189(b)(1)(B), the provisions for implementing RACM and BACM for the significant source categories of disturbed cleared areas, earth moving, and industrial haul roads; and

(2) Under sections 189(a)(1)(B), 189(b)(1)(A), and 189(c), the attainment and RFP demonstrations for the Maryvale and Salt River sites.

For the reasons discussed above, EPA is proposing to disapprove:

(1) Under sections 172(c)(1), 189(a)(1)(C) and 189(b)(1)(B), the provisions for implementing RACM and BACM for the significant source categories of agricultural fields, agricultural aprons, vacant lands, unpaved parking lots, and unpaved roads; and

(2) Under sections 189(a)(1)(B), 189(b)(1)(A), and 189(c)(1), the attainment and RFP demonstrations at the West Chandler and Gilbert sites.

Finally, EPA is proposing to find that the microscale plan (1) provides the necessary assurances that the state and local agencies have adequate personnel, funding and authority under state law to carry out the submitted microscale plan, and (2) includes an adequate enforcement program, as required by CAA sections 110(a)(2)(E)(i) and 110(a)(2)(C).

### B. Consequences of the Proposed Disapprovals

As noted before, EPA required submittal of a microscale plan meeting both the moderate and serious area requirements for the 24-hour PM–10 standard by May 9, 1997 and a full regional plan meeting those requirements for both the 24-hour and annual standards by December 10, 1997. The microscale and regional plans taken together would satisfy both the moderate area requirements for the 24-hour standard mandated by the Ninth Circuit in *Ober* and the serious area planning requirements for both standards. The subject of this proposed action is the microscale plan only; the full regional plan is not due until late 1997. It is, therefore, premature to

determine if the microscale plan, in and of itself, fully complies with the Clean Air Act requirements for moderate and serious PM-10 nonattainment areas. Such a determination is not possible until the regional plan is submitted and reviewed.

Because the microscale plan taken alone is not intended to fully comply with the RACM/BACM implementation, reasonable further progress and attainment demonstration requirements of the Clean Air Act, final disapprovals of portions of the microscale plan would not trigger sanctions under CAA section 179(a). CAA section 179(a) requires the imposition of one of the sanctions in section 179(b) within 18 months of a disapproval if EPA "disapproves a [State] submission \* \* \* based on the submission's failure to meet one or more of the elements required by [the CAA]." Because the purpose of the microscale plan was to, in effect, provide a down payment towards meeting certain requirements of the Act, EPA is not, at this time, proposing to find that the State has failed to meet any of the applicable elements required by the CAA as contemplated by section 179(a).

EPA is subject to the terms of a consent decree approved by the U.S. District Court for the District of Arizona on March 25, 1997. *Ober v. Browner*, No. CIV 94-1318 PHX PGR. The consent decree obligates EPA to propose a federal implementation plan (FIP) for PM-10 in the Maricopa nonattainment area by March 20, 1998 and finalize that FIP by July 18, 1998<sup>27</sup> if the Agency disapproves all or part of the microscale plan. Therefore, if EPA finalizes the proposed disapprovals described above, EPA will have an obligation to promulgate a regional moderate area PM-10 FIP that addresses the statutory requirements for attainment, RACM and RFP. Under the consent decree, the scope of this FIP obligation is reduced to the extent that EPA approves by July 18, 1998 SIP provisions meeting the statutory requirements for RACM, RFP and attainment for moderate PM-10 nonattainment areas.

EPA believes, as is expressed in CAA section 101(a), that air pollution control is primarily the responsibility of states and local jurisdictions. Therefore, the Agency will work with the State of Arizona and the local agencies and jurisdictions responsible for PM-10 planning and control in Maricopa County to develop SIP provisions that can reduce the scope of, or eliminate, any potential FIP. Considerable work is

already underway or planned in the area to address the PM-10 problem. As noted before, the full serious area regional PM-10 plan is due December 10, 1997. In addition, the microscale plan contains two initiatives, MCESD's regional program to address controls on nonpermitted sources and the ADEQ/MCESD/NRCS agreement to address fugitive dust from agricultural sources, that are targeted at significant but currently uncontrolled sources of PM-10.

#### IV. Administrative Requirements

##### A. Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

##### B. Regulatory Flexibility Act

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 sections 110 and 301, and subchapter I, part D of the CAA do not create any new requirements but simply act on 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 flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its action concerning SIPs on such grounds. *Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. § 7410(a)(2).

##### C. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed

into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval/disapproval action proposed does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

##### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Particulate matter, Incorporation by reference.

**Authority:** 42 U.S.C. 7401.

Dated: May 29, 1997.

**Felicia Marcus,**

*Regional Administrator.*

[FR Doc. 97-14848 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Parts 52

[AL-044-1 9710b; FRL-5829-8]

#### Approval and Promulgation of Implementation Plans Alabama: Revisions to Several Chapters and Appendices of the Alabama Department of Environmental Management (ADEM) Administrative Code for the Air Pollution Control Program

**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 through the Department of Environmental Management on October

<sup>27</sup> The FIP deadlines each advance 2 months if EPA fails to act on the microscale plan by July 18, 1997.

30, 1996, the State of Alabama through the Department of Environmental Management (ADEM) submitted a State Implementation Plan (SIP) submittal to revise the ADEM Administrative Code for the Air Pollution Control Program. Numerous revisions were made to Chapters 335-3-1, -2, -3, -4, -5, -6, -8, -9, -12, -13, -14, -15, Appendices C, E, and F. In the final rules section of this **Federal Register**, the EPA is approving the State of Alabama'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 July 7, 1997.

**ADDRESSES:** Written comments on this action should be addressed to Kimberly Bingham, at the EPA Regional Office listed below. Copies of the documents relative to this action 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.

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, Atlanta Federal Center, Region 4 Air Planning Branch, Atlanta Federal Center, 61 Forsyth Street, Atlanta, Georgia 30303-3104.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Bingham of the EPA Region 4 Air Planning Branch at (404) 562-9038 and at the above address.

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

Dated: April 7, 1997.

**Michael V. Peyton,**

*Acting Regional Administrator.*

[FR Doc. 97-14852 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

[AD-FRL-5836-5]

RIN 2060-AE37

### National Emission Standards for Hazardous Air Pollutants Emissions: Group IV Polymers and Resins

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; extension of compliance.

**SUMMARY:** This action proposes a temporary extension of the compliance dates specified in 40 CFR 63.1311 (b) and (d) for poly(ethylene terephthalate) (PET) affected sources and announces the reconsideration of the equipment leak provisions contained in 40 CFR 63.1331 as these provisions pertain to PET affected sources. The EPA is proposing this temporary extension only as necessary to complete reconsideration and any necessary revision to the rule. The EPA is proposing this temporary extension pursuant to Clean Air Act section 301(a)(1).

Because these amendments are merely extending the compliance date for equipment leaks, the EPA does not anticipate receiving adverse comments. Consequently, the proposed revisions to the promulgated rule are also being issued as a direct final rule in the Final Rules Section of this **Federal Register**. If no significant adverse comments are received by the due date for comments (see **DATES** section below), no further action will be taken with respect to this proposal, and the direct final rule will become final on the date provided in that action.

**DATES: Comments.** Comments must be received on or before July 7, 1997 unless a hearing is requested by June 16, 1997. If a hearing is requested, written comments must be received by July 21, 1997.

**Public Hearing.** Anyone requesting a public hearing must contact the EPA no later than June 16, 1997. If a hearing is held, it will take place on June 23, 1997 beginning at 10:00 a.m.

**ADDRESSES: Comments.** Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket

and Information Center (6102), Attention Docket Number A-92-45 (see docket section below), Room M-1500, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460. The EPA requests that a separate copy also be sent to the contact person listed under **FOR FURTHER INFORMATION CONTACT**. Comments and data may also be submitted electronically by following the instructions provided in the **SUPPLEMENTARY INFORMATION** section. No Confidential Business Information (CBI) should be submitted through electronic mail.

**Public Hearing.** If a public hearing is held, it will be held at the EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Ms. Marguerite Thweatt, U.S. Environmental Protection Agency, MD-13, Research Triangle Park, N.C. 27711, telephone (919) 541-5607.

**Docket.** The official record for this rulemaking has been established under docket number A-92-45 (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments and data, which does not include any information claimed as CBI, is available for inspection between 8 a.m. and 4 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in the **ADDRESSES** section. Alternatively, a docket index, as well as individual items contained within the docket, may be obtained by calling (202) 260-7548 or (202) 260-7549. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Rosensteel, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5608.

### SUPPLEMENTARY INFORMATION:

#### Electronic Filing

Electronic comments and data can be sent directly to EPA at: a-and-r-docket@epamail.epa.gov. Electronic comments and data must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on diskette in WordPerfect 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number A-92-45. Electronic

comments may be filed online at many Federal Depository Libraries.

**Electronic Availability**

This document is available in docket number A-92-45 or by request from the EPA's Air and Radiation Docket and Information Center (see ADDRESSES), and is available for downloading from the Technology Transfer Network (TTN), the EPA's electronic bulletin board system. The TTN provides information and technology exchange in various areas of emissions control. The service is free, except for the cost of a telephone call. Dial (919) 541-5742 for up to a 14,000 baud per second modem. For further information, contact the TTN HELP line at (919) 541-5348, from 1:00 p.m. to 5:00 p.m., Monday through Friday, or access the TTN web site at: <http://ttnwww.rtpnc.epa.gov>.

**Regulated entities**

Regulated categories and entities include:

Category	Examples of regulated entities
Industry .....	Facilities that produce PET.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities regulated by the NESHAP addressed in this notice. If you have questions regarding the applicability of the NESHAP addressed in this notice to a particular entity, consult the person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

If no significant, adverse comments are timely received, no further activity is contemplated in relation to this proposed rule and the direct final rule in the final rules section of this **Federal Register** will automatically go into effect on the date specified in that rule. If significant adverse comments are timely received, the direct final rule will be withdrawn and all public comment received will be addressed in a subsequent final rule. Because the EPA will not institute a second comment period on this proposed rule, any parties interested in commenting should do so during this comment period.

For further supplemental information and the rule provisions, see the information provided in the direct final rule in the final rules section of this **Federal Register**.

**Administrative**

*A. Paperwork Reduction Act*

For the Group IV Polymers and Resins NESHAP, the information collection requirements were submitted to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*. The OMB approved the information collection requirements and assigned OMB control number 2060-0351. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15. The EPA has amended 40 CFR part 9, section 9.1, to indicate the information collection requirements contained in the Group IV Polymers and Resins NESHAP.

This action has no impact on the information collection burden estimates made previously. Therefore, the ICR has not been revised.

*B. Executive Order 12866 Review*

Under Executive Order 12866, the EPA must determine whether the regulatory action is "significant" and therefore, subject to OMB review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to lead to 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 in State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The proposed rule will provide a temporary extension of the compliance dates specified in 40 CFR 63.1311(b) and (d) for PET affected sources. The proposed rule does not add any additional control requirements. Therefore, this proposed rule was classified "non-significant" under Executive Order 12866 and was not required to be reviewed by OMB.

*C. Regulatory Flexibility*

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small government jurisdictions. This proposal would not have a significant impact on a substantial number of small entities because the proposed temporary compliance extension would not impose any economic burden on any regulated entities. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

*D. Unfunded Mandates*

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under section 205, the EPA must select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that this proposed rule does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: May 30, 1997.

**Carol M. Browner,**  
*Administrator.*

[FR Doc. 97-14859 Filed 6-5-97; 8:45 am]

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 69

[CC Docket Nos. 96-262, 94-1, 91-213, 96-263; FCC 97-158]

#### Presubscribed Interexchange Carrier Charge for Special Access Lines; Reallocation of General Support Facility Costs

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission is concerned that its most recent changes to access charges assessed on multi-line business lines may encourage some multi-line businesses that are currently using switched access to purchase instead special access lines, which would negatively affect the Commission's transition from the per-minute carrier common line (CCL) charge to the flat presubscribed interexchange carrier charge (PICC) as set out in the *Access Charge Reform First Report and Order*. The Commission tentatively concludes, therefore, that it should permit price cap LECs to assess a PICC on special access lines to recover revenues for the common line basket. The Commission seeks comments on this proposal and the related issue of how special access connections should be counted for purposes of assessing a "per line" PICC. This rule will help ensure the transition from the per minute CCL charge to the flat PICC. In the second part of this FNPRM, the Commission also addresses the allocation of general support facility costs. Under the current allocation of general support facility costs, incumbent LECs recover through interstate access charges costs associated with the LECs' nonregulated billing and collection functions. In the FNPRM, the Commission tentatively concludes that price cap incumbent LECs' general purpose computer costs attributable to billing and collection should not be recovered through regulated access charges. The Commission seeks comment on two proposed options for reassigning these costs to the billing and collection category. This rule is intended to correct the misallocation of GSF costs.

**DATES:** Comments for the notice of proposed rulemaking, including comments on the information collection requirements are due on or before June 26, 1997. Replies are due on or before July 11, 1996, except that reply comments on the information collection requirements are due on or before July

28, 1997. Written comments must be submitted to the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before August 5, 1997.

**ADDRESSES:** Address all comments concerning this Notice of Proposed Rulemaking to Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file two copies of any pleading with the Competitive Pricing Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W. Washington, D.C. 20554. Comments on the information collections also should be filed with the Secretary, Federal Communications Commission. Parties commenting on the information collections should also file a copy of any filing with Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554 and with Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, N.W., Washington, D.C. 20503.

**FOR FURTHER INFORMATION CONTACT:** Richard Lerner, Attorney, Common Carrier Bureau, Competitive Pricing Division, (202) 418-1530. For additional information concerning the information collections contained in this Report and Order contact Judy Boley at 202-418-0214, or via the Internet at [jboley@fcc.gov](mailto:jboley@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Further Notice of Proposed Rulemaking adopted May 7, 1997, and released May 16, 1997. The full text of this Proposed Rulemaking is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M St., NW., Washington, DC. The complete text also may be obtained through the World Wide Web, at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Orders/fcc.97158.wp](http://www.fcc.gov/Bureaus/Common_Carrier/Orders/fcc.97158.wp), or may be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857-3800, 2100 M St., NW., Suite 140, Washington, DC 20037. This FNPRM contains proposed or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

### Paperwork Reduction Act

This FNPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this FNPRM, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this FNPRM; OMB comments are due 60 days from date of publication of this FNPRM in the **Federal Register**. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

*OMB Approval Number:* None.

*Title:* Access Charge Reform Further Notice of Proposed Rulemaking.

*Form No.:* N/A.

*Type of Review:* New collection.

*Respondents:* Business or other for profit.

*Number of Respondents:* 13.

*Estimated Time Per Response:* 720 hours.

*Total Annual Burden:* 9,360 hours.

*Estimated costs per respondent:* \$22,200.

*Total Annual Estimated Costs per respondent:* \$288,600.

*Needs and Uses:* Under this proposal, a price cap LEC would study the uses of the general purpose computer assets recorded in Account 2124 to determine the percentage of investment in that account that is used for billing collection activities. We propose that each price cap LEC add to its cost allocation manual (CAM) a new section entitled "Interstate Billing and Collection." That section would describe: (1) The manner in which the price cap LEC provides interstate billing and collection services, and (2) the study it uses to determine the portion of Account 2124 investment that it attributes to the billing and collection category. The special study would then be subject to the same independent audit requirements as other regulated and nonregulated cost allocations.

## Synopsis of Further Notice of Proposed Rulemaking

### A. Special Access Presubscribed Interexchange Carrier Charge

In this Further Notice of Proposed Rulemaking (FNPRM), we seek comment on our proposal to allow incumbent local exchange carriers to impose a Presubscribed Interexchange Carrier Charge (PICC) on special access lines.

#### 1. Background

2. As discussed in the Access Charge Reform, First Report and Order, CC Docket 96-262, FCC 97-158 (released May 16, 1997) (*Access Charge Reform Order*), in most cases, the \$3.50 subscriber line charge (SLC) ceiling for primary residential and single-line business customers does not allow recovery through the SLC of the average per-line common line revenues permitted under our price cap rules. Similarly, in certain service areas, the \$6.00 SLC for multi-line business lines is insufficient to recover the average per-line revenues permitted by price cap regulation. To alleviate this shortfall, we are instituting a number of changes, including raising the ceiling on the SLC for multi-line business and second and additional residential lines. Although this increase in the SLC will recover some of the shortfall, other measures are needed to allow recovery of the common line revenues permitted under our rules.

3. Therefore, we have permitted local exchange carriers (LECs) to recover common line revenues not recovered from the SLC by assessing flat, per-line charges on the end-user's presubscribed interexchange carrier. Specifically, we are permitting LECs to assess a PICC on all lines, subject to ceilings which will be increased each year. To the extent that the revenues from SLCs and PICCs on primary residential lines and single-line business lines are insufficient to recover the full common line revenues permitted by our price cap rules for these lines, or the multi-line SLCs are at their ceilings, incumbent LECs shall recover the difference by assessing an additional PICC on non-primary residential and multi-line business lines. To the extent that these PICCs do not recover an incumbent LEC's remaining permitted CCL revenues, incumbent LECs generally shall recover any such residual common line revenues through per-minute carrier common line (CCL) charges assessed on originating access minutes.

4. As a result of our new rules, certain multi-line businesses will be paying higher SLCs than they do now.

Similarly, as the PICCs are phased in, interexchange carriers (IXCs) initially will be required to pay higher PICCs for a multi-line business end user compared to the PICC paid for a primary residential end user or a single-line business end user.

5. In contrast, users of special access do not pay a SLC. Furthermore, under special access, IXCs do not incur the same local access charges that are incurred by end users using switched access. In light of our most recent changes to charges incurred by multi-line businesses, including the higher SLC and the new multi-line business PICC, it may be cost effective for some multi-line businesses that are currently using switched access to purchase instead special access lines.

6. We are concerned that these facts could lead to the migration of certain businesses from the public switched network to special access, which would result in a decrease in projected revenue from multi-line SLCs. As a result PICCs for all remaining switched access lines will necessarily increase to make up for the loss of revenue.

#### 2. Proposal

7. We tentatively conclude that we should permit price cap LECs to assess a PICC on special access lines to recover revenues for the common line basket. The special access PICC would be no higher than the PICC that an incumbent LEC could charge for a multi-line business line. Under our proposal, the special access PICC would not recover transport interconnection charge (TIC) or marketing expense.

8. We acknowledge that our proposal is a departure from established Commission practice that special access will not subsidize other services. Although our proposal is a subsidy, it is temporary in nature and will be phased out as the single-line PICC is phased in. We tentatively conclude that our proposal is necessary for our transition from the per-minute CCL charge to the flat PICC to work.

9. We invite parties to comment on this proposal. We also seek comment on how special access connections should be counted for purposes of assessing a "per line" PICC. Parties should also address the extent to which our proposal affects large and small LECs differently and how small business entities, including small incumbent LECs and new entrants, will be affected.

10. Consistent with our approach to reform the interstate access charge regime, however, we tentatively conclude that the scope of this proceeding should be limited to incumbent price cap LECs. As discussed

in the *Access Charge Reform Order*, we have limited the scope of access reform, with some limited exceptions, to price cap incumbent LECs. These incumbent LECs are the seven Regional Bell Operating Companies (Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell, U S West), Citizens, Frontier, GTE, Aliant (formerly Lincoln), SNET, and United/Central. Similarly, we limit the scope of this FNPRM. To the extent necessary, we will instead address the effect of these issues on rate-of-return carriers in our separate access reform proceeding for rate-of-return carriers in 1997. In that proceeding, we will have the opportunity to conduct a comprehensive review of the circumstances unique to these carriers. We seek comment on this tentative conclusion regarding the scope of this proceeding. We also invite parties to identify any changes that should be made to other access elements as a result of this proposed change.

### B. Reallocation of General Support Facility Costs

11. As discussed in Section IV. D of the Access Charge Reform Order, the current allocation of General Support Facility (GSF) costs enables incumbent LECs to recover through regulated interstate access charges costs associated with the LECs' nonregulated billing and collection functions. In this section, we seek comment on proposed changes in the allocation of price cap LECs' interstate costs between regulated interstate services and nonregulated billing and collection activities.

#### 1. Background

12. The costs that incumbent LECs recover through interstate access charges are determined by a multi-step process. Incumbent LECs first record their investment costs and booked expenses in the accounts prescribed by the Commission's Part 32 Uniform System of Accounts (USOA). They next divide the recorded investment and expenses between regulated and nonregulated services pursuant to Part 64 of the Commission's rules. Incumbent LECs then divide regulated expenses and investment costs between the state and interstate jurisdictions pursuant to the separations procedures prescribed in Part 36 of the Commission's rules. Finally, in accordance with our Part 69 access charge rules, the LEC apportions its regulated interstate costs among the interstate access and interexchange service categories.

13. Because the Part 69 access charge rules are applied at the end of this

multi-step process, they are written to accommodate the accounts defined by the USOA and the cost categories prescribed by the Separations Manual. In 1987, the Commission revised its access charge rules in response to the Commission's comprehensive revision of both the USOA and the Separations Manual. Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, CC Docket No. 87-113, Report and Order, 52 FR 37368 (October 6, 1987), corrected 54 FR 8196 (February 27, 1989) (*Part 69 Conformance Order*). In its *Part 69 Conformance Order*, the Commission amended Part 69 to reapportion regulated interstate costs, including General Support Facilities (GSF) investment expenses, among the existing access elements.

14. As discussed in Section IV.D of the *Access Charge Reform Order*, the GSF investment category in Part 36 includes assets that support other operations, such as land, buildings, vehicles, as well as general purpose computer investment accounted for in USOA Account 2124. Some incumbent LECs use general purpose computer equipment, which is included in the GSF investment category, to provide nonregulated billing and collection services to IXCs. The costs of providing interstate billing and collection service are not, however, treated as nonregulated in the Part 64 cost allocation process. Instead, nonregulated interstate billing and collection costs are identified through the Part 36 and Part 69 cost allocation process. The separations process allocates these costs to the various separations categories based on the separations of the three largest categories of expenses, i.e., plant specific expenses, plant non-specific expenses, and customer operations expenses. These three largest categories, or the "Big Three Expenses," are the combined expense groups comprising: (1) Plant Specific Operations Expense, Accounts 6110, 6120, 6210, 6220, 6230, 6310, and 6410; (2) Plant Nonspecific Operations Expenses, Accounts 6510, 6530, and 6540; and (3) Customer Operations Expenses, Accounts 6610 and 6620.

15. In its comments in response to the *Access Charge Reform NPRM*, AT&T refers to the allocation of embedded GSF expenses, including general purpose computer expenses, among access categories as a misallocation resulting in an implicit cross-subsidy of incumbent LECs' nonregulated billing and collection services. Access Charge Reform, Price Cap Performance Review

for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 62 FR 4670 (January 31, 1997). This allocation, AT&T contends, results in the inappropriate support through regulated access charges of LECs' billing and collection service, which is a nonregulated, interstate service. AT&T estimates that \$124 million of expenses recovered in interstate access support the nonregulated billing and collection category. Of the \$124 million, AT&T states that \$60.1 million is included in interstate switched access, and \$20.5 million is in interstate special access, with the remainder recovered by the SLC.

## 2. Proposal

16. The failure of Part 69 to assign general purpose computer costs to the billing and collection category can be traced to our decision in the *Part 69 Conformance Order* to use an investment-based allocator to apportion general support facilities (GSF) investment. As discussed in Section IV.D of the *Access Charge Reform Order*, § 69.307 of the Commission's rules apportions GSF investment among the billing and collection category, the interexchange category, and the access elements based on the amount of Central Office Equipment (COE), Cable and Wire Facilities (CWF), and Information Origination/Termination Equipment (IO/T) investment allocated to each Part 69 category. This rule appears on its face to provide for an allocation of GSF investment to billing and collection. Because no COE, CWF, or IO/T investment is allocated to the billing and collection category, however, no GSF investment, and thus no portion of general purpose computer investment, is allocated to the billing and collection category. Similarly, because expenses related to GSF investment are allocated in the same manner as GSF investment, no GSF expenses (including expenses related to general purpose computers) are allocated to billing and collection. Price cap LECs' costs allocated to the interstate billing and collection category are estimated to be approximately \$480 million.

17. As discussed in Section V of the *Access Charge Reform Order*, we limit the scope of access reform, with some limited exceptions, to price cap incumbent LECs. Consistent with our approach to reform the interstate access

charge regime, we tentatively conclude that our proposed changes to the allocation of GSF investment will apply only to price cap LECs. We will address the misallocation of rate-of-return LECs' interstate costs between regulated interstate services and nonregulated billing and collection activities in our separate access reform proceeding for rate-of-return carriers in 1997, which will provide us with the opportunity to conduct a comprehensive review of the circumstances unique to these carriers. We seek comment on this tentative conclusion regarding the scope of this proceeding.

18. To the extent that incumbent LECs' costs are underallocated to the billing and collection category, incumbent LECs' regulated services are recovering through interstate access charges costs associated with unregulated services. We therefore tentatively conclude that price cap incumbent LECs' general purpose computer costs attributable to billing and collection should not be recovered through regulated access charges. We seek comment on two options for reassigning these costs to the billing and collection category.

19. Under the first option, a price cap LEC would study the uses of the general purpose computer assets recorded in Account 2124 to determine the percentage of investment in that account that is used for billing and collection activities. That percentage, multiplied by the ratio of the dollar amount in Account 2124 to the dollar amount in Account 2110, which accumulates the total GSF investment, would be applied to the interstate portion of Account 2110 to determine a dollar amount that represents general purpose computer assets used for interstate billing and collection activities. The dollar amount so identified would be attributed directly to the billing and collection category. The remainder of the interstate portion of Account 2110 shall be apportioned among the access elements and the interexchange category using the current investment allocator. General purpose computer expenses recorded in Account 6124 would be treated in a similar fashion to Account 2124. The interstate portion of Account 6124 would be allocated between: (a) The billing and collection category, and (b) all other elements and categories using the percentage derived for Account 2124. The remainder of Account 6120 (GSF expense) would be apportioned based on current GSF allocators. Appropriate downward exogenous cost adjustments would be made to all price cap baskets.

20. Two objections are commonly raised to the use of special studies to make regulatory cost allocations. First, such studies are said to be costly. We recognize that there are costs attached to a special study approach. We note, however, that price cap LECs may already be required to study the use of computer investment in Account 2124 as part of the process of allocating that investment between regulated and nonregulated activities pursuant to the Part 64 joint cost rules. Second, it may be claimed that permitting price cap LECs to use special studies gives them too much discretion and that regulators are unable to ascertain the validity of the studies. To remedy this concern, we propose that each price cap LEC add to its cost allocation manual (CAM) a new section entitled "Interstate Billing and Collection." That section would describe: (1) The manner in which the price cap LEC provides interstate billing and collection services, and (2) the study it uses to determine the portion of Account 2124 investment that it attributes to the billing and collection category. The special study would then be subject to the same independent audit requirements as other regulated and nonregulated cost allocations. In addition, to obtain an independent certification of the validity of the procedures adopted by the price cap LEC, we would instruct the independent auditors to examine the design and execution of the study during the first independent audit following the addition of the billing and collection section to the CAM and to report their conclusions on the validity of the study.

21. Under the second option, we would modify § 69.307 of our rules to require use of a general expense allocator to allocate the interstate portion of Account 2110 between: (1) The billing and collection category, and (2) all other elements and categories. We propose to use the "Big Three Expense" allocator used elsewhere in Part 69, excluding, however, any account or portion of an account that is itself apportioned based on the apportionment of GSF to avoid circularity. The GSF investment not allocated to the billing and collection category would then be apportioned among the access elements and the interexchange category using the current investment allocator. This would ensure that GSF costs are allocated among all access categories, including the billing and collection category. The interstate portion of Account 6120 would be apportioned among all elements and categories based on the overall apportionment of GSF investment. This

option covers only price cap incumbent LECs that provide interstate billing and collection using regulated assets. Carriers that acquire billing and collection services from unregulated affiliates through affiliate transactions or from third parties would continue recording their expenses for acquiring such services in Account 6623, which is already apportioned to the billing and collection category.

22. We invite parties to comment on the feasibility of these two options and propose alternative methods for reassigning general purpose computer costs to the billing and collection category. Parties should also address the extent to which either option affects large and small LECs differently and how small business entities, including small incumbent LECs and new entrants, will be affected. We invite parties to identify any changes that should be made to other access elements as a result of any changes we may make to the GSF allocation procedures.

### C. Procedural Issues

#### 1. Ex Parte Presentations

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

#### 2. Initial Regulatory Flexibility Act Analysis

24. Pursuant to the Regulatory Flexibility Act (RFA), the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in the Further Notice of Proposed Rulemaking (FNPRM). Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the FNPRM, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the FNPRM, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the RFA.

25. *Reason for action.* The Commission has revised its interstate access charge rules to make them consistent with the Telecommunications Act of 1996. As discussed in the FNPRM, multi-line business customers will pay a higher

subscriber line charge as a result of access charge reform, while special access customers do not pay such a charge. In addition, as the PICCs are phased in IXCs will be required to pay a substantially higher PICC for a multi-line business end user compared to the PICC paid for a primary residential end user or single-line business end user. An IXC serving multi-line business customers through special access can avoid paying the PICCs. As discussed in the FNPRM, the current allocation of general support facilities expenses enables incumbent LECs to recover through regulated interstate access charges costs caused by the LECs' nonregulated billing and collection functions.

26. *Objectives.* By proposing to allow LECs to impose a subscriber line charge on special access customers, we seek to prevent a decrease in projected revenue from multi-line subscriber line charges and PICCs caused by the migration of certain multi-line business customers from the public switched network to special access. We seek to revise the Commission's current allocation of price cap LECs' interstate costs between regulated interstate access services and nonregulated billing and collection activities to move interstate access rates closer to cost, consistent with the 1996 Act's new competitive paradigm.

27. *Legal Basis.* The proposed action is supported by Sections 4(i), 4(j), 201-205, 208, 251, 252, 253, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 201-205, 208, 251, 252, 253, 403.

28. *Description, potential impact and number of small entities affected.* For purposes of this FNPRM, the Regulatory Flexibility Act defines a "small business" to be the same as a "small business concern" under the Small Business Act (SBA), 15 U.S.C. 632, unless the Commission has developed one or more definitions that are appropriate to its activities. See 5 U.S.C. sec. 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. sec. 632). Under the SBA, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA. 15 U.S.C. 632. See, e.g., *Brown Transport Truckload, Inc., v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994). The Small Business Administration has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be a small entity that

has no more than 1500 employees. 13 CFR 121.201.

29. *Total Number of Telephone Companies Affected.* The proposals in the FNPRM, if adopted, would affect all LECs that are regulated by the Commission's price cap rules. Currently, 13 incumbent LECs are subject to price cap regulation. We tentatively conclude that all price cap carriers have more than 1500 employees and, therefore, are not small entities.

30. *Reporting, record keeping and other compliance requirements.* It is not clear whether, on balance, all proposals in this FNPRM would increase or decrease incumbent LECs' administrative burdens.

31. We believe that the reforms proposed in the first section of the FNPRM would require price cap LECs (not small entities) to make at least one tariff filing, and possibly several additional filings, but otherwise should not affect their administrative burdens. The reforms proposed in the second section of the FNPRM may require price cap LECs (not small entities) to study the uses of the general purpose computer assets recorded in Account 2124 to determine the percentage of investment in that account that is used for billing and collection activities, but otherwise should not affect their administrative burdens.

32. *Federal rules which overlap, duplicate or conflict with this proposal.* None.

33. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives.* In the FNPRM, we limit the scope of our proposals to incumbent price cap LECs, thereby not affecting small entities. We seek comment on these proposals and urge that parties support their comments with specific evidence and analysis.

### 3. Further Notice of Proposed Rulemaking Comment Filing Dates

34. Pursuant to applicable procedures set forth in § 1.399 and 1.411 *et seq.* of the Commission's Rules, 47 CFR 1.399, 1.411 *et seq.*, interested parties may file comments, including comments on the information collection requirements, no later than June 26, 1997, with the Secretary, Federal Communications Commission, Washington D.C. 20554. Interested parties must file replies no later than July 11, 1997, except that reply comments on the information collection requirements are due no later than July 28, 1997. To file formally in this proceeding, participants must file an original and twelve copies of all comments, reply comments, and supporting comments. If participants

want each Commissioner to receive a personal copy of their comments, an original plus 16 copies must be filed. In addition, parties should file two copies of any such pleading with the Competitive Pricing Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington D.C. 20554.

35. Parties submitting diskettes should submit them along with their formal filings to the Office of the Secretary. Submissions should be on a 3.5 inch diskette formatted in a DOS PC compatible form. The document should be saved in WordPerfect 5.1 for Windows format. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comment), docket number, and date of submission.

36. You may also file informal comments electronically via e-mail <access@fcc.gov>. Only one copy of electronically-filed comments must be submitted. You must put the docket number of this proceeding in the subject line (see the caption at the beginning of this FNPRM, or in the body of the text if by Internet). You must note whether an electronic submission is an exact copy of formal comments on the subject line. You also must include your full name and Postal Service mailing address in your submission.

37. Comments and replies must comply with Section 1.49 and all other applicable sections of the Commission's rules. We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and replies. Comments and replies must also clearly identify the specific portion of this FNPRM to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the Table of Contents of this FNPRM, such comments must be included in a clearly labelled section at the beginning or end of the filing.

38. Written comments by the public on the proposed and/or modified information collections are due July 28, 1997. Written comments must be submitted to the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the **Federal Register**. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained

herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to fain\_\_t@al.eop.gov.

### D. Ordering Clauses

Accordingly, *it is ordered*, pursuant to Sections 1-4, 10, 201-205, 251, 254, 303(r), and 410(a) of the Communications Act of 1934, as amended, and Section 601 of the Telecommunications Act of 1996, 47 U.S.C. secs. 10, 151-154, 201-205, 224, 251, 254, 303(r) 410(a), and 601, that notice is hereby given of the rulemaking described above and that comment is sought on these issues.

### List of Subjects in 47 CFR Part 69

Access charges, Communications common carriers.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

[FR Doc. 97-14629 Filed 6-5-97; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 14

RIN 1018-AD98

#### Humane and Healthful Transport of Wild Mammals, Birds, Reptiles and Amphibians to the United States

**AGENCY:** U.S. Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Fish & Wildlife Service proposes to make an amendment to regulations published in 50 CFR part 14, pertaining to the humane and healthful transport of wild mammals and birds to the United States. This proposed rule extends the regulations pertaining to the humane and healthful transport of wild mammals and birds to the United States to include reptiles and amphibians. These regulations enable the Secretary of the Interior to meet responsibilities designated by the Lacey Act Amendments of 1981 (Pub. L. 87-79, 95 Stat. 1073), enacted on November 16, 1981. The purpose of this rule is to ensure the Lacey Act Amendments' consistency and enforceability extend across all species, as described by Congress.

**DATES:** Comments must be submitted on or before September 4, 1997.

**ADDRESSES:** Director, U.S. Fish and Wildlife Service, c/o Office of Management Authority either by mail 4401 N. Fairfax Drive, Room 430, Arlington, VA 22203 or by fax (703) 358-2280 or by e-mail to R9OMA\_CITES@mail.fws.gov.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kenneth Stansell, Chief, Office of Management Authority, U.S. Fish and Wildlife Service, telephone (703) 358-2093, fax (703) 358-2280.

**SUPPLEMENTARY INFORMATION:** The Service recognizes three justifications for amending 50 CFR 14 subpart J. First, the Lacey Act Amendments of 1981 prohibit the transportation of all classes of species into the United States under inhumane or unhealthful conditions, and require that the United States Government promulgate regulations governing the transportation of wildlife. On June 17, 1992, the Service finalized (57 FR 27094) the rules contained in 50 CFR part 14 subpart J, establishing rules for the humane and healthful transport of wild mammals and birds to the United States. Subpart J included rules for mammals and birds only, because at the time the Service determined these classes of species to be priorities for two reasons: (a) evidence demonstrated they exhibited the greatest need for more humane and healthful transportation and (b) they represented a high volume of wildlife trade into the United States.

To more fully comply with the amendments of the Lacey Act, which requires the healthful and humane transport of all animals and the promulgation of regulations necessary to that end, the Service proposes to extend 50 CFR part 14 subpart J to include rules for the transport of reptiles and amphibians. Furthermore, many reptiles and amphibians are species included in the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). It is a CITES requirement that all CITES-listed species are packed and shipped in accordance with the International Air Transport Association (IATA) Live Animals Regulations. Therefore, the proposed rule would place these internationally accepted standards into the Code of Federal Regulations for reptiles and amphibians.

The Service's second justification for the proposed amendment to the rule is the need to protect the well-being of reptiles and amphibians during transport. The Service possesses substantial evidence showing that current practices of some shippers for transporting reptiles and amphibians are

detrimental to the animals. The Service currently enforces the Lacey Act Amendments' basic prohibition of the inhumane or unhealthful transportation of reptiles and amphibians. However, proving that transportation is inhumane or unhealthful is difficult absent grossly inhumane or unhealthful conditions that result in high mortality. The proposed amendment would respond to this problem by providing the Service's Law Enforcement Division with the authority to cite shippers for failure to comply with specific regulatory requirements even where, by chance, high mortality has not resulted. This additional authority will help the Service ensure increased compliance with humane and healthful shipping standards, and thus eliminate mortality and injury for transported reptiles and amphibians.

Finally, the proposed rule to 50 CFR part 14 subpart J enables the Service to process the high and increasing volume of reptiles and amphibians entering the United States. Specifically, the regulation equips the Service with rules which address the particular biological requirements of reptiles and amphibians, and enable the Service to respond better to the problems associated with transporting these species.

Throughout the proposed rule, the Service uses the word "wild," usually in the context of describing "wild animals." The Service does not consider whether an animal is born in the wild or in captivity to be germane to the issue of its being a wildlife species. The Service considers habituated or tame captive individuals of otherwise wild species to be wildlife. The Service notes that, as per 50 CFR 14.52, a Service officer must clear all wildlife transported into the United States. This Subpart J applies to all mammals, birds, reptiles, and amphibians that require Service clearance. The Service also notes that "wild" is the same as "fish or wildlife", as defined in both 50 CFR 10.12 and 18 U.S.C. 42(a)(2). Therefore, "wild" is defined as "the same as fish or wildlife, as defined in Section 10.12."

The rule augments 50 CFR part 14 subpart J with fifteen sections: three each for four separate groupings of reptiles species and for one grouping of amphibians. The Service utilized the same system of taxonomic classification for grouping the species as that used by IATA in its Live Animals Regulations, 23rd edition. These regulations serve as the international industry standards for ensuring the humane and healthful shipment of live animals. The Service recognizes that IATA annually revises its Live Animals Regulations and that

CITES holds shippers and carriers legally accountable for complying with the most current set of IATA regulations. Similarly, the Service will require shippers and carriers to comply with those changes insomuch as the proposed rule refers to or incorporates IATA Live Animals Regulations in any of its regulations.

In establishing the species groupings the Service mirrored IATA in differentiating between the first two groupings of species by the size of the transported animal. If the animal's exact size places it on the borderline between the two groupings, the Service encourages shippers to use their discretion and professional judgement in deciding which grouping's transportation rules to follow, based on the needs of the animal(s) being transported.

The Service also acknowledges that the IATA system of listing and naming species is inconsistent with that of CITES, for which only the species' scientific name is official, for listing purposes. Nevertheless, the Service chose to use IATA's system of naming animal species, a combination of common English and scientific names, for two reasons. First, shippers transport both CITES-listed and non-CITES listed species. Second, the Service wanted the proposed rule to be as consistent as possible with the IATA regulations, the international industry standards, for the convenience of shippers and carriers.

For the same reason, the Service proposes to adapt the IATA Live Animals Regulations' container requirements, preparations before dispatch, feeding and watering guide, and general care and loading specifications outlined for each of the species groupings, when possible. However, the Service enhanced some of the IATA regulations where it felt doing so would improve animal health and survival. For example, the Service proposes to require shippers to use stronger, more durable construction materials than the IATA regulations for some species groupings. For this reason, the Service decided not to allow for uniform construction material requirements for all species groupings, despite the similarity between each species groupings' particular requirements. In contrast, the Service has also relaxed some of the IATA regulations. For example, Section 14.181 limits the number of small Squamata, small Crocodylia or Rhynchocephalia to five specimens per bag, while IATA Container Requirement #41, for similar species, recommends one specimen per bag. The Service notes that full compliance with IATA

regulations may nevertheless be required by, for instance, relevant CITES permits.

The Service's proposed revisions to 50 CFR part 14 subpart J fall into two categories. The first category includes minor revisions made to sentences in the paragraphs of sections dealing with the general issues of transporting all live animal species. Generally, this category's revisions consist of adding the words "reptiles and amphibians" into a sentence. However, some of the revisions include important general statements describing rules for the humane and healthful transport of all reptile and amphibian species. In a few instances, the Service recognized that these rules could and should apply to mammals and birds as well and made the revisions accordingly. Throughout these sections, the Service use the word "animal" instead of having to reference each of the animal classes: mammal, bird, reptile or amphibian. The Service intends for the reader to understand that it refers to any and all of these classes of animals. Sections 14.101 through 14.112 contain revisions of this first category.

For example, the proposed rule includes reptiles and amphibians in the regulations in Section 14.105 paragraphs (a) and (b), requiring veterinary certificates for all animals entering the United States. The Service does not expect a veterinarian from the initial exporting country to inspect each individual animal singly in the case of high-volume shipments. However, the Service expects a government-certified veterinarian to use professional judgment in deciding how to take a sample of the animals in a shipment to determine their health status before they are exported to the United States.

Another change in this section pertains to the transport of sick animals. The Service included language in Section 14.105(c) which prohibits the entry of any animal that has visible external parasites, such as ticks, mites, or leeches. These parasites may harbor zoonotic diseases that constitute a public health hazard. The Service extended this regulation to include mammals, birds, reptiles and amphibians.

Section 14.108, paragraphs (c), (d), and (f) prohibit the provision of food and/or water to reptiles and amphibians during transportation. The Service acknowledges that under certain thermal conditions and extended durations of time, these animals do require food and water. The Service reminds shippers and carriers that those thermal conditions and extended durations of time represent violations of

other regulations outlined in the proposed rule. In other words, neither the shipper nor the carrier should ever allow those conditions to arise that would necessitate providing the animal with food and/or water. However, the Service recognizes that unforeseen events may arise that require the shipper or carrier to provide a reptile or amphibian with food and/or water. In those cases, the shipper shall provide the animal with sufficient food and uncontaminated water and shall supply the carrier with specific feeding instructions in a manner consistent with the regulations outlined in Section 14.108.

Section 14.109 paragraph (b) proposes that the ambient temperature range for reptiles and amphibians while in the transportation process be from 21.1 C (70 F) to 26.7 C (80 F). While some reptiles and amphibians might be able to survive at lower temperatures, many would not. Therefore, the Service proposes that shippers and carriers maintain this optimal ambient temperature range to ensure high survivability rates for all transported reptiles and amphibians. The Service welcomes any comment on what would constitute a more optimal ambient temperature range for *all* reptiles and amphibians.

Paragraph (b)(2) in Section 14.110 outlines guidelines and methods for pesticide use in the control of insects, ectoparasites, and other pests. The Service added this paragraph to ensure that neither the shipper's nor the carrier's pest control protocol harms the transported animal's health.

The second category of revisions consists of new sections that add rules applying specifically to one of the five proposed groupings of reptile and amphibian species. These revisions represent the incorporation and adaptation of IATA Live Animals Regulations into 50 CFR part 14 for these species. Throughout these sections, the Service uses the word "animal" instead of referring to each of the animals within that grouping of species. The Service intends for the reader to understand it refers to any and all of the species within the grouping. Sections 14.181 through 14.223 contain second category revisions.

Within these sections, some paragraphs only apply to specific species within the larger groupings. Paragraph (b)(7) of Section 14.181 contains specific guidelines for aquatic snakes. The shipper shall transport only seasnakes, elephant trunk snakes, tentacled snakes (*Erpeton*), and wart snakes (*Achrocordus*) in damp primary enclosures. These snakes require aquatic

support of their body weight to ensure higher survival rates during transport. The shipper shall transport all other aquatic snakes referred to generically as "watersnakes" in the same way as the proposed rule outlines for other snakes in Sections 14.181 and 14.191: warm and dry within a cloth bag.

Several paragraphs—14.182 (b), 14.192 (c), 14.202 (a) and (b), and 14.222 (a)—refer to suitable, non-organic, or sterilized packing materials within the animal's primary enclosure. The Service added this language to assist shippers in avoiding inadvertent violations of the animal and plant health inspection rules of the U.S. Department of Agriculture (USDA). The Service recognizes that many container notes in the IATA Live Animals Regulations recommend packing material such as brushwood, moss, wood chips, or other organic substances. However, the USDA explicitly prohibits the entry of such material into the United States. The Service used the term "suitable" in this case in the recognition of any packing system which the proposed rule failed to include in its list of acceptable methods but which meet the more general requirements.

Paragraph (b) of Section 14.192 provides guidelines on sealing the jaw of crocodylians. The Service has determined that some commercial tape and most duct tape adhesive are harmful to the thin skin covering the heads of crocodylians. Therefore, shippers shall only use those materials specified in the paragraph: surgical or veterinary approved tape.

In each of the sections pertaining to general care and loading—Sections 14.183, 14.193, 14.203, 14.213, and 14.223—the Service explicitly prohibits the shipper from mixing species in a single bag or compartmentalized container within the primary enclosure. The Service based its decision on the IATA Live Animals Regulations, which also explicitly prohibit the mixing of species within the animal's primary enclosure.

Paragraph (b) in each of these sections discuss ambient temperature variance. The regulation in these paragraphs requires shippers and carriers to maintain the animal's optimal ambient temperature range throughout the transport process. As the previous discussion of Section 14.109 noted, the Service considers any failure to do so as a violation of the regulations while recognizing that unexpected events may inadvertently expose the animal to non-optimal ambient temperatures. Particularly during exposure to cold, the animal may lie dormant for prolonged periods, and even appear to be dead.

Therefore, neither the shipper nor the carrier shall presume the animals to be dead.

The Service also prohibits the use of corrugated cardboard or corrugated board in constructing a primary enclosure, unless the shipper uses it to enclose a Styrofoam primary enclosure. The Service has determined that these materials, when used alone, possess insufficient strength to comply with either the general construction guidelines for primary enclosures in Section 14.106 or in the species grouping specific construction guidelines for primary enclosures in Sections 14.181, 14.191, 14.201, 14.211, and 14.221.

Another change involves the proposed regulations for transporting hatchling turtles, or any turtle with a carapace length of less than 10 cm (4 in), outlined in sections 14.211–14.213. Presently, the United States does not permit the commercial importation of turtles of this size. Noncommercial imports are limited in number and may require specific measures to protect the public health (42 CFR 17.52).

Section 14.211 details guidelines for constructing primary enclosures for transporting these hatchling turtles. The Service enhanced the IATA Live Animals Regulations container requirement #47 by reducing the number of hatchlings that a shipper can place in each of the primary enclosure's compartmentalized containers from 62 to 25. The Service justifies its decision based upon the need to increase survivorship and to protect the animals' welfare. Nevertheless, the Service followed the IATA guidelines in the number of compartmentalized containers per primary enclosure (four).

Sections 14.121 through 14.172 contain no changes whatsoever because they contain specific rules applicable only to particular groups of mammal and bird species. The Service chose not to make any changes to the rules applying to the humane and healthful transport of wild mammals and birds. Thus, the Service will not consider any comments made by the public pertaining to mammals and birds at this time in formulating the final rule but could consider them as a separate effort by the Service.

Finally, this document contains only those sections of 50 CFR part 14 subpart J in which the proposed rule revises and/or adds words, a sentence(s), a paragraph(s), or an entire section(s).

### Required Determinations

#### *Economic Effect—Executive Order 12866*

The Service has concluded that this proposed rule is not a "significant regulatory action" in the sense of Executive Order 12866 and was not subject to review by the Office of Management and Budget. The Service bases its conclusion on the fact that the proposed rule takes existing industry standards already in practice, strengthens them for some species for biological reasons, and codifies them into U.S. Federal regulations.

In those cases where the Service has strengthened industry standards, it has done so to decrease the expected mortality rate of the animals. Shippers may experience incremental cost increases from having to improve the primary enclosures to meet the proposed rule's specifications. Similarly, shippers may have to produce or purchase more primary enclosures to comply with the lower number of animals per primary enclosure that the Service has proposed for certain species. However, the shipper will capture additional benefits from the decreased mortality rate which should offset and may even exceed the additional costs the shipper may incur in either of these scenarios. Therefore, without available data proving or disproving either its analysis' assumptions or conclusions, the Service has determined that the proposed rule will pose no significant additional financial or economic cost to shippers and carriers.

Moreover, the proposed rule does not include any additional inspections or fees, so it does not pose any additional cost to shippers or carriers. Thus, the supply price of engaging in wildlife trade will remain the same. Similarly, with no additional or incremental cost for the supplier to pass on to the consumer, the proposed rule will not raise the price paid for any class of consumer: wholesalers, retailers, or retail customers. Without any significant net price, market or competitive effects, the proposed rule probably will not cause measurable change to any of the accounts in the balance of payments for either the exporting or importing country. Therefore, the proposed rule will not have a significant effect at either the sectoral or macroeconomic level.

#### *The Regulation Flexibility Act*

The Service has also certified that these revisions will not have a significant economic effect on a substantial number of small entities as described by the Regulatory Flexibility

Act (5 U.S.C. 601 *et seq.*). The proposed rule will require all entities to comply with the proposed regulations, regardless of their size. The above discussion established that the scientifically determined strengthening of current industry standards at worst will have no significant or measurable economic effect and potentially may benefit shippers. Moreover, the Service expects that the revisions would reduce the burden on small entities by making requirements clearer, but not more stringent.

#### *Executive Order 12988*

The Service has determined that this proposed rule meets the applicable standards provided in Sections 3(a) and (b) of Executive Order 12988.

#### *Paperwork Reduction Act*

The Service has examined this proposed rule under the Paperwork Reduction Act of 1995, and found it to contain no information collection requirements.

#### **List of Subjects in 50 CFR Part 14**

Animal welfare, Exports, Fish, Imports, Labeling, Reporting and recordkeeping requirements, Transportation, Wildlife.

Accordingly, 50 CFR subpart J is proposed to be amended as follows:

#### **PART 14—[AMENDED]**

1. The authority citation for part 14 continues to read as follows:

**Authority:** 18 U.S.C. 42(c); 16 U.S.C. 3371–3378; 16 U.S.C. 1538(d)–(f), 1540(f); 16 U.S.C. 1382; 16 U.S.C. 705, 712; 31 U.S.C. 483(a).

2. The Title of Subpart J is revised and new sections 14.181 through 14.223 are added to the table of contents read as follows:

#### **Subpart J—Standards for the Humane and Healthful Transport of Wild Mammals, Birds, Reptiles, and Amphibians to the United States**

##### **Specifications for Reptiles Group 1 (Small Squamata, Small Crocodylia, Rhynchocephalia)**

Secs.

- 14.181 Design and construction.
- 14.182 Preparations before dispatch.
- 14.183 General care and loading.

##### **Specification for Reptiles Group 2 (Large Crocodylia and Large Squamata)**

- 14.191 Design and construction.
- 14.192 Preparations before dispatch.
- 14.193 General care and loading.

##### **Specification for Reptiles Group 3 (Testudines)**

- 14.201 Design and construction.

- 14.202 Preparations before dispatch.
- 14.203 General care and loading.

**Specification for Reptiles Group 4 (Juvenile or Hatchling Turtles)**

- 14.211 Design and construction.
- 14.212 Preparations before dispatch.
- 14.213 General care and loading.

**Specification for Amphibians (Urodela/ Caudata, Anura/Salientia, and Gymnophiona Apoda)**

- 14.221 Design and construction.
- 14.222 Preparations before dispatch.
- 14.223 General care and loading.

3. Section 14.101 is revised to read as follows:

**§ 14.101 Purposes.**

The purpose of this subpart is to prescribe requirements necessary to ensure that live wild mammals, birds, reptiles, and amphibians shipped to the United States arrive alive, healthy, and uninjured, and that transportation of such animals occurs under humane and healthful conditions. These regulations implement Section 9(d) of the Lacey Act Amendments of 1981 (18 U.S.C. 42(c)).

4. Section 14.102 is amended by revising the definitions for Ambient air temperature, Carrier, Communicable disease, Handle, Holding area, Primary enclosure, and Sanitize, and by adding definitions for Inner enclosure, Reptiles Group 1, Reptiles Group 2, Reptiles Group 3 and Reptiles Group 4, below to read as follows:

**§ 14.102 Definitions.**

\* \* \* \* \*

*Ambient air temperature* means the temperature of the air surrounding a primary enclosure containing a wild mammal, bird, reptile, or amphibian.

\* \* \* \* \*

*Carrier* means any person operating an airline, railroad, motor carrier, shipping line, or other enterprise engaged in the business of transporting any wild mammal, bird, reptile, or amphibian for any purpose including exhibition and for any person, including itself.

*Communicable disease* means any contagious, infectious, or transmissible disease or parasite, either internal or external, of wild mammals, birds, reptiles, or amphibians.

\* \* \* \* \*

*Handle* means feed, house, manipulate, crate, shift, transfer, immobilize, restrain, treat, or otherwise control the movement or activities of any wild mammal, bird, reptile, or amphibian.

*Holding area* means a designated area at or within a terminal facility that has been specially prepared to provide shelter and other requirements for wild

mammals, birds, reptiles, or amphibians being transported to the United States and in which such wild mammals, birds, reptiles, or amphibians are maintained within the specified range of ambient temperature prior to, during, or following such shipment.

\* \* \* \* \*

*Inner enclosure* means, in the case of reptiles and amphibians, any box, bag, sack, plastic jar, or similar container which may contain reptiles and amphibians within the primary enclosure.

*Primary enclosure* means any structure used to restrict a mammal, bird, reptile or amphibian to a limited amount of space, such as a cage, box, crate, room, pen, run, stall, pool, or hutch. Primary enclosure does *not* mean a subdivision, section or compartmentalized container within a cage, box, crate, room, pen, run, stall, pool, or hutch.

\* \* \* \* \*

*Reptiles Group 1* means any of the following reptiles: Crocodylians under 60 cm (24 in), Lizards under 30 cm (12 in), Snakes under 90 cm (36 in), or other reptiles (unless otherwise specified).

*Reptiles Group 2* means any of the following reptiles: Crocodylians over 60 cm (24 in), Lizards over 30 cm (12 in), or Snakes over 90 cm (36 in). Reptiles Group 3 (Order Testudinata) means any of the following reptiles: Turtle species of carapace length equal to or greater than 4.5 CM (1.75 in), Marine turtles, Terrapin species, or Tortoise species.

*Reptiles Group 3* (Order Testudinata) means any of the following reptiles: Turtle species of carapace length equal to or greater than 4.5 CM(1.75in), Marine turtles, Terrapin species, or Tortoise species.

*Reptiles Group 4* means any juvenile or hatchling turtles of less than 4.5 cm (1.75 in) in carapace length.

*Sanitize* means to make physically clean and, as far as possible, free of toxic or infectious agents injurious to the health of wild mammals, birds, reptiles, or amphibians.

\* \* \* \* \*

5. Section 14.103 is revised to read as follows:

**§ 14.103 Prohibitions.**

Unless the shipper fully satisfies the requirements of this subpart J and meets all other legal requirements, it is unlawful for any person to transport to the United States, cause to be transported to the United States, or allow the transportation to the United States any live wild mammal, bird, reptile, or amphibian. It shall be unlawful for any person to import, to

transport, or to cause or permit the transportation to the United States any wild mammal, bird, reptile, or amphibian under inhumane or unhealthful conditions or in violation of this subpart J.

6. Section 14.104 is revised to read as follows:

**§ 14.104 Translations.**

Any certificate or document required by this subpart to accompany a mammal, bird, reptile, or amphibian transported to the United States and written in a foreign language must be accompanied by an accurate English translation.

7. Section 14.105 is amended by revising the paragraphs (a), (b)(1), (c), and (d) to read as follows:

**§ 14.105 Consignment to carrier.**

(a) No carrier shall accept any live wild mammal, bird, reptile, or amphibian for transport to the United States that a veterinarian certified as qualified by the national government of the initial country from which the mammal, bird, reptile, or amphibian is being exported has not examined within 10 days prior to commencement of transport to the United States. If the national government of such country does not certify veterinarians, then the veterinarian must possess either certification or a license from a local government authority designated by the national government as authorized to certify veterinarians.

(b)(1) A certificate of veterinary medical inspection, signed by the examining veterinarian, stating that the animal has been examined, is healthy, appears to be free of any communicable disease, and is able to withstand the normal rigors of transport must accompany the mammal, bird, reptile, or amphibian; the certificate should include the veterinarian's license number, certification number, or equivalent. The carrier shall not accept a mammal in the last third of its pregnancy, if this is detectable using professionally accepted standards, for transport to the United States except for medical treatment and unless the examining veterinarian certifies in writing that she or he has examined the animal, evaluated the state of pregnancy, and, despite the medical condition requiring treatment, determined that the animal is able physically to withstand the normal rigors of transportation to the United States.

\* \* \* \* \*

(c) A sick or injured wild mammal, bird, reptile, or amphibian shall be permitted transport to the United States

only if the primary purpose of such transport is for needed medical treatment and upon certification in writing by the examining veterinarian that the treatment is necessary and the animal is able to withstand the normal rigors of travel in its present condition. A veterinary attendant qualified to care for and treat the sick or injured animal shall accompany it at all times throughout the transport process and have continuous access to it at all times. This individual shall be in possession of or have ready access to all medications to be administered during the transport. Furthermore, no carrier shall accept any live animals that have visible external parasites, such as ticks, mites, or leeches.

(d) No carrier shall accept any wild mammal, bird, reptile, or amphibian for transport to the United States presented by the shipper less than 1 hour or more than 6 hours prior to the scheduled departure of the conveyance on which it is to be transported. The carrier shall notify the crew of the presence of live animal shipments.

8. Section 14.106 is amended by adding paragraph (b)(8); revising the introductory text; and revising paragraphs (a), (b) introductory text, (b)(1), (b)(2), (b)(4), (b)(5), (b)(6), (b)(7), (c), (d), (e), (f), (g), and (h) to read as follows:

**§ 14.106 Primary enclosures.**

No carrier shall accept for transport to the United States any live wild mammal, bird, reptile, or amphibian in a primary enclosure that does not conform to the following requirements:

(a) The most current edition of the Container Requirements of the Live Animals Regulations (LAR) published by the International Air Transport Association (IATA) shall be complied with by all parties transporting wild mammals, birds, reptiles, or amphibians to the United States. The Director of the Federal Register approved incorporation of LAR by reference in accordance with 5 U.S.C. 552(a) and 1 CFR 51. The public and all interested parties may obtain copies from IATA, 2000 Peel St., Montreal, Quebec, Canada H3A 2R4. The public and all interested parties may inspect copies at the U.S. Fish and Wildlife Service, 4401 N. Fairfax Dr., Arlington, VA 22203 or at the Office of the Federal Register, 800 N. Capitol St., NW., Suite 700, Washington, DC. In case of any conflict between IATA and the regulations in this subpart, this subpart shall govern.

(b) The primary enclosure shall be constructed so that—

(1) The strength of the primary enclosure is sufficient to contain the

mammal, bird, reptile, or amphibian and to withstand the normal effects of transport;

(2) The interior of the primary enclosure is smooth and free from any protrusion, projection, or abrasive material that could be injurious to the mammal, bird, reptile, or amphibian within;

\* \* \* \* \*

(4) The primary enclosure may be closed and provide secure access with an animal-proof device designed to prevent accidental opening and release of the mammal, bird, reptile, or amphibian;

(5) The opening of the primary enclosure will be easily accessible for either emergency removal or inspection of the mammal, bird, reptile, or amphibian by authorized personnel while minimizing the risk of escape of the mammal, bird, reptile, or amphibian;

(6) The primary enclosure will have sufficient openings to ensure adequate air exchange at all times to meet the respiratory needs of the bird, mammal, reptile, or amphibian, by providing adequate ventilation on at least three sides, with the primary enclosures for aquatic reptile and amphibian species being leakproof and oxygenated to prevent desiccation, and with ventilation ensured by placing the majority of the ventilation on the upper part of the primary enclosure, and by securely attaching meshed openings to the primary container to prevent possible occlusion of inner ventilation holes by the primary container when needed.

(7) No dividers or any other material will be placed into the primary enclosure that may preclude adequate ventilation or create a multi-layered primary enclosure for the purpose of increasing animal density within the primary enclosure; and

(8) Any construction materials used will not contain treatment of any paint, preservative, or other chemical that is injurious or otherwise harmful to the health or well-being of wild mammals, birds, reptiles, and amphibians.

(c) Unless the shipper or carrier permanently affixes the primary enclosure in the conveyance, or the enclosure has an open top for certain large mammals, the shipper shall fit spacer bars allowing circulation of air around the primary enclosure to the exterior of the primary enclosure's top, sides, and base. Spacer bars on a primary enclosure need extend no more than 15 centimeters (6 inches) from the surface of the enclosure. Within this 6-inch limit, the spacers on a primary

enclosure containing one animal shall extend a distance equal to at least 10 percent of the longer dimension of the surface to which they are attached, and the spacers on a primary enclosure containing more than one animal shall extend a distance equal to at least 20 percent of the longer dimension of the surface to which they are attached. For reptiles and amphibians, the primary enclosure shall be large enough to allow the animal to lie in a natural manner with enough space so that stacking of animals within the same primary enclosure is avoidable. The height of the primary enclosure shall permit an air flow over the animal or its/their container but prevent stacking. The primary enclosure shall have a clearance of 3 cm (1.2 in) above the highest point of the animal and 1 cm (.4 in) for frog species of less than or equal to 1 cm (.4 in) in size. The shipper shall increase this clearance accordingly for the larger species.

(d) The shipper shall ensure the primary enclosure has adequate handholds or other devices for lifting by hand or to facilitate lifting and carrying by machine if the carrier has not permanently affixed it within the conveyance. The shipper shall make such handholds or other devices an integral part of the primary enclosure, shall enable them to be lifted without excessive tipping, and shall design them so that the person handling the primary enclosure will not come in contact with the animals contained within.

(e) A primary enclosure shall have a solid, leak-proof bottom or removable, leak-proof collection tray under a slatted or wire mesh floor. The shipper shall design and construct a slatted or wire mesh floor in a manner such that the spaces between the slats or the holes in the mesh cannot trap the limbs of animals contained within the primary enclosure. A primary enclosure for mammals shall contain unused absorbent litter on the solid bottom or in the leak-proof tray in sufficient quantity to absorb and cover excreta. This litter shall be safe and nontoxic and shall not resemble food normally consumed by the mammals. A primary enclosure used to transport marine mammals in water, in a waterproof enclosure, a sling, or on foam is exempt from the requirement to contain litter. A primary enclosure used to transport birds shall not contain litter, unless the examining veterinarian has specified in writing that litter is medically necessary. For those amphibians and species of reptiles that require it, the primary enclosures shall include dampened bedding to provide the

necessary moisture throughout the transportation period.

(f) If a shipper or carrier previously has used a primary enclosure to transport or store wild mammals, birds, reptiles or amphibians, the shipper or carrier shall clean and sanitize the primary enclosure in a manner that will destroy pathogenic agents and pests injurious to the health of wild mammals, birds, reptiles, and amphibians before the primary enclosure can be re-used. No carrier or shipper shall co-mingle live animal shipments with inanimate cargo during transit.

(g) For a primary enclosure that the shipper has not permanently affixed in the conveyance, the shipper shall mark in English on the outside of the top and one or more sides of the primary enclosure, in letters not less than 2.5 cm (1 in) in height, "Live Animals" or "Wild Animals," "Do Not Tip," "Only Authorized Personnel May Open Container," and other appropriate or required instructions. The shipper shall also conspicuously mark all primary enclosure sides on the outside with arrows to indicate the correct upright position of the primary enclosure. These arrows should extend up the sides of the primary enclosure so that the point of the arrow is visible and clearly indicates the top of the primary enclosure. The shipper shall also correctly label on the outside of the primary enclosure the quantity and scientific name of the species inside each of the inner enclosures.

(h) The shipper shall securely attach to each primary enclosure food and water instructions as specified in § 14.108, information regarding what constitutes obvious signs of stress in the species being transported, and information about any drugs or medication to be administered by the accompanying veterinary attendant. Copies of shipping documents accompanying the shipment shall also be securely attached to the primary enclosure. The carrier's pouch or manifest container or the shipper's attendant accompanying the wild mammal, bird, reptile, or amphibian shall carry the original documents.

\* \* \* \* \*

9. Section 14.107 is amended by revising paragraphs (a), (c) and (e) to read as follows:

**§ 14.107 Conveyance.**

(a) The carrier shall design, construct, and maintain the animal cargo space of a conveyance which it uses to transport wild mammals, birds, reptiles, or amphibians to the United States in such

a way that ensures the humane and healthful transport of the animals.

\* \* \* \* \*

(c) Neither the shipper nor the carrier shall place any wild mammal, bird, reptile, or amphibian in a cargo space of a conveyance that does not provide sufficient air for it to breathe normally. Shippers and carriers shall position primary enclosures in a cargo space in such a manner that each animal within a primary enclosure has access to sufficient air for normal breathing.

\* \* \* \* \*

(e) Neither the shipper nor the carrier shall transport a wild mammal, bird, reptile, or amphibian in a cargo space that contains any material, substance, or device that may result in inhumane conditions or injury to the animal's health unless the shipper or carrier take all reasonable precautions to prevent such conditions or injury.

10. Section 14.108 is amended by revising paragraphs (b), (c), (d), (e), and (f), and adding paragraph (g) to read as follows:

**§ 14.108 Food and water.**

\* \* \* \* \*

(b) No carrier shall provide any food or water to reptiles or amphibians during the duration of the journey, unless specifically directed to do so in writing by a veterinarian.

(c) A mammal or bird requiring drinking water shall have uncontaminated water suitable for drinking made available to it at all times prior to commencement of transport to the United States, during intermediate stopovers, and upon arrival in the United States, or as directed by the shipper's written instructions.

(d) A mammal or bird that obtains moisture from fruits or other food shall be provided such food prior to commencement of transport to the United States, during stopovers, and upon arrival in the United States, or as directed by the shipper's written instructions.

(e) During a stopover or while still in the custody of the carrier after arrival in the United States, the shipper or carrier shall observe the primary enclosure of the mammal, bird, reptile, or amphibian in transit no less frequently than once every four hours and shall provide food and water to mammals and birds according to the instructions required by paragraph (a) of this section.

(f) Suitable and sufficient food shall be made available to mammals and birds during transport and to reptiles or amphibians, if specifically directed to do so in writing by a veterinarian.

(g) Additional requirements for feeding and watering particular kinds of

animals are found below in the specifications for the various groups.

11. Section 14.109 is revised to read as follows:

**§ 14.109 Care in transit.**

(a) During transportation to the United States, including any stopovers during transport, the carrier shall visually inspect each primary enclosure not less than once every 4 hours, or in the case of air transport, every 4 hours whenever the cargo hold is accessible. During such inspections, the carrier shall verify that the ambient temperature is within allowable limits (see § 14.109(b)), that the journey has not damaged either the primary enclosure, and that the animals receive adequate ventilation, and that, when transport is by air, the carrier maintains suitable air pressure to support live animals within the cargo area (pressure equivalent to a maximum altitude of 8000 feet). During these observations the carrier shall also determine whether any birds or mammals are in obvious distress as described in documents attached to the primary enclosure. The absence of such a document or the absence of information as to signs of distress shall not remove this responsibility. The carrier shall attempt and shall consult the shipper concerning any possible need for veterinary care if no veterinary attendant is traveling with the shipment; if the shipper cannot be reached in the case of an emergency, qualified veterinary care should be provided. A veterinarian or qualified attendant traveling with the shipment shall be provided access to the animal.

(b) Unless otherwise specified in this paragraph or in writing by the examining veterinarian, neither the shipper nor the carrier shall allow the ambient air temperature in a holding area, transporting device, conveyance, or terminal facility containing mammals or birds to fall below 12.8 degrees C (55 degrees F) nor to exceed 26.7 degrees C (80 degrees F). Either the shipper or the carrier shall provide auxiliary ventilation when the ambient air temperature is 23.9 degrees C (75 degrees F) or higher. In the case of penguins and auks, neither the shipper nor the carrier shall allow the ambient air temperature to exceed 18.3 degrees C (65 degrees F) at any time, and auxiliary ventilation shall be provided when the ambient air temperature exceeds 15.6 degrees C (60 degrees F). In the case of polar bears and sea otters, neither the shipper nor the carrier shall allow the ambient air temperature to exceed 10 degrees C (50 degrees F). In the case of reptiles, neither the shipper nor the carrier shall allow the ambient

temperatures to fall below 21.1 degrees C (70 degrees F) nor to exceed 26.7 degrees C (80 degrees F). In the case of amphibians, neither the shipper nor the carrier shall allow the ambient temperatures to fall below 15.6 degrees C (60 degrees F), nor to exceed 21.1 degrees C (70 degrees F).

12. Section 14.110 is amended by revising paragraphs (a), (b) introductory text, and (b)(2), to read as follows:

**§ 14.110 Terminal facilities.**

(a) Any terminal facility used for wild mammal, bird, reptile, or amphibian transport in the country of export, stopover countries, or the United States shall contain a separate animal holding area or areas. No carrier or shipper shall co-mingle live animal shipments with inanimate cargo in the designated animal holding area.

(b) A carrier or shipper holding any wild mammals, birds, reptiles, or amphibians in a terminal facility shall provide the following:

\* \* \* \* \*

(2) An effective program for the control of insects, ectoparasites, and pests of mammals, birds, reptiles, or amphibians using the following methods for the animals: the shipper or carrier shall apply only non-residual pesticides which are non-toxic to the animals and apply them only when the animals are not present in the room; the shipper or carrier shall wash away the pesticide after the application period elapses; and neither the shipper nor the carrier shall introduce the animals again until after ventilating the room to be free from fumes and vapor for 24 hours;

\* \* \* \* \*

13. Section 14.111 is amended by revising paragraphs (a), (b), (d), (e), (f) introductory text, (f)(1), (f)(4); and adding (f)(5) to read as follows:

**§ 14.111 Handling.**

(a) Care shall be exercised to avoid handling the primary enclosure in a manner likely to cause physical or behavioral trauma or stress to the wild mammals, birds, reptiles, or amphibians.

(b) Neither the shipper nor the carrier shall drop, tip excessively, or otherwise mishandle a primary enclosure used to move any wild mammals, birds, reptiles, or amphibians, nor shall they stack or place the primary enclosure in a manner that may result in its falling or being tipped.

\* \* \* \* \*

(d) The carrier shall accomplish the transport of wild mammals, birds, reptiles, or amphibians to the United States in the most expeditious manner,

with the fewest stopovers possible, and without unnecessary delays.

(e) The carrier shall load live wild mammals, birds, reptiles, or amphibians last and unload them first from a conveyance consistent with other procedures and requirements of the carrier.

(f) A carrier shall not allow wild mammals, birds, reptiles, or amphibians to remain for extended periods of time outside a holding area and shall move them between a holding area and a conveyance as expeditiously as possible. A carrier or shipper maintaining wild mammals, birds, reptiles, or amphibians in a holding area, or transporting them to or from a holding area or between a holding area and a conveyance, shall provide the following:

(1) Shelter from sunlight, artificial light, cold air, drafts, and/or heat. When sunlight and/or artificial light is likely to cause overheating or discomfort, sufficient shade and/or darkness shall be provided to protect animals from the light or heat.

\* \* \* \* \*

(4) Shelter from drafts, and/or air conditioners. The shipper and the carrier shall provide animals protection from drafts.

(5) Protection from harassment. The shipper and the carrier shall protect animals from disturbances, including, but not limited to, harassment by humans, other animals, or machinery that makes noise, emits fumes, heat, or light, or causes vibration.

14. Section 14.112 is revised to read as follows:

**§ 14.112 Other applicable provisions.**

In addition to the provisions of § 14.101 through 14.111, the shipper and the carrier shall meet the requirements of § 14.121 through 14.223 applicable for particular groups of animals for all shipments of wild mammals, birds, reptiles, and amphibians covered by this part.

15. Sections 14.181 through 14.223 are added to read as follows:

**Specifications for Reptiles Group 1 (Small Squamata, Small Crocodylia, and Rhynchocephalia)**

**§ 14.181 Design and construction.**

(a) *Materials.* The shipper shall construct primary enclosures of hardboard, plywood, plastic and/or wood and inner enclosures of burlap or cloth bags, fine nylon or similar mesh, expanded polystyrene/Styrofoam, fiberboard or, fine wire mesh. The Service considers neither corrugated card board nor corrugated board to be suitable for these species.

(b) *Principles of design.* The shipper shall meet the following principles of design in constructing the primary enclosure in addition to those outlined in § 14.106.

(1) For a primary enclosure 50 × 50 cm (19.5 × 19.5 in), the shipper shall pack young alligators, caimans, gavials, and crocodiles (juveniles) in trays with bedding of damp macrolite or other similar material. The shipper shall place no more than four trays in a primary enclosure.

(2) The shipper may carry specimens of small Squamata, small Crocodylia and Rhynchocephalia with a tail base width of 5 cm (2 in) or greater without inner bags in the primary enclosures. The shipper may pack these in trays, but each tray shall have no more than 10 animals.

(3) The shipper shall not use metal in the construction of the primary enclosures.

(4) The shipper shall use strong plywood or expanded polystyrene/Styrofoam boxes with adequate ventilation for construction of the primary enclosures. The shipper shall make ventilation holes smaller than the size of the animal in the primary enclosure. If the ventilation holes in the primary enclosure are larger than the animal enclosed, the shipper shall cover the holes with fine wire mesh securely attached on the outside of the primary enclosure.

(5) Ventilation holes in the primary enclosure never shall exceed 2.5 cm (1 in) in diameter and the shipper always shall securely cover them with very fine nylon gauze on the inside of the primary enclosure.

(6) If the shipper uses bags as the inner enclosure, the shipper must construct the sealed bags of cotton or burlap bags of coarse but sturdy weave which will allow ventilation and must secure them in the primary enclosure. Each bag shall carry a label "POISONOUS" or "Non-poisonous" as appropriate.

(7) The shipper may place damp absorbent material to maintain humidity for journeys of longer than 72 hours but the shipper must never allow such damp material to cool below the required animal temperature.

(8) The shipper shall place snakes, and small lizards, including geckos and chameleons, in linen or cotton or burlap bags of coarse but sturdy weave, such that fresh air may enter the bag but the animal may not push its way through the bag. In this case, except aquatic snakes, the shipper need not line the primary enclosure with nylon mesh or gauze. The shipper shall secure the bags to the primary enclosure without the

use of nails or staples or other such devices that rip the bags upon removal, or place them in small compartmentalized containers to prevent stacking. The use of bags shall be limited to 5 specimens per 4 litre volume bag.

(9) The shipper shall pack aquatic snakes in bags which the shipper thoroughly has dampened for total transportation time of 72 or more hours. Shippers shall meet the humidity requirements of animals by using dampened packing materials such as cloth bags, foam rubber, or damp paper.

(10) The shipper shall transport large snakes, whose length approaches the maximum for this species grouping (90 cm or 36 in), in individual durable primary enclosures, and the same principles of design shall apply.

**§ 14.182 Preparations before dispatch.**

(a) The shipper may pack more than one animal per bag if the shipper uses bags as the inner enclosure, except for chameleons or if the species is aggressive. The shipper shall secure the bags by partitions or compartmentalized containers to prevent stacking and shifting. The bags must be packed so that they are not stacked nor placed too close together to prevent the animals movement within the bag. The shipper shall pack the bags in such a way as to permit air to circulate around the bags within a primary enclosure.

(b) If the shipper uses a box or plastic container as the inner enclosure, the shipper shall place suitable non-organic or sterilized soft material within the inner enclosure to provide small reptiles with a foothold.

(c) The shipper shall provide chameleons with a system of suitable non-organic or sterilized perches and shall hydrate the chameleons with warm fresh water at the time of packing.

(d) The shipper shall pack all small reptiles with plenty of crumpled paper or foam rubber, but the shipper must take care not to occlude ventilation.

(e) The shipper shall individually pack venomous reptiles in transparent mesh bags closed by tying the bag opening into a knot and place those bags in styrofoam primary enclosures which the shipper shall then place within a wooden primary enclosure. The shipper shall clearly label both of the primary enclosures with "VENOMOUS" or "POISONOUS," including the number of enclosed animals, their common name, scientific name, and antivenin type required to treat bites by the species, next to the "LIVE ANIMAL" and "THIS WAY UP" labels.

(f) When transporting venomous reptiles, the importer shall provide a

certificate of affiliation with a physician or medical snake bite treatment center. Importers shall also have in their immediate possession a primary dosage amount of antivenin of the appropriate type for the species they are transporting.

**§ 14.183 General care and loading.**

(a) The shipper shall not mix or combine species with other species in a single bag or compartment within the primary enclosure.

(b) Temperature. The shipper and the carrier shall maintain an ambient temperature described in the general requirement in § 14.109.

(1) If there is the likelihood of extreme temperature variance during shipment, the shipper shall insulate the primary enclosure with a outer ventilated polystyrene box. If the temperature is likely to drop, the shipper shall put warm packs in a sealed bag or bags around the primary enclosures.

(2) The shipper, carrier, and importer shall take special care to avoid exposure to extreme temperatures.

**Specification for Reptiles Group 2 (Large Crocodylia and Large Squamata)**

**§ 14.191 Design and construction.**

(a) *Materials.* The shipper shall use wood in the construction of the primary enclosure.

(b) *Principles of design.* The shipper must meet the following principles of design in constructing the primary enclosure in addition to those outlined in § 14.106.

(1) The shipper may carry animals of these species with a tail base width of 5 cm (2 in) or greater without inner bags in the primary enclosures as described in § 14.181. The shipper may pack these in trays, but each tray shall have no more than 10 animals.

(2) The shipper may pack animals up to 77 cm (30 in) in length in parallel as small groups in the primary enclosure.

(3) The shipper shall pack animals over 77 cm (30 in) in length individually in separate primary enclosures.

(4) The shipper shall place reptiles over 77 cm (30 in) in length separately in strong, heavily-framed and well-padded wooden crate primary enclosures with dimensions that restrict movement of the animal.

(5) The shipper shall place ventilation holes at the sides and on the top of the container to provide adequate ventilation.

(6) The ends of the inside of the primary enclosure shall be smooth to prevent injury to the animal's head.

(7) If polystyrene containers are used, the shipper shall place them within a wooden ventilated primary enclosure.

**§ 14.192 Preparations before dispatch.**

(a) Where necessary, the shipper must place suitable sterile, non-organic material in the primary enclosure.

(b) The shipper shall secure closed the mouths of these animals with veterinarian's tape or heavy rubber bands, making certain not to block the nostrils, and blindfold them with a soft material. Large animals which need sedation shall receive a muscle relaxant under strict supervision of a veterinarian. The shipper shall place larger crocodylians (over 180 cm or 6 feet) in primary enclosures constructed with laminated plywood of a minimum thickness of 1.25 to 2 cm (1/2 to 3/4 in) with smooth inside walls and joints, with exterior reinforced frames of wood which the shipper shall screw together rather than nail. The primary enclosure shall conform to the body size and the shipper shall pad the primary enclosure to prevent injury or excessive movement.

(c) When either the shipper or the carrier expect temperature changes during shipment, the shipper or the carrier shall insulate the primary enclosure with polystyrene or other suitable insulating material to prevent temperature changes within the primary enclosure.

**§ 14.193 General care and loading.**

(a) The shipper shall not mix or combine species with other species in a single bag or compartment within the primary enclosure.

(b) Temperature variance. If there is the likelihood of extreme temperature variance during shipment, the shipper shall insulate the primary enclosures with a polystyrene box.

(1) The shipper and the carrier shall maintain an ambient temperature as described in the general requirements of § 14.109.

(2) The shipper and the carrier shall take special care to avoid exposure to extreme temperatures. If the shipper expects inappropriate low temperatures, the shipper shall place chemical heat packs around the primary enclosures.

(c) Sedation of animals. When shippers use immobilizing drugs for large crocodylians (over 180 cm or 6 feet in length), they shall include the drug type and appropriate antidote in the veterinary documents accompanying the shipment. A qualified veterinary technician, trained animal care attendant, or licensed veterinarian shall also accompany the shipment.

### Specification for Reptiles Group 3 (Testudines)

#### § 14.201 Design and construction.

(a) *Materials.* The shipper shall only use high density water-resistant fiberboard, water-resistant hardboard, plywood of a minimum 3 ply, and/or rigid plastics in the construction of the primary enclosure. The shipper shall not construct primary enclosures out of corrugated cardboard, corrugated board, or other materials likely to become damaged during transit.

(b) *Principles of design.* The shipper shall meet the following principles of design in constructing the primary enclosure in addition to the requirements outlined in § 14.106.

(1) The shipper shall use sturdy fiberboard, hardboard, plywood or rigid plastic boxes with adequate ventilation openings on the sides and top cover, or baskets with an impervious inner tray as the primary enclosures. The shipper shall securely fasten fine wire mesh outside the primary enclosures to screen the ventilation openings which shall be of a minimum of 1 cm (0.5 in) in diameter.

(2) The primary enclosure shall be shallow so that animals are unable to clamber on top of one another. The shipper may place padding in the form of crumpled newspaper, foam rubber, or Styrofoam peanuts around the animals to prevent shifting and injury from excessive movement. When the animals are less than 10 cm (4 in) in carapace length, the shipper shall permit no more than ten (10) individuals per primary enclosure in order to prevent excessive stacking of the animals.

(3) For the large animals of greater than 10 cm (4 in) in carapace length, the shipper shall place no more than 5 individuals in the primary enclosure.

(4) Certain species are aggressive, and the shipper shall individually pack them (e.g., snapping turtles of the family Chelydridae, mud and musk turtles of the family Kinosternidae, big-headed turtles of the family Platysternidae, and all soft-shelled turtles of the family Trionychidae).

#### § 14.202 Preparations before dispatch.

(a) Where necessary, the shipper shall place non-organic or other suitable material in the box.

(b) The shipper shall pack terrapins and aquatic turtles in damp, not wet, soft, absorbent bedding of crumpled newspaper, foam rubber, or other suitable sterilized and non-organic material to minimize injury.

#### § 14.203 General care and loading.

(a) In cases of more than one animal per shipment, the shipper shall not mix

or combine species with other species in a single primary enclosure.

(b) The shipper and the carrier shall take special care to avoid exposure to extreme temperatures. Particularly during cold weather, these animals lie dormant for prolonged periods and, therefore, neither the shipper nor the carrier shall presume them to be dead.

(1) On no account shall either the shipper or the carrier induce unnatural hibernation loading the consignments in thermally controlled containers.

(2) In extreme temperatures, the shipper shall place the primary enclosure inside a ventilated polystyrene container which permits air to circulate around the primary enclosures.

### Specification for Reptiles Group 4 (Juvenile or Hatchling Turtles)

#### § 14.211 Design and construction

(a) *Materials.* The shipper shall use water-resistant fiberboard, water-resistant hardboard, plywood, rigid plastics, and/or water-resistant chip board in the construction of the primary enclosures.

(b) *Principles of design.* The shipper must meet the following principles of design in constructing the primary enclosure in addition to the requirements outlined in § 14.106.

(1) The shipper shall use water-resistant fiberboard, water resistant hardboard, plywood, or rigid plastic, or chip board boxes with ventilation openings on the sides, top cover, and dividers (for the compartmentalized containers) in the primary enclosures. The shipper shall reinforce the design of the front and back. The shipper shall affix spacer bars to the top of the primary enclosures to ensure proper ventilation if carrier stacks several primary enclosures.

(2) The primary enclosure shall be shallow so that the animals are unable to clamber on top of one another but must be large enough to allow free movement. This primary enclosure shall not exceed 7.5 cm (3 in) in depth. The shipper shall not load more than 25 individuals in each compartmentalized container within the primary enclosure. The shipper shall not load more than 100 individuals per standard primary enclosure with dimensions of 46 x 46 x 7.5 cm (18 x 18 x 3 in).

#### § 14.212 Preparations before dispatch.

The shipper shall not band more than 4 primary enclosures together.

#### § 14.213 General care and loading.

(a) In cases of more than one animal per shipment, the shipper shall not mix or combine species with other species in

a bag or compartment within the primary enclosure. The shipper shall load only animals of the same size in the same compartmentalized container or primary enclosure.

(b) The shipper and the carrier shall take special care to avoid exposure to extreme temperatures. Particularly during cold weather, these animals lie dormant for prolonged periods and, therefore, neither the shipper nor the carrier shall presume them to be dead.

(1) On no account shall either the shipper or the carrier induce unnatural hibernation by loading the consignments in thermally controlled containers.

(2) In extreme temperatures the shipper shall place the primary enclosure inside a ventilated polystyrene container which permits animals to receive enough air exchange to allow for normal respiration.

### Specification for Amphibians (Urodela/Caudata, Anura/Salientia, and Gymnophiona/Apoda)

#### § 14.221 Design and construction.

(a) The shipper shall use expanded polystyrene, burlap, cloth, or clear plastic bags, water resistant chipboard, rigid plastics, water-resistant fiberboard, and/or water resistant wood in the construction of the primary enclosures and inner enclosures.

(b) Principles of design. The shipper must meet the following principles of design in constructing the primary enclosure in addition to those outlined in § 14.106.

(1) The shipper shall cover air holes with plastic mesh on the inside of the primary enclosure. The shipper shall make the air holes to provide adequate ventilation but shall punch them outwardly so that the animal will not be able to get its snout through the primary enclosure.

(2) The shipper may carry frogs, toads, and terrestrial salamanders in a shallow primary enclosure designed to prevent stacking of the animals, with the bottom lined with damp non-abrasive material.

(3) Large frogs that might jump at the lids of the primary enclosure and injure themselves require special packing. For these species, the shipper shall pad the inside of the covers of the primary enclosures with cotton of fine weave muslin, bubble wrap, or foam rubber unless the shipper has packed the animals in bags in the primary enclosure.

(4) In the case of small animals, the shipper may place up to four animals in the same compartmentalized container of the primary enclosure, provided that the animals are not toxic or aggressive

to each other and will not be injured by stacking.

(5) The shipper may carry aquatic species of amphibians (such as Necturus, Axolotls, Caecilians [Typhlonectes], Pipa and Xenopus) in a primary enclosure of two double-bagged sealed plastic bags a third full of water. The shipper shall fill the remainder with oxygen as specified by International Air Transport Association Live Animals Regulations' Container Requirements for transporting fish.

#### § 14.222 Preparations before dispatch.

For those frogs, newts, salamanders, Caecilians, and toad species which require moisture, the shipper shall pack the animals in primary enclosures with sponges or balls of crushed blotting paper or foam rubber chips which the shipper shall moisten with water. The shipper may also use other dampened suitable material.

#### § 14.223 General care and loading.

(a) The shipper shall not mix or combine species with other species in a single bag or compartment within the primary enclosure.

(b) Temperature. The shipper and the carrier shall take special care to avoid exposure to extreme temperatures, including the use of insulated shipping boxes. Particularly during cold weather, these animals lie dormant for prolonged periods and, therefore, neither the shipper nor the carrier shall presume the animals to be dead.

Dated: May 24, 1997.

**Donald J. Barry,**

Assistant Secretary, Fish and Wildlife and Parks.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 23

#### Proposals by Other Countries To Amend Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of decision.

**SUMMARY:** The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulates international trade in certain animals and plants. Species for which such trade is controlled are listed in Appendices I, II, and III to CITES. Any country that is a Party to CITES

may propose amendments to Appendix I or II for consideration by the other Parties.

This notice announces decisions by the U.S. Fish and Wildlife Service (Service) on negotiating positions to be taken by the United States delegation with regard to proposals submitted by Parties other than the United States. The proposals will be considered at the tenth regular meeting of the Conference of the Parties (COP10) to be held in Harare, Zimbabwe, June 9-20, 1997. This notice announces a deadline for public recommendations regarding potential reservations that could be taken by the United States on any listing decisions by the Parties at COP10. It also announces a potential amendment to the proposal submitted by the United States, and discussed in previous **Federal Register** notices, to include map turtles in Appendix II, and a revision to the proposal of the United States (also in the previous **Federal Register** notices) to include goldenseal in Appendix II.

**DATES:** Proposals mentioned in this notice are scheduled to be discussed along with preliminary votes by Party countries in committee on the weekdays from approximately June 11 to 17, 1997. Final votes in plenary sessions are likely on June 18 and 19, 1997, without discussion unless one-third of the Parties support the reopening of discussion on specific proposals. Any of these proposals that are adopted will enter into effect 90 days after the close of COP10 (i.e., on September 18, 1997). Public comments regarding potential reservations to be taken by the United States on listings adopted by the Parties at COP10 need to be received by the Service's Office of Scientific Authority by August 15, 1997.

**ADDRESSES:** Please send correspondence concerning this notice to Chief, Office of Scientific Authority; 4401 North Fairfax Drive, Room 750; Arlington, Virginia 22203. Fax number: 703-358-2276.

Comments and other information received are available for public inspection by appointment, from 8 a.m. to 4 p.m. Monday through Friday, at the Arlington, Virginia address.

**FOR FURTHER INFORMATION CONTACT:** Dr. Charles W. Dane, Chief, Office of Scientific Authority, U.S. Fish and Wildlife Service, Washington, D.C., telephone: 703-358-1708, fax: 703-358-2276.

#### SUPPLEMENTARY INFORMATION:

##### Background

CITES regulates import, export, re-export, and introduction from the sea of certain animal and plant species.

Species for which trade is controlled are included in one of three Appendices. Appendix I includes species threatened with extinction that are or may be affected by international trade. Appendix II includes species that, although not necessarily now threatened with extinction, may become so unless the trade is strictly controlled. It also lists species that must be subject to regulation in order that trade in other currently or potentially threatened species may be brought under effective control (e.g., because of difficulty in distinguishing specimens of currently or potentially threatened species from those other species). Appendix III includes species that any Party country identifies as being subject to regulation within its jurisdiction for purposes of preventing or restricting exploitation, and for which it needs the cooperation of other Parties to control trade.

Any Party country may propose amendments to Appendices I and II for consideration at meetings of the Conference of the Parties. The proposal must be communicated to the CITES Secretariat at least 150 days before the meeting. The Secretariat must then consult the other Parties and appropriate intergovernmental agencies, and communicate their responses to all Parties no later than 30 days before the meeting. Proposals submitted to the Secretariat are subsequently distributed to all Parties. The proposals submitted by the United States or cosponsored with other Parties for consideration at COP10 were addressed in the April 16, 1997, **Federal Register** (62 FR 18559). After preliminary review of other Parties' proposals received for consideration at COP10, the Service announced the proposals and invited comments on tentative negotiating positions in the April 17, 1997, **Federal Register** (62 FR 18731).

This notice announces the negotiating positions to be taken by the United States delegation on the proposals submitted by the Parties other than the United States for consideration at the forthcoming meeting of the Parties. It also announces a *potential amendment to a proposal* submitted by the United States and discussed in previous **Federal Register** notices of August 26, 1996 (61 FR 44324) and April 16, 1997 (62 FR 18559), to include all species of map turtles (genus *Graptemys*) in Appendix II, and an amendment to the proposal by the United States (also in the previous **Federal Register** notices) to include goldenseal (*Hydrastis canadensis*) in Appendix II. The decisions announced in this notice represent formal guidance to the delegation. Although it is neither

practical nor in the best interests of the United States to establish inflexible negotiating positions, the delegation will seek to obtain agreement of the Conference of the Parties with these positions unless new information becomes available (see Summary of Positions). Decisions on negotiating positions on resolutions and agenda items to be considered at COP10 are presented in a separate **Federal Register** notice.

### Proposals on Map Turtles and Goldenseal by the United States

On January 10, 1997, the United States submitted a proposal to the CITES Secretariat, for consideration at COP10, to include all species of map turtles (genus *Graptemys*) in Appendix II. This proposal, like all proposals submitted by the United States, was developed through a public process and first suggested formally in an August 26, 1996, **Federal Register** notice (61 FR 44324). As a result of input received, the final proposal was modified such that three of the twelve species would be included in Appendix II only because of similarity of appearance to the other nine species. The Service's argument in reaching that position was that, even though those three species (*Graptemys geographica*, *G. pseudogeographica*, and *G. ouachitensis*) were common and widely distributed, their listing was necessary in order that trade in the other more vulnerable species could be effectively controlled. In subsequent discussions, the International Association of Fish and Wildlife Agencies (IAFWA) asked the Service to remove those three species from the proposal, if the range States of the other nine species agreed to take certain actions that would result in the same level of protection being achieved that was intended by the Service's proposed listing. In response, the Service developed a list of State actions it deemed necessary to fulfill the intended purpose and agreed to remove the three species from the proposal, if the States would agree to engage in dialogue about implementing the needed actions. If the range States respond positively to the Service's position, the Service will amend its proposal accordingly at COP10. Subsequently, if the envisioned protection is not afforded the nine more vulnerable species, the Service will reconsider proposing the remaining three species for inclusion in either Appendix II or Appendix III.

The proposal to include *Hydrastis canadensis* (goldenseal) in Appendix II, which was submitted to the CITES Secretariat by the United States on January 10, 1997, for consideration by

the other Parties at COP10 (see 62 **Federal Register** 18559, April 16, 1997), is being revised to exclude the finished pharmaceutical products (i.e., the end-product medicinals), so the annotation would read: "Roots, rhizomes or rootstocks, and specimens recognizable as being parts thereof, as well as powder thereof in bulk". The listing would also have the standard exclusions such as seeds, as specified in 50 CFR Part 23.23(d).

The possibility of an amendment to not regulate all parts and derivatives of this species was presented in the proposal (Section 7.1) and the April 16, 1997 **Federal Register** (62 FR 18571). The Service believes that this lesser regulation, which would include raw powder still in the manufacturing process but not the finished products for the consumer such as capsules, is sufficient to begin a cooperative endeavor for the conservation of goldenseal. Should it be found with experience that this is insufficient regulation, a new CITES proposal to include other parts or derivatives could be presented to the Parties to consider, and would be announced in some future **Federal Register** with a similar process for comments from the public.

### Comments Received

A public meeting held on April 25, 1997, provided opportunities for comments from organizations and the general public on the tentative positions published in the April 17, 1997, **Federal Register** (62 FR 18731). These meetings were attended by 33 non-Federal-government individuals, representing 24 non-government organizations, one embassy, one foreign government agency, and three private businesses. Some of these attendees did not comment, and some followed up their verbal comments with written statements. Nineteen additional organizations, one business, and five unaffiliated individuals provided substantive written comments during the comment period on species proposals.

Most of the animal proposals received comment from at least one organization. The proposals receiving the greatest attention were those on elephants, whales, brown bear, white rhinoceros, vicuña, hawksbill sea turtle, and map turtles (the amendment being considered for the U.S. proposal). Written comments on plant species were received from three organizations and one specialist in certain aspects of plants. Cumulatively, all plant proposals were addressed by commenters, with the most comments

concerning one or more of the proposals on cacti.

The Service has prepared a summary of public comments entitled "Assessment of Comments on Species Listing Proposals." The separate development of this document, in keeping with past practice of the Service, allows for more timely and less expensive publication in the **Federal Register**. Although biological and trade information received from individuals and organizations after the comment period expired is not referenced in this document, all such information was considered on the basis of its scientific and/or technical merit. The "Assessment of Comments on Species Listing Proposals" is available from the Office of Scientific Authority upon request.

### Summary of Positions

As a consequence of (a) careful review and analysis of public comments and (b) new information that has become available from a variety of other sources since publication of tentative positions in the earlier **Federal Register** (62 FR 18731), some positions have been changed. Nine changes relate to animal listing proposals. Six of these (related to brown bear, vicuña, and Nile crocodile) involve negotiating positions previously "under review" and three (on vicuña annotations and South American curassows) involve reversals of position. Two changes involve plant listing proposals. One (on cut flowers of various families) involves a reversal of position; and one (on several taxa or groups of commonly propagated plants) involves a position formerly "under review." The latter involves a detailed review and analysis prepared by the Service that will be provided to interested Parties at COP10. All changes in position since the previous notice were made on the basis of new information, including information provided through the public comment process.

The negotiating positions presented in the following table are based upon (a) the best available biological and trade information available to the Service at this time, (b) the criteria adopted at COP9 for listing species in the Appendices (Resolution Conf. 9.24), (c) Confs. 3.15 and 8.22 on ranching, and (d) Conf. 9.18 on regulation of trade in plants. Rationale for (and/or commentary on) each current position is presented in footnotes referenced in the table. In some cases, only the rationale for a position has changed from that presented in the previous notice. The bases for some positions, particularly those that have changed since the

previous notice, are further explained in the separate "Assessment of Comments on Species Listing Proposals."

Although this notice sets forth the negotiating positions of the United

States at COP10, new information that becomes available during a COP can often lead to modifications in positions.

Support or opposition to particular proposals may depend on whether

certain questions about them are answered satisfactorily at the meeting. At COP10, the U.S. delegation will disclose all position changes and the rationale for them.

Species	Proposed amendment	Proponent	U.S. position
<b>Mammals</b>			
Order Diprotodontia:			
<i>Burramys parvus</i> (Mountain pygmy possum).	Deletion from Appendix II .....	Australia .....	Support. <sup>1</sup>
<i>Dendrolagus bennettianus</i> (Bennett's tree kangaroo).	Deletion from Appendix II .....	Australia .....	Support. <sup>1</sup>
<i>Dendrolagus lumholtzi</i> (Lumholtz's tree kangaroo).	Deletion from Appendix II .....	Australia .....	Support. <sup>1</sup>
Order Xenarthra:			
<i>Chaetophractus nationi</i> (Hairy armadillo).	Inclusion in Appendix I .....	Bolivia .....	Support. <sup>1</sup>
Order Cetacea:			
<i>Eschrichtius robustus</i> (Gray whale).	Transfer of the Eastern Pacific stock from Appendix I to II.	Japan .....	Oppose. <sup>2</sup>
<i>Balaenoptera acutorostrata</i> (Minke whale).	Transfer of the Okhotsk Sea West Pacific and the Southern Hemisphere stocks from Appendix I to II.	Japan .....	Oppose. <sup>2</sup>
<i>Balaenoptera acutorostrata</i> (Minke whale).	Transfer of the Northeast Atlantic and the North Atlantic Central stocks from Appendix I to II.	Norway .....	Oppose. <sup>2</sup>
<i>Balaenoptera edeni</i> (Bryde's whale).	Transfer of the North Pacific Western stock from Appendix I to II.	Japan .....	Oppose. <sup>2</sup>
Order Carnivora:			
<i>Ursus arctos</i> (Brown bear) .....	Transfer of all Asian and European populations from Appendix II to I.	Bulgaria and Jordan.	Oppose. <sup>3</sup>
<i>Ursus arctos</i> (Brown bear) .....	Transfer of all Asian and European populations from Appendix II to I.	Finland .....	Oppose. <sup>3</sup>
<i>Panthera onca</i> (Jaguar) .....	Establishment of annual export quotas for hunting trophies of zero in 1997, 1998, and 1999 and of 50 thereafter.	Venezuela .....	Oppose. <sup>4</sup>
Order Proboscidea:			
<i>Loxodonta africana</i> (African elephant).	Transfer of the Botswanan population from Appendix I to II, with certain annotations <sup>5</sup> .	Botswana, Namibia, and Zimbabwe.	Under review. <sup>6,7,8</sup>
<i>Loxodonta africana</i> (African elephant).	Transfer of the Namibian population from Appendix I to II, with certain annotations <sup>9</sup> .	Botswana, Namibia, and Zimbabwe.	Under review. <sup>6,8,10</sup>
<i>Loxodonta africana</i> (African elephant).	Transfer of the Nimbabwewan population from Appendix I to II, with certain annotations <sup>11</sup> .	Botswana, Namibia, and Zimbabwe.	Under review. <sup>6,8,12</sup>
Order Perissodactyla:			
<i>Ceratotherium simum simum</i> (Southern white rhinoceros).	Amendment to annotation 503 in the CITES Appendices) to allow trade in parts and derivatives but with a zero export quota.	South Africa .....	Oppose. <sup>13</sup>
Order Artiodactyla:			
<i>Pecari tajacu</i> (Collared peccary) ..	Deletion from Appendix II (Mexican population) .....	Mexico .....	Oppose. <sup>14</sup>
<i>Vicugna vicugna</i> (Vicuña) .....	Annotated transfer of certain populations to Appendix II <sup>15</sup> .	Argentina .....	Oppose. <sup>16,17,18</sup>
<i>Vicugna vicugna</i> (Vicuña) .....	Annotated transfer of certain populations to Appendix II <sup>19</sup> .	Bolivia .....	Under review. <sup>18,20</sup>
<i>Vicugna vicugna</i> (Vicuña) .....	Amendment to annotation 504 in the CITES Appendices to replace the words "VICUÑANDES-CHILE" and "VICUÑANDES-PERU" with the words "VICUÑA-COUNTRY OF ORIGIN".	Peru .....	Support. <sup>21</sup>
<i>Vicugna vicugna</i> (Vicuña) .....	Amendment to annotation 504 (in the CITES Appendices list) to allow also the countries that are members of the Vicuña Convention to utilize the term VICUÑA-PAIS DE ORIGENARTESANIA, along with the authorized trademark, on luxury handicrafts and knitted articles made of wool sheared from live vicuñas from Appendix II populations.	Peru .....	Oppose. <sup>18</sup>
<i>Elaphurus davidianus</i> (Père David's deer).	Inclusion in Appendix II .....	Argentina and China.	Support. <sup>1</sup>
<i>Bison bison athabascaae</i> (Wood bison).	Transfer from Appendix I to II in accordance with precautionary measure B.2.b of Resolution Conf. 9.24, Annex 4.	Canada .....	Under review. <sup>22</sup>
<i>Bos javanicus</i> (Banteng) .....	Inclusion in Appendix I .....	Thailand .....	Support. <sup>1,23</sup>
<i>Bubalus arnee</i> (Water buffalo) .....	Include In Appendix I .....	Thailand .....	Support. <sup>1</sup>

Species	Proposed amendment	Proponent	U.S. position
<i>Ovis ammon nigrimontana</i> (Kara Tau argali).	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
<b>Birds</b>			
Order Galliformes:			
<i>Pauxi pauxi</i> (Northern helmeted curassow).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Pauxi unicornis</i> (Horned curassow).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
Order Gruiformes:			
<i>Turnix melanogaster</i> (Black-breasted buttonquail).	Deletion from Appendix II .....	Australia .....	Oppose. <sup>24</sup>
<i>Pedionomus torquatus</i> (Plains wanderer).	Deletion from Appendix II .....	Australia .....	Support. <sup>1</sup>
<i>Gallirallus australis hectori</i> (Eastern weka rail).	Deletion from Appendix II .....	New Zealand .....	Support. <sup>1</sup>
Order Psittaciformes:			
<i>Amazona agilis</i> (Black-billed parrot).	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
<i>Amazona viridigenalis</i> (Red-crowned parrot).	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
<i>Cacatua sulphurea</i> (Lesser sulphur-crested cockatoo).	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
<i>Eunymphicus cornutus uvaeensis</i> (Ouvea horned parakeet).	Transfer from Appendix II to I .....	Germany .....	Oppose. <sup>25</sup>
<i>Vini kuhlii</i> (Kuhl's lorikeet) .....	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
<i>Vini peruviana</i> (Tahitian lorikeet)	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
<i>Vini ultramarina</i> (Ultramarine lorikeet).	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
Order Coraciiformes:			
<i>Aceros waldeni</i> (Wriathed-billed hornbill).	Transfer from Appendix II to I .....	Germany .....	Support. <sup>1</sup>
Order Passeriformes:			
<i>Leiothrix argentauris</i> (Silver-eared mesia).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Leiothrix lutea</i> (Red-billed leiothrix).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Liocichla omeiensis</i> (Omei Shan liocichla).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Tangara fastuosa</i> (Seven-colored tanager).	Inclusion in Appendix II .....	Germany and the Netherlands.	Support. <sup>1</sup>
<i>Amandava formosa</i> (Green avadavat).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Padda oryzivora</i> (Java sparrow ...)	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Gracula religiosa</i> (Hill mynah) .....	Include in Appendix II .....	Netherlands and the Philippines.	Support. <sup>1</sup>
<b>Reptiles</b>			
Order Testudinata:			
<i>Callagur borneoensis</i> (Painted terrapin).	Inclusion in Appendix II .....	Germany .....	Support. <sup>1</sup>
<i>Eretmochelys imbricata</i> (Hawksbill sea turtle).	Transfer of the Cuban population from Appendix I to II with certain annotations <sup>26</sup> .	Cuba .....	Oppose. <sup>14</sup>
Order Crocodylia:			
<i>Caiman latirostris</i> (Broad-snouted caiman).	Transfer of the Argentine population from Appendix I to II, pursuant to resolution on ranching.	Argentina .....	Under review. <sup>27</sup>
<i>Crocodylus niloticus</i> (Nile crocodile).	Maintenance of the Malagasy population in Appendix II, pursuant to resolution on ranching.	Madagascar .....	Oppose. <sup>28</sup>
<i>Crocodylus niloticus</i> (Nile crocodile).	Establishment of an annual export quota of 1,000 skins and 100 hunting trophies from wild animals for the years 1998–2000.	Tanzania .....	Oppose. <sup>29</sup>
<i>Crocodylus niloticus</i> (Nile crocodile).	Maintenance of the Ugandan population in Appendix II, pursuant to resolution on ranching.	Uganda .....	Support. <sup>30</sup>
Order Sauria:			
<i>Varanus bengalensis</i> (Indian monitor).	Transfer of the population of Bangladesh from Appendix I to II subject to annual export quotas of 150,000 skins in 1997 and 225,000 in 1998 and 1999.	Bangladesh .....	Oppose. <sup>14</sup>
<i>Varanus flavescens</i> (Yellow monitor).	Transfer of the population of Bangladesh from Appendix I to II subject to annual export quotas of 100,000 skins in 1997, 1998, and 1999.	Bangladesh .....	Oppose. <sup>14</sup>
<b>Amphibians</b>			
Order Anura:			
<i>Mantella bernhardi</i> (Golden mantella).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>

Species	Proposed amendment	Proponent	U.S. position
<i>Mantella cowani</i> (Golden mantella).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Mantella haraldmeieri</i> (Golden mantella).	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<i>Mantella viridis</i> (Golden mantella)	Inclusion in Appendix II .....	Netherlands .....	Support. <sup>1</sup>
<b>Mollusks</b>			
Class Gastropoda:			
<i>Paryphanta</i> spp. (New Zealand amber snails).	Deletion from Appendix II .....	Switzerland .....	Support. <sup>1</sup>
<b>Other Animal Proposals</b>			
Any Appendix II species annotated to limit the trade to certain types of specimens.	Amendment to the relevant annotations of Appendix II species annotated to limit the trade to certain types of specimens, to include the following wording: "All other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly".	Switzerland .....	Support. <sup>31</sup>
<b>Plants—General</b>			
Araliaceae: <i>Panax quinquefolius</i> (American ginseng).	Amend the Appendix II listing of this species ( <i>cf.</i> current annotation #3), to include only the following parts: "Roots and specimens recognizable as being parts of roots".	Switzerland .....	Support. <sup>32,33</sup>
Cactaceae spp. (Cacti): Mexican cacti	Amend the Appendix II listing for this family ( <i>cf.</i> current annotation #4), to include seeds of cacti from Mexico, except those seeds obtained from artificial propagation in Production Units.	Mexico .....	Support. <sup>1,6,34</sup>
Leguminosae (Fabaceae): <i>Pericopsis elata</i> (Afro-rosalia), and Meliaceae: <i>Swietenia mahagoni</i> (Caribbean mahogany).	Amend the Appendix II listing of these two species ( <i>cf.</i> current annotation #5), to include only the following parts: "Logs, sawn wood, and veneer sheets".	Switzerland .....	Support. <sup>35</sup>
Proteaceae: <i>Orothamnus zehyeri</i> (Marsh-rose).	Transfer from Appendix I to Appendix II, in accordance with precautionary measure B.2.b) of Resol. Conf. 9.24, Annex 4.	South Africa .....	Support. <sup>1</sup>
<i>Protea odorata</i> (Ground-rose or Swartland sugarbush).	Transfer from Appendix I to Appendix II, in accordance with precautionary measure B.2.b) of Resol. Conf. 9.24, Annex 4.	South Africa .....	Oppose. <sup>14,24,36</sup>
Scrophulariaceae: <i>Picrorhiza kurrooa</i> (Kutki).	Include in Appendix II, along with only the following parts <sup>37</sup> : Roots [i.e., rhizomes/rootstocks] and readily recognizable parts thereof.	India .....	Support. <sup>1,33</sup>
Theaceae: <i>Camellia chrysantha</i> , which is <i>Camellia petelotii</i> in part (Golden-flowered camellia).	Delete from Appendix II .....	China .....	Support. <sup>1</sup>
Valerianaceae: <i>Nardostachys grandiflora</i> (= <i>Nardostachys jatamansi</i> misapplied) (Himalayan nard or spikenard).	Include in Appendix II, along with only the following parts <sup>37</sup> : Roots [i.e., rhizomes/rootstocks] and readily recognizable parts thereof.	India .....	Support. <sup>1,33</sup>
<b>Plants—Artificial Propagation</b>			
Families other than Orchidaceae (Orchids).	Amend the listings of most plant families now in Appendix II (current annotations #1, #2, #4, and #8), to also exclude the following part: Cut flowers of artificially propagated plants.	Switzerland .....	Support. <sup>38</sup>
Cactaceae spp. (Cacti): (1) Hybrid Easter cactus; (2) Christmas cactus, Crab cactus; (3) Red cap cactus, Oriental moon cactus; and (4) Bunny ears cactus.	Amend the Appendix II listing for this family ( <i>cf.</i> current annotation #4), to exclude artificially propagated specimens of the following hybrids and/or cultivars: (1) <i>Hatiora graeseri</i> (= <i>H. gaertneri</i> <i>H. rosea</i> ); (2) <i>Schlumbergera</i> (= <i>Zygocactus</i> ) hybrids and cultivars [sic] <sup>39</sup> ( <i>S. truncata</i> cultivars, and its hybrids with <i>S. opuntoides</i> [= <i>S. exotica</i> ], <i>S. orssichiana</i> , and <i>S. russelliana</i> [= <i>S. buckleyi</i> ]); (3) <i>Gymnocalycium mihanovichii</i> cultivars (those lacking chlorophyll, grafted <sup>40</sup> ); and (4) <i>Opuntia microdasys</i> .	Denmark .....	Oppose. <sup>41</sup>
Euphorbiaceae: Succulent <i>Euphorbia</i> spp. (Succulent euphorbs): Three-ribbed milk tree.	Amend the Appendix II listing of succulent <i>Euphorbia</i> spp., with an annotation to exclude artificially propagated specimens of <i>Euphorbia trigona</i> cultivars <sup>42</sup> .	Denmark .....	Oppose. <sup>41</sup>
Primulaceae: <i>Cyclamen</i> spp. (Cyclamens): Florist's cyclamen.	Amend the Appendix II listing of <i>Cyclamen</i> spp., with an annotation to exclude artificially propagated specimens of the hybrids and cultivars of <i>Cyclamen persicum</i> , except when traded as dormant tubers.	Denmark .....	Oppose. <sup>41</sup>

<sup>1</sup> The listing, uplisting, downlisting, or delisting of this taxon (or parts in the case of some plants) appears to be consistent with the relevant biological, trade, and precautionary criteria of Resolution Conf. 9.24.

<sup>2</sup>The United States continues to support the 1978 request from the International Whaling Commission (IWC) to take all possible measures to support the IWC ban on commercial whaling for certain species and stocks of whales and therefore opposes the transfer of this species from Appendix I to Appendix II.

<sup>3</sup>The proposal from Bulgaria and Jordan defers to the details presented in the proposal from Finland. Although it is clear that some of the European or Asian populations of this species not presently included in Appendix I meet the criteria for Appendix I, the United States is not convinced by the proposal that the brown bear population of Russia qualifies. The Russian population is subject to a managed sport harvest that appears to be in itself sustainable, but this population in particular is also prone to illegal take for medicinal products. Unless Russia supports the proposal and there is no compelling objection from other range states, the United States opposes the proposal as written. However, the United States would support an amended proposal that addresses specific range state populations (i.e., all members of the species within specified national boundaries) meeting the biological criteria for Appendix I, if the proposal is supported by the relevant range state(s).

<sup>4</sup>The proposal acknowledges that the jaguar population proposed for phased-in trophy-hunting may be the most threatened population in the country. The United States opposes this proposal without (a) a more convincing case that trophy hunting will not add to existing pressure on the jaguar population and (b) a management plan involving comprehensive population monitoring in the affected area.

<sup>5</sup>Annotated to allow: (a) the direct export of registered stocks of whole raw tusks of Botswana origin to one trading partner (Japan) subject to annual quotas of 12.68 t. in 1998 and 1999; (b) international trade in hunting trophies; and (c) international trade in live animals to appropriate and acceptable destinations.

<sup>6</sup>The proposal presents biological information that supports the proposed action.

<sup>7</sup>The Panel of Experts report on this proposal noted deficiencies in the record-keeping system for the ivory stockpile and showed there is no clear plan for use of ivory revenues to benefit elephant conservation. It also noted the existence of some movement of ivory through the country. The United States has concerns about these reported deficiencies and about the adequacy of trade controls in the importing country.

<sup>8</sup>The United States is consulting other African elephant range states to determine whether adoption of this proposal by the Parties would cause conservation concerns in other portions of the species' range.

<sup>9</sup>Annotated to allow: (a) the direct export of registered stocks of whole raw tusks of Namibian origin owned by the government of Namibia to one trading partner (Japan) that will not reexport, subject to annual quotas that will not exceed 6900 kg. between September 1997 and August 1998 and between September 1998 and August 1999; (b) international trade in live animals to appropriate and acceptable destinations for non-commercial purposes; and (c) international trade in hunting trophies for non-commercial purposes.

<sup>10</sup>Although noting there is probably some movement of ivory through the country, the Panel of Experts reported satisfactory to excellent internal management controls in Namibia and an excellent legal structure for establishing a conservation fund with ivory stock sale revenues. The Panel concluded that the proposal would likely benefit elephant conservation in Namibia. The United States has concerns about the adequacy of trade controls in the importing country.

<sup>11</sup>Annotated to allow: (a) the direct export of registered stocks of whole raw tusks to one trading partner (Japan) subject to annual quotas of 10 t. in 1998 and 1999; (b) international trade in hunting trophies; (c) international trade in live animals to appropriate and acceptable destinations; (d) international trade in non-commercial shipments of leather articles and ivory carvings; and (e) export of hides.

<sup>12</sup>The Panel of Experts noted deficiencies in trade enforcement controls in Zimbabwe, including failure to prevent illegal exports of large commercial shipments of worked ivory, and showed there is no clear plan for use of ivory revenues to benefit elephant conservation. It also noted the existence of significant movement of ivory through the country. The United States has concerns about these reported deficiencies and about the adequacy of trade controls in the importing country.

<sup>13</sup>While acknowledging the excellent record of the government of South Africa in restoring populations of this species, the United States is concerned about potential detrimental effects of re-opening a legal international trade in rhinoceros horn. The United States has invested considerable effort into encouraging use of alternatives to rhinoceros horn derivatives in traditional Asian medicines.

<sup>14</sup>The proposal does not present sufficient biological information to justify the listing, uplisting, downlisting, or delisting as proposed, based on the criteria in Resolution Conf. 9.24.

<sup>15</sup>Transfer of the population of the Province of Jujuy and of the semicaptive populations of the Provinces of Jujuy, Salta, Catamarca, La Rioja, and San Juan, Argentina, from Appendix I to II, with an annotation to allow only the international trade in wool sheared from live vicuñas, and in cloth and manufactured items made thereof, under the mark, "VICUÑA-ARGENTINA."

<sup>16</sup>Although the population may no longer meet the biological criteria for Appendix I, the proposal does not yet satisfy the precautionary measures of Annex 4 of Resolution Conf. 9.24. The proposal does not clearly describe a population monitoring program, does not demonstrate either local incentives for conservation or the existence of effective controls on production and export of products, and does not present sufficient detail to indicate transparency in the vicuña conservation fund.

<sup>17</sup>The United States is opposed to international trade in raw wool during the early phases of a vicuña downlisting, before a management plan has been implemented and shown to be effective, unless convincing safeguards are demonstrated by the proponent.

<sup>18</sup>The United States is concerned about the risks of large quantities of luxury handicrafts and knitted articles derived from vicuña wool leaving the countries of origin without CITES controls, because of the CITES personal effects exemption.

<sup>19</sup>Transfer of the populations of the Conservation Units of Mauri-Desaguadero, Ulla Ulla, and Lipez-Chicas, Bolivia, from Appendix I to II, with an annotation to allow only the international trade in cloth and manufactured items made thereof, under the mark, "VICUÑA-BOLIVIA."

<sup>20</sup>The proposal presents excellent population data and a well conceived approach to development of management plans and follow-through monitoring of the effectiveness of vicuña management in different socio-economic regimes. The United States considers this proposal to be under review until the report on exports of vicuña cloth at COP10 is presented and evaluated. Despite the quality of the proposal, the United States does not believe that trade in vicuña products from Bolivia is warranted until the proposed management plan is operational and the Parties have an opportunity to consider other than a zero quota for vicuña products, and provided that export will be limited initially to easily controlled products.

<sup>21</sup>The United States sees no difficulties with such a change in the labeling of approved products.

<sup>22</sup>Because of the remote isolation of the wild population, and because of the risk of disease spreading to captive populations if wild animals are introduced, it is highly unlikely that trade in wood bison presently in captivity would be detrimental to the survival of the species in the wild. Nonetheless, the species appears to meet the biological criteria for retention in Appendix I. The proposal remains under review, while the United States consults with Canada to obtain clarification on the species' status.

<sup>23</sup>The United States supports the exclusion from the proposal of introduced populations remote from the natural range, e.g., the introduced population of Australia.

<sup>24</sup>Although trade is not recorded, the population is so small that retention in the Appendices would seem advisable as a precautionary measure in the event illegal trade should ever occur.

<sup>25</sup>Because the subspecies are extremely similar and occur in the same jurisdiction, the proposed split-listing would be practically unenforceable and would be inconsistent with Annex 3 of Resolution Conf. 9.24.

<sup>26</sup>Annotated to allow: (a) trade in current registered stocks of shell with one trading partner (Japan) that will not re-export; and (b) export in one shipment per year, to the same partner, of shell marked in compliance with Resolution Conf. 5.16, which allows definitive identification of origin, from a traditional harvest (maximum 500 individuals per year) or from an experimental ranching program (anticipated: 50 individuals in the first year; 100 in the second year; and 300 in the third year).

<sup>27</sup>The United States is not convinced that the necessary trade controls (including a tagging scheme in accordance with Resolution Conf. 9.22) are in place to ensure that the ranching program will be beneficial to the species and its continuing to seek clarification from Argentina.

<sup>28</sup>The United States opposes the proposal on the basis that it does not provide a clear picture of the regulatory and control measures that need to be in place in order to monitor ranching operations and control trade. A modified proposal under quota provisions that would allow for export of 200 or fewer problem animals, and a quota of 3,000–5,000 ranched animals as previously allowed, would be acceptable.

<sup>29</sup>The United States opposes export of more than 200 nuisance animals and more than 100 sport trophies, because the reporting requirement related to the previous approval by the Parties of export of 1,000 wild-caught nuisance animals and 100 trophies does not present sufficient information to justify the level of harvest and subsequent export of wild animals outside protected areas. The IUCN Crocodile Specialist Group does not believe that the current wild harvest is sustainable and questions the accuracy of crocodile export reports.

<sup>30</sup> The United States supports the proposal, conditional upon Uganda agreeing to (a) monitor the effect of release of juveniles in the wild and to adjust egg collection limits if necessary; (b) clarify the manner in which the ranching program provides conservation benefits to the species; and (c) accepting a CITES Secretariat review (in consultation with the IUCN Crocodile Specialist Group) of the progress of the ranching program prior to the next meeting of the Conference.

<sup>31</sup> The United States believes the recommended language would help clarify annotated downlistings, such as that of the South African population of the white rhinoceros, and reduce the possibility of misinterpreting or abusing the downlisting process. However, annotation of the Appendices is a complex and confusing subject that deserves a thorough review from legal and technical perspectives. Accordingly, the United States has prepared a draft resolution on annotated downlistings, presently under internal review, and looks forward to detailed discussion at COP10.

<sup>32</sup> The current listing includes "Roots and readily recognizable parts thereof". The proposed revision is considered to be a minor change, which would clarify and keep the intent of the 1985 proposal (at COP5) to include the whole roots and the larger parts thereof, and to exclude minor pieces and processed products. Some importing Parties have found that the current annotation can be interpreted too broadly.

<sup>33</sup> The United States will recommend standardization of the inclusion of the parts for *Panax quinquefolius* (American ginseng), *Picrorhiza kurrooa* (Kutki), and *Nardostachys grandiflora* (Himalayan nard), with the annotation "Roots, rhizomes or rootstocks, and specimens recognizable as being parts thereof". This would keep the intent of the proposal of Switzerland for *Panax quinquefolius*, and the intent of the proposals of India for the other two species, while accommodating those two species' different morphology of having rhizomes or rootstocks.

<sup>34</sup> This proposal is considered necessary to assist enforcement of Mexican law that regulates the export of seeds collected in the wild from cacti in Mexico. The Government of Mexico, at the November 1996 meeting of the CITES Plants Committee, presented information on recent violations of Mexican law and over-collection of cactus seeds of various taxa for export to various Party countries. The United States is discussing with Mexico how they intend to administer the differentiation of seeds collected in the wild from seeds produced by artificial propagation in their Production Units (i.e., nurseries). We understand that this proposal only covers the populations of cacti in Mexico; it does not cover populations of Mexican cacti native beyond Mexico, or specimens of Mexican cacti artificially propagated elsewhere than in Mexico.

<sup>35</sup> These two current listings include "Saw-logs, sawn wood, and veneers". The proposed revision is considered to be a minor change, which would correspond to the categories and definitions of HS codes 44.03 (logs), 44.06 and 44.07 (sawn wood), and 44.08 (veneer sheets) in the Harmonized System of the World Customs Organization. The change was recommended by the CITES Timber Working Group.

<sup>36</sup> There are so few individuals and populations of this species known in the wild, and so few artificially propagated individuals available in cultivation, that continued inclusion of the species in Appendix I is considered to be an appropriate precaution.

<sup>37</sup> The proposal for this species discusses its rhizomes or rootstocks rather than botanical roots.

<sup>38</sup> The proposal seeks to establish a new standard exclusion for Appendix II taxa. Presently, there is no known cut-flower trade in the pertinent listed Appendix II taxa (i.e., the taxa other than orchids), either from the wild or from flowers produced by artificial propagation (nor are there any complications in any trading of their hybrids with Appendix I taxa). The conservation of species in the wild is therefore considered to be unaffected by this proposed new standing listing for Appendix II (and probably Appendix III), to which exceptions (i.e., inclusion of the cut flowers) can be made whenever warranted in future proposals for particular taxa. Although the proposal did not address the taxa of Nepal in Appendix III, which also have their listings standardized with the current annotation #1, we expect the Secretariat to encourage Nepal to accept this new exclusion for those listings as well.

<sup>39</sup> This proposal is considered to not include all taxa (or hybrids and cultivars) of *Schlumbergera*, but just those listed in detail in the proposal and in this FEDERAL REGISTER notice. If this proposal goes forward, the United States will seek clarification or an amendment to that more limited effect.

<sup>40</sup> The proposal stated that the artificially propagated grafting stocks are mostly specimens of *Hylocereus* species and *Harrisia* "Jusbertii", but these taxa (and any other cactus taxa that might be used as grafting stock) were not directly presented for similar exclusion. The United States will consider supporting this portion of the proposal, if an amendment to specify the taxa of the grafting stocks, for example only *Harrisia* "Jusbertii", *Hylocereus trigonus* *Hylocereus undatus* can be adopted.

<sup>41</sup> Although the stipulated taxa are artificially propagated extensively, the risk either to other taxa in the wild or to pertinent natural taxa needs consideration. The burden for enforcement would be significantly complicated by excluding these artificially propagated specimens. Nevertheless, minimizing or reducing the implementation burden, and the regulation of artificially propagated specimens, are worthy goals, when there is no risk to taxa in the wild.

<sup>42</sup> This proposal is considered not to include *Euphorbia hermentiana*, which we understand is not a synonym of *Euphorbia trigona*.

## Future Actions

Amendments are adopted by a two-thirds majority of the Parties present and voting. All species amendments adopted will enter into effect 90 days after the close of COP10 (i.e., on September 18, 1997) for the United States, unless a reservation is entered. Article XV of CITES enables any Party to exempt itself from implementing CITES for any particular species, if it enters a reservation with respect to that species. A Party desiring to enter a reservation must do so during the 90-day period immediately following the close of the meeting at which the Parties voted to include the species in Appendix I or II. Soon after COP10, the Service plans to publish a notice in the **Federal Register** announcing the final decisions of the Parties on all proposed amendments to the Appendices. If the United States should decide to enter any reservation, this action must be transmitted to the Depositary Government (Switzerland) by September 18, 1997. The United States has never entered a reservation to a CITES listing. It would consider doing

so only if evidence is presented to show that implementation of an amendment would be contrary to the interests or laws of the United States.

## Comments on Possible Reservations

The Service invites comments and recommendations from the public concerning reservations that may be taken by the United States on any amendments to the Appendices adopted by the Parties at COP10. The Service's past practice has been to solicit public comments only after the COP, in the notice that announces the actions of the Parties at the COP on the proposed species amendments. However, because of the short time available for taking reservations, the Service is now soliciting comments on possible reservations on any proposed species amendment that may be adopted. Although the Service will re-solicit comments after COP10 *if time is available*, this present notice may be the only request for such comments. Recommendations or comments regarding reservations must be received by August 15, 1997. If the United States should enter any reservations, they will

be announced in the same **Federal Register** notice that incorporates the listing decisions of the Parties into the Code of Federal Regulations (50 CFR Part 23).

Reservations, if entered, may do little to relieve importers in the United States from the need for foreign export permits, because the Lacey Act Amendments of 1981 (16 U.S.C. 3371 *et seq.*) make it a Federal offense to import into the United States any animals taken, possessed, transported, or sold in violation of foreign conservation laws. If a foreign country has enacted CITES as part of its law, and that country has not taken a reservation with regard to the animal or plant, or its parts or derivatives, the United States (even if it had taken a reservation on a species) would continue to require CITES documents as a condition of import. Any reservation by the United States would provide exporters in this country with little relief from the need for U.S. export documents. Importing countries that are Party to CITES would require CITES-equivalent documentation from the United States, even if it enters a

reservation, because the Parties have agreed to allow trade with non-Parties (including reserving Parties) only if they issue documents containing all the information required in CITES permits or certificates. In addition, if a reservation is taken on a species listed in Appendix I, the species should still be treated by the reserving Party as in

Appendix II according to Conf. 4.25, thereby still requiring CITES documents for export of these species. It is the policy of the United States that commercial trade in Appendix I species for which a country has entered a reservation undermines the effectiveness of CITES.

This notice was prepared by Drs. Marshall A. Howe and Bruce MacBryde,

Office of Scientific Authority, under authority of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: June 2, 1997.

**John G. Rogers,**

*Acting Director.*

[FR Doc. 97-14806 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-55-P

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.

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. 96-095-2]

#### Monsanto Co.; Availability of Determination of Nonregulated Status for Genetically Engineered Corn

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

**SUMMARY:** We are advising the public of our determination that the Monsanto Company's corn line designated as MON 802, which has been genetically engineered for insect resistance and glyphosate herbicide tolerance, is no longer considered a regulated article under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on our evaluation of data submitted by the Monsanto Company in its petition for a determination of nonregulated status and an analysis of other scientific data. This notice also announces the availability of our written determination document and its associated environmental assessment and finding of no significant impact.

**EFFECTIVE DATE:** May 27, 1997.

**ADDRESSES:** The determination, an environmental assessment and finding of no significant impact, and the petition may be inspected at USDA, room 1141, South Building, 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 those documents are requested to call before visiting on (202) 690-2817 to facilitate entry into the reading room.

**FOR FURTHER INFORMATION CONTACT:** Dr. James Lackey, BSS, PPQ, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737-1236; (301) 734-8713. To obtain

a copy of the determination or the environmental assessment and finding of no significant impact, contact Ms. Kay Peterson at (301) 734-4885; e-mail: mkpeterson@aphis.usda.gov.

#### SUPPLEMENTARY INFORMATION:

##### Background

On November 12, 1996, the Animal and Plant Health Inspection Service (APHIS) received a petition (APHIS Petition No. 96-317-01p) from the Monsanto Company (Monsanto) of St. Louis, MO, seeking a determination that a corn line designated as MON 802, which has been genetically engineered for insect resistance and glyphosate herbicide tolerance, does not present a plant pest risk and, therefore, is not a regulated article under APHIS' regulations in 7 CFR part 340.

On December 18, 1996, APHIS published a notice in the **Federal Register** (61 FR 66650-66651, Docket No. 96-095-1) announcing that the Monsanto petition had been received and was available for public review. The notice also discussed the role of APHIS, the Environmental Protection Agency, and the Food and Drug Administration in regulating the subject corn line and food products derived from it. In the notice, APHIS solicited written comments from the public as to whether this corn line posed a plant pest risk. The comments were to have been received by APHIS on or before February 18, 1997. APHIS received no comments on the subject petition during the designated 60-day comment period.

##### Analysis

Corn line MON 802 has been genetically engineered to express a CryIA(b) insect control protein derived from the common soil bacterium *Bacillus thuringiensis* subsp. *kurstaki* (Bt). The petitioner stated that the Bt delta-endotoxin protein is effective in protecting the subject corn line from damage caused by the European corn borer throughout the growing season. The subject corn line also expresses the CP4 EPSPS protein isolated from *Agrobacterium* sp. strain CP4 and the GOX protein cloned from *Achromobacter* sp. strain LBAA, which, when introduced into the plant cell, confer tolerance to the herbicide glyphosate. The particle acceleration method was used to transfer the added genes into the parental corn line, and

their expression is controlled in part by the intron from the corn *hsp70* gene and by gene sequences from the plant pathogens *Agrobacterium tumefaciens* and cauliflower mosaic virus. The *nptII* selectable marker gene is present in the subject corn line under the control of a bacterial promoter, but is not expressed in the plant.

The subject corn line has been considered a regulated article under APHIS' regulations in 7 CFR part 340 because it contains gene sequences derived from plant pathogens. However, evaluation of field data reports from field tests of the corn line conducted under APHIS notifications since 1993 indicates that there were no deleterious effects on plants, nontarget organisms, or the environment as a result of the environmental release of corn line MON 802.

##### Determination

Based on its analysis of the data submitted by Monsanto, a review of other scientific data, and field tests of the subject corn line, APHIS has determined that corn line MON 802: (1) Exhibits no plant pathogenic properties; (2) is no more likely to become a weed than corn lines developed by traditional breeding techniques; (3) is unlikely to increase the weediness potential for any other cultivated or wild species with which it can interbreed; (4) will not cause damage to raw or processed agricultural commodities; (5) will not harm threatened or endangered species or other organisms, such as bees, that are beneficial to agriculture; and (6) should not reduce the ability to control insects in corn or other crops when cultivated. Therefore, APHIS has concluded that the subject corn line and any progeny derived from hybrid crosses with other nontransformed corn varieties will be as safe to grow as corn in traditional breeding programs that are not subject to regulation under 7 CFR part 340.

The effect of this determination is that Monsanto's corn line MON 802 is no longer considered a regulated article under APHIS' regulations in 7 CFR part 340. Therefore, the requirements pertaining to regulated articles under those regulations no longer apply to the field testing, importation, or interstate movement of the subject corn line or its progeny. However, importation of corn line MON 802 or seeds capable of

propagation are still subject to the restrictions found in APHIS' foreign quarantine notices in 7 CFR part 319.

### National Environmental Policy Act

An environmental assessment (EA) has been prepared to examine the potential environmental impacts associated with this determination. The EA was prepared in accordance with: (1) The National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on that EA, APHIS has reached a finding of no significant impact (FONSI) with regard to its determination that Monsanto's corn line MON 802 and lines developed from it are no longer regulated articles under its regulations in 7 CFR part 340. Copies of the EA and the FONSI are available upon request from the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Done in Washington, DC, this 30th day of May 1997.

**Terry L. Medley,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 97-14876 Filed 6-5-97; 8:45 am]

BILLING CODE 3410-34-P

## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

[RFP #126-FW-NRCS-97]

### Soil Survey Division Research Program

**AUTHORITY:** Pub. L. 74-46, 16 U.S.C. 590(a-f), Pub. L. 89-560.

**AGENCY:** Natural Resources Conservation Service, USDA.

**ACTION:** Announcement of availability of funds for Request for Proposal.

**SUMMARY:** The Natural Resources Conservation Service (NRCS), Soil Survey Division through Congressional authority, has provided soil related research primarily through the National Soil Survey Laboratory (NSSL), and the National Cooperative Soil Survey (NCSS), in Lincoln, Nebraska. The Soil Survey Division has focused its research on soil genesis and processes, soil-landscape relationships, and development of criteria for Soil Taxonomy.

The Soil Survey Laboratories, in concert with University collaborators, led in the development of laboratory procedures for physical, chemical, and mineralogical methods in support of the NCSS. Historically, geomorphic projects constituted prominent research activities.

The Soil Survey Division has funds for selected proposals and will utilize these funds specifically for research and development within its budget.

**DATES:** The solicitation release date is June 10, 1997. Request for Proposal must be received on or before July 10, 1997. Proposals received after July 10, 1997, will not be considered for funding.

**ADDRESSES:** Proposals must be submitted to the following address: USDA, Natural Resources Conservation Service, National Business Management Center, FWFC, Bldg. 23, 501 Felix St., P.O. Box 6567, Ft. Worth, TX 76115-0567. The telephone number is (817) 334-5461; Internet: jlowe9ftw.nrcs.usda.gov. Hand-delivered proposal, including those submitted through an express mail or a courier service, must be submitted to the following address: USDA, Natural Resources Conservation Service, National Business Management Center, FWFC, Bldg 23, 501 Felix St., Ft. Worth, TX 76115. The telephone number is: (817) 334-5461.

**FOR FURTHER INFORMATION CONTACT:** John Kimble, U.S. Department of Agriculture, National Soil Survey Center, Federal Building, Room 152, 100 Centennial Mall North, Lincoln, NE 68508-3866; telephone (402) 437-5376; jkimble@nssc.nrcs.usda.gov.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that under the authority for Soil Survey, awards ranging from \$10,000 to \$50,000 will be awarded for support of any one proposal, regardless of the amount requested. The total amount of funds available for proposals is \$300,000.

### Eligibility and Limitations on Use of Funds

Under this program, subject to the availability of funds, the Secretary may award proposal to land-grant colleges and universities, State agricultural experiment stations, colleges, universities, private entities, and to Federal laboratories having a demonstrable capacity in soil research. Proposal received from scientists at non-United States organizations or institutions will not be considered for support.

This request for proposal is subject to the provision found in 7 CFR part 3019, the Uniform Administrative

Requirement for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-profit Organizations, which sets forth procedures to be followed when submitting grant proposals, rules governing the evaluation of proposals, processes regarding the awarding of grants, and regulations relating to the post-award administration of grant projects. In addition, other Federal statutes and regulations, such as 7 CFR 3051, the Audits of Institutions of Higher Education and Other Nonprofit Institutions, and OMB Circular A-110 and A-21, apply to this program.

### Specific Areas of Research To Be Supported in Fiscal Year 1997

A research framework has been developed to advance the fundamental goals of understanding and portraying (T.E.C.) the pedosphere, to develop and quantify soil interpretations, and to provide efficient technology transfer relevant for the NRCS and its cooperators. Methods development is important within this framework. In the past, much of the laboratory's focus was on development and improvement of laboratory methods. These efforts need to be continued. Also, additional needs are to focus more on field methods used to help in mapping, scaling of data, and model development for prediction of soil properties and extension of single point information for use in description of complex natural ecosystems. Within the critical research issues, both methods development (laboratory and field) and information delivery techniques are extremely important.

This framework includes the following integrative elements:

1. Soil-Water and Temperature
2. Geomorphic Modeling
3. Soil Quality/Soil Health
4. Soil Biological Processes in Soils and Carbon Cycling
5. Soil Genesis and Taxonomy
6. Spatial Variability & Scaling

### Critical Research Issues

Research is needed in the following general focus areas:

1. *Utilization of the NRCS Soil database.* The NRCS has an excellent and extensive database consisting of measured soil physical, chemical, and mineralogical properties from soils throughout the world. The database is an under utilized tool that has significant potential for use in improving soil quality, increasing agricultural production, and providing information to our customers. Development of new uses for the soils data is encouraged.

2. *New and developing issues in agriculture.* Site specific management (production maximization and critical area management) and soil quality are current examples of new areas holding promise of improving agricultural production while maintaining or proving soil conditions.

3. *Global Climate Change.* Studies in this area include understanding future effects on agriculture and forestry of climate change, whether natural or human caused. Priority areas are effects of soil carbon sequestration and release, monitoring changes in soil moisture and temperature over time, and contributions of agriculture and forestry to the mitigation of greenhouse gas emission and to project the capability to adapt to these changes. Studies related to developing data on soil properties that can be used by others in Global Climate research are also of interest.

4. *Use-dependent and temporal soil properties.* Studies in these areas may be closely related to other research activities such as site specific management or to development of long-term soil climate indices through analyses of continuously-monitored properties such as soil water status and soil temperature.

5. *Relationship of the pedosphere to other "spheres."* The relationship of the pedosphere to the atmosphere, geosphere, hydrosphere and biosphere should be investigated in a globally integrated manner. Included in this area is the development of models linking the soil environment to global models of the earth's interactions.

6. *Paleo-environment.* Studies of paleo-environmental parameters, as proxy models, can be used to predict climatic effects. This is an extremely important area in this era of global climate changes.

7. *Scaling data.* Included in this area are the needs to aggregate data from different sources and different scales and to develop means for dealing with geographically variable data.

8. *Ecosystem management.* Studies should be oriented to integrated units such as watersheds rather than individual farm fields, political areas such as counties, individual soil map units or point-location. The concept of soil landscape should be developed and refined.

#### How to Obtain Application Materials

Copies of this solicitation, and the Administrative provisions for this program (7 CFR and 3019) may be obtained by writing to the address or calling the telephone number which follows: USDA, National Business Management Center, Acquisition

Management, Attn: Mr. James Lowe, P.O. Box 6567, 501 Felix Street, Ft. Worth, TX 76115-0567, (817) 334-5461. Persons with disabilities who require alternative means of communication for proposal information (Braille, large print, audiotapes, etc.) should contact the USDA Office of Communications at (202) 720-2791.

These materials may also be requested via internet by sending a message with your name, mailing address (not e-mail) and phone number, to [jlowe@ftw.nrcs.usda.gov](mailto:jlowe@ftw.nrcs.usda.gov). The material will be mailed to you as quickly as possible.

#### Preparation and Submission of Proposals

Proposals submitted in response to this announcement for research opportunities must be submitted in accordance with the following guidelines.

Proposals shall be less than 10 pages in length. They must contain target dates and deadlines for the proposed research. The research proposal must include the hypotheses to be tested, expected results, and detailed budget, project (executive summary), statement of problem(s), a brief literature review, benefits of the proposed research to NCSS, science and society, proposed outreach program, and existing facilities/equipment. When the project is to be carried out in a cooperative nature with the NRCS, with an NCSS partner, or with another entity, the responsibilities of each partner must be described.

A two page curriculum vitae for each researcher(s) needs to be included with the proposal. A description of the qualifications of the scientist(s) (including degrees, publications, related grants, and past work). Failure to provide full and complete information may reduce the possibility of receiving an award.

#### Proposal Review

Proposal will be reviewed by NRCS and outside reviewers to ensure that they are within the areas outlined under critical issues and within established procedures of the NRCS. Strong consideration will be given to proposals that have the potential for enhancing the use of the existing data and information presently available at the NSSC.

In accordance with Federal statutes and regulation and USDA, NRCS policies, no person on grounds of race, color, age, sex, national origin, or disability shall be excluded from participation in, denied the benefits of, or be subject to discrimination under any program or activity receiving

financial assistance from the Department of Agriculture. Entities or individuals will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities support by this award of assistance.

**Roy R. Twidt,**

*Director, National Business Management Center.*

[FR Doc. 97-14767 Filed 6-5-97; 8:45 am]

BILLING CODE 3410-16-P

### COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

#### Procurement List; Proposed Additions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed Additions to Procurement List.

**SUMMARY:** The Committee has received proposals to add to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**COMMENTS MUST BE RECEIVED ON OR BEFORE:** July 7, 1997.

**ADDRESS:** Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202-3461.

**FOR FURTHER INFORMATION CONTACT:** Beverly Milkman (703) 603-7740.

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the commodities and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodities and services proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following commodities and services have been proposed for addition to Procurement List for production by the nonprofit agencies listed:

#### Commodities

##### *Bottle, Oil Sample*

8125-01-082-9697

NPA: Easter Seal Rehabilitation Center of Greater Waterbury, Waterbury, Connecticut

##### *Cap, Cold Weather*

8415-01-099-7843

8415-01-099-7844

8415-01-099-7845

8415-01-099-7846

8415-01-099-7847

8415-01-099-7848

NPA: Pueblo Diversified Industries, Inc., Pueblo, Colorado, Developmental Services of Northwest Kansas, Hays, Kansas

##### *Vest, Grenade Carrier*

8415-01-317-1622

NPA: Industries of the Blind, Inc., Greensboro, North Carolina, Raleigh Lions Clinic for the Blind, Inc., Raleigh, North Carolina

#### Services

##### *Administrative Services*

Nevada Field Office

Las Vegas, Nevada

NPA: Opportunity Village ARC, Las Vegas, Nevada

##### *Food Service Attendant*

U.S. Coast Guard Activities New York, Fort Wadsworth

Staten Island, New York

NPA: Fedcap Rehabilitation Services, Inc., New York, New York

##### *Food Service Attendant*

Fort Bliss, Texas

NPA: Tresco, Inc., Las Cruces, New Mexico

##### *Janitorial/Custodial*

Plains High School

Plains, Georgia

NPA: Sumter County Mental Retardation Services Center, Americus, Georgia

##### *Janitorial/Custodial*

U.S. Department of Interior/Bureau of Reclamation

Lower Colorado Regional Office

Boulder City, Colorado

NPA: Opportunity Village ARC, Las Vegas, Nevada

##### *Laundry Service*

Evans U.S. Army Community Hospital (all general laundry excluding uniforms)

Fort Carson, Colorado

NPA: Goodwill Industrial Services Corporation, Colorado Springs, Colorado

##### *Laundry Service*

(all non-hospital laundry)

Fort Carson, Colorado

NPA: Goodwill Industrial Services Corporation, Colorado Springs, Colorado

##### **Connie Corley,**

*Associate Director for Administration.*

[FR Doc. 97-14802 Filed 6-5-97; 8:45 am]

BILLING CODE 6353-01-P

#### **COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED**

##### **Procurement List Additions**

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Additions to the procurement list.

**SUMMARY:** This action adds to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**EFFECTIVE DATE:** July 7, 1997.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202-3461.

**FOR FURTHER INFORMATION CONTACT:** Beverly Milkman (703) 603-7740.

**SUPPLEMENTARY INFORMATION:** On March 17, April 4, 11 and 18, 1997, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (62 F.R. 12596, 16135, 17781 and 19102) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodities and services and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodities and services proposed for addition to the Procurement List.

Accordingly, the following commodities and services are hereby added to the Procurement List:

##### *Commodities*

Pen, Cushion Grip, Transparent

7520-01-424-4866

7520-01-424-4872

7520-01-424-4884

7520-01-424-4875

7520-01-424-4847

7520-01-424-4859

Flat Trays and Lids

P.S. Item 1257-L

P.S. Item 1257-T

##### *Services*

Administrative Services, Department of Health and Human Services, Region 8, Denver, Colorado

Grounds Maintenance, Miramar Naval Air Station, San Diego, California

Janitorial/Custodial, USARC #1, East Point, Georgia

Janitorial/Custodial, Beltsville Agricultural Research Center, Building 001, Beltsville, Maryland

Janitorial/Custodial, Guy Cardillo USARC, Roslindale, Massachusetts

Janitorial/Custodial, Naval Air Station, South Weymouth, Massachusetts

Janitorial/Custodial, G.H. Crossman USARC, 130 Eldridge Street, Taunton, Massachusetts

Janitorial/Grounds Maintenance, Federal Building and U.S. Post Office, Carson City, Nevada

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

**Connie Corley,**

*Associate Director for Administration.*

[FR Doc. 97-14803 Filed 6-5-97; 8:45 am]

BILLING CODE 6353-01-P

## CIVIL RIGHTS COMMISSION

### Sunshine Act Meetings

**AGENCY:** U.S. Commission on Civil Rights.

**DATE AND TIME:** Friday, June 13, 1997, 9:30 a.m.

**PLACE:** U.S. Commission on Civil Rights, 624 Ninth Street, N.W., Room 540, Washington, DC 20425.

#### STATUS

#### Agenda

- I. Approval of Agenda
- II. Approval of Minutes of May 19, 1997
- III. Announcements
- IV. Staff Report
- V. Nomination for Staff Director—Executive Session
- VI. Miami Report
- VII. Equal Educational Opportunity Reports
- VIII. State Advisory Committee Reports
  - District of Columbia: Residential Mortgage Lending Discrimination
  - Kentucky: Bias and Bigotry in Kentucky
  - Washington: Disproportionality in the Juvenile Justice System
- IX. GAO Report
- X. Discussion of the Staff Draft GPRA Strategic Plan
- XI. Future Agenda Items

#### CONTACT PERSON FOR FURTHER

**INFORMATION:** Barbara Brooks, Press and Communications (202) 376-8312.

**Stephanie Y. Moore,**

*General Counsel.*

[FR Doc. 97-14949 Filed 6-4-97; 11:01 am]

BILLING CODE 6335-01-M

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Agency:** Bureau of Export Administration.

**Title:** Commercial Encryption Items Transferred from the Department of State to the Department of Commerce.

**Agency Form Number:** BXA-748P.

**OMB Approval Number:** 0694-0104.

**Type of Request:** Extension of a currently approved collection.

**Burden:** 7,720 hours.

**Avg. Hours Per Response:** Ranges between 2 and 40 hours depending on the reporting and/or recordkeeping requirement.

**Needs and Uses:** The information required is needed to support export license applications to export or reexport encryption items. The associated rulemaking describes licensing policies for different categories of encryption items and establishes criteria for "key" recovery. Without the information, licensing decisions could not be made.

**Affected Public:** Businesses or other for-profit organizations.

**Frequency:** On occasion.

**Respondent's Obligation:** Mandatory.

**OMB Desk Officer:** Victoria Baecher-Wassmer, (202) 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482-3272, Department of Commerce, Room 5327, 14th and Constitution Avenue, N.W., Washington, D.C. 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Victoria Baecher-Wassmer, OMB Desk Officer Room 10202, New Executive Office Building, Washington, D.C. 20503.

Dated: May 30, 1997.

**Linda Engelmeier,**

*Departmental Forms Clearance Officer.*

[FR Doc. 97-14834 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-33-P

## DEPARTMENT OF COMMERCE

### Bureau of the Census

#### 1997 Survey of Minority-Owned Business Enterprises (SMOBE) and 1997 Survey of Women-Owned Businesses (WOB); Proposed Collection; Comment Request

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paper work and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information

collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 5, 1997.

**ADDRESSES:** Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Valerie Strang, Bureau of the Census, AGFS, Iverson Mall 300-15, Washington, DC 20233, (301) 763-5726.

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

The Census Bureau plans to conduct the 1997 Survey of Minority-Owned Business Enterprises (SMOBE) and the 1997 Survey of Women-Owned Businesses (WOB). They are the only comprehensive, regularly collected sources of information on businesses owned by minorities and women. They are conducted as part of the economic census program which is required by law to be taken every 5 years under Title 13 of the United States Code, Sections 131, 193, and 224.

Businesses will be eligible to be selected for this survey if they reported any business activity on any one of the following 1997 Internal Revenue Service tax forms: 1040 (Schedule C), "Profit or Loss from Business" (Sole Proprietorship); 1065, "U.S. Partnership Return of Income"; 1120S, "U.S. Income Tax Return for an "S" Corporation"; or any one of the 1120 tax forms. Businesses will be asked questions about the gender, race, and ethnicity of the person(s) owning majority interest in the business.

Within the last two months, 188 of our primary data users, including state and local governments, were canvassed to solicit their comments on proposed changes to the 1997 SMOBE/WOB programs. The proposed changes, summarized below, address the shortcomings of the 1992 data and reflect, where feasible, comments received from the data users canvassed.

- Expand survey to include all corporations.

In 1992, only subchapter "S" corporations in addition to partnerships and sole proprietorships were included for SMOBE. A small sample of "C" corporations was included in WOB to provide estimates at the industry division level only. A subchapter "S"

corporation is a special IRS designation for a legally incorporated business with 35 or fewer shareholders who elect to be taxed as individual shareholders rather than as a corporation. Approximately 2.5 million "C" corporations, accounting for 75 percent of all U.S. business receipts, were not included in 1992. A "C" corporation is a legally incorporated business under state laws which, unlike a subchapter S corporation, has no restrictions on the number of shareholders required to qualify. While adding these corporations to the 1997 program will increase overall respondent burden, their inclusion will provide a more complete coverage of women- and minority-owned businesses. The increase in burden resulting from the tax law change in 1996 which raised the allowable number of stockholders for subchapter "S" corporations to 75 is not separately estimated. Including "C" corporations will also allow us to track the true change in minority participation better in the future, since the survey results will not be impacted by changes in tax laws that affect who is likely to be a "C" or "S" corporation.

- Redefine the reporting unit to be the entire company.

The SMOBE/WOB survey has historically defined a business as an entity that files a business income tax return. Businesses that have submitted an application for and received one or more employer identification (EI) numbers may have filed tax returns under more than one of these EIs. In past SMOBE/WOB surveys, each EI was treated as a separate business. For the 1997 survey, we propose to define all operations under the same ownership as one company or business, irrespective of the number of EIs the company has. We believe this definition is more appropriate for counting businesses. Furthermore, it will eliminate surveying the same business owner more than once. This change will have no effect on the receipts, employment, and payroll data for the survey, but will slightly reduce the count for the number of businesses. However, using administrative data, we should be able to provide 1997 firm counts on a basis comparable to 1992.

- Determine minority/women ownership based on gender/race/ethnicity of the person(s) owning majority interest in the business, rather than on the simple majority of the number of owners, without regard to percentage of interest owned.

Minority/women ownership of a business has historically been based on the gender/race/ethnicity of the majority of shareholders/partners, regardless of

their percent of ownership in the business. Businesses with 50 percent or more women/minority owners have in the past been included in the women/minority business counts. For example, a business with two female owners and one male owner was counted as a woman-owned business, even if the male owned 90 percent of the interest in the business. With this proposed change, it would not be a woman-owned business.

Businesses owned by a male and female, filing a joint tax return, were generally counted as female-owned, unless additional administrative data were available to determine otherwise. With this proposal, a separate tabulation will be made for those sharing equal interest in the business and will not be counted as female-owned. Only businesses in which women own a 51 percent or greater interest will be counted as WOB. This may cause a substantial decrease in the number of women-owned businesses. However, this method should provide results more consistent with business assistance programs and affirmative action directives.

We are still examining how best to count businesses in which ownership is split by race/ethnicity with no single racial/ethnic group having majority interest. Please provide any recommendations regarding how these businesses should be tabulated.

The following proposed reduction in coverage will help offset the increased costs of expanding coverage to all corporations:

- Change the level of business receipts required for inclusion in the surveys from \$500 to \$1,000.

The 1992 program included virtually all nonfarm businesses, including all businesses and persons with receipts from self-employment of more than \$500. Increasing the receipts level from \$500 to \$1,000 will reduce the total number of businesses by approximately 10 percent, but reduce receipts totals by only \$1 million or one-fourth of a percent.

## II. Method of Collection

The Census Bureau will use a mailout/mailback survey form to collect the data. The questionnaires will be mailed from our processing headquarters in Jeffersonville, Indiana. Three mail follow-ups will be conducted at approximately one-month intervals. Upon closeout of the survey, the response data will be edited and reviewed.

## III. Data

*OMB Number:* [not available].

*Form Numbers:* One form will be used: MB97-1, Survey of Business Owners and Self-Employed Persons.

*Type of Review:* Regular Review.

*Affected Public:* Large and small businesses, other for-profit organizations and nonprofit institutions.

*Estimated Number of Respondents:* 2.5 million. This 108 percent increase is due to the demand placed upon us to provide complete coverage of minority- and women-owned businesses; the need for reliable estimates at the state level by 2-digit SIC code; and better estimates for American Indian-owned businesses. In the past, "C" corporations have been excluded from the business universe and, therefore, the total number of minority- and women-owned businesses has been understated.

*Estimated Time Per Response:* The average for all respondents is 10 minutes or less.

*Estimated Total Burden Hours:* The total estimated burden is 416,666 hours. This increase over 1992 is due to the addition of "C" corporations to provide detailed comprehensive estimates for both women- and minority-owned businesses; and the need for reliable estimates at the state level by 2-digit SIC code, and better estimates for American Indian-owned businesses. However, the average response time per respondent is only 10 minutes.

*Estimated Total Cost:* Included in the total cost of the 1997 Economic Census, estimated to be \$218 million.

The cost to all respondents for their time to respond is \$5,304,258. The cost is calculated by multiplying the annual burden hours (416,666) by the Bureau of Labor Statistics' 1993 estimate (\$499 for a 39.2 hour work week) for a private industry entry level accountant.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Title 13, United States Code, Sections 131, 193, and 224.

## IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or

included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: June 2, 1997.

**Linda Engelmeier,**

*Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 97-14757 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-07-P

**DEPARTMENT OF COMMERCE**

**Bureau of Economic Analysis**

**Proposal To Collect Information on the Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons**

**ACTION:** Proposed collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506 (c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 5, 1997.

**ADDRESSES:** Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to: R. David Belli, U.S. Department of Commerce, Bureau of Economic Analysis, BE-50(OC), Washington, DC 20230 (Telephone: 202-606-9800)

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The BE-93 Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons will obtain data on transactions in intangible property rights between U.S. and unaffiliated foreign persons in 1997 and subsequent years. The data are necessary for compiling monthly estimates of U.S. international transactions in goods and services, the U.S. balance of payments,

and the national income and product accounts. The data also will support U.S. trade policy initiatives, including trade negotiations.

To bring the annual BE-93 survey into conformity with current international standards, coverage of general use computer software royalties and license fees is being moved to the BE-93 from the BE-22 Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons.

**II. Method of Collection**

The survey will be sent to potential respondents in January and responses are due on March 31, each year following the year covered by the survey. All U.S. persons whose total receipts from, or total payments to, unaffiliated foreign persons for intangible rights equaled or exceeded \$500,000 during the covered year are required to report. A U.S. person that receives a form but is not required to report data must file an exemption claim.

**III. Data**

*OMB Number:* 0608-0016.

*Form Number:* BE-93.

*Type of Review:* Regular submission.

*Affected Public:* U.S. businesses and other persons receiving royalties and license fees from, or paying royalties and license fees to, unaffiliated foreign persons.

*Estimated Number of Responses:* 550.

*Estimated Time Per Response:* 4 hours.

*Estimated Total Annual Burden*

*Hours:* 2,200.

*Estimated Total Annual Cost:* \$66,000 (based on an estimated reporting burden of 2,200 hours and an estimated hourly cost of \$30).

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 2, 1997.

**Linda Engelmeier,**

*Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 97-14753 Filed 6-5-97; 8:45 a.m.]

BILLING CODE 3510-06-P

**DEPARTMENT OF COMMERCE**

**Bureau of Economic Analysis**

**Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons**

**ACTION:** Proposed collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 5, 1997.

**ADDRESSES:** Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW., Washington DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to: R. David Belli, U.S. Department of Commerce, Bureau of Economic Analysis, BE-50(OC), Washington, DC 20230 (Telephone: 202-606-9800)

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The BE-22 Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons will obtain data on transactions in selected services between U.S. and unaffiliated foreign persons in 1997 and subsequent years. The data from this survey will update the results of the 1996 BE-20 benchmark survey of selected services, and will provide sample data for the derivation of universe estimates for years between quinquennial benchmark surveys. The information obtained from the survey is critically needed for tracking international transactions in new, growing, and volatile categories of services. The data are necessary for compiling monthly estimates of U.S. international transactions in goods and services, the U.S. balance of payments,

and the national income and product accounts. The data also will support U.S. trade policy initiatives, including trade negotiations.

To bring the annual BE-22 survey into conformity with the 1996 BE-20 benchmark survey, which closed several gaps in coverage of international services transactions, and to provide annual coverage of a few types of services covered by the previous two benchmark surveys but which have grown to the point where annual coverage is needed, the Bureau of Economic Analysis (BEA) is considering adding coverage of: purchases (payments) and sales (receipts) of agricultural services; employment agencies and temporary help supply services; operational leasing services; and sales (but not purchases) of merchanting services. BEA is also considering adding a broad category for purchases and sales of "other" business, professional, and technical services; this category would likely cover language-translation services, security services, collection services, actuarial services, salvage services, certain waste cleanup services, and, possibly, other specified services. Finally, to better conform BEA surveys with current international standards, coverage of general use computer software royalties and license fees is being dropped from the BE-22 and moved to the BE-93, Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons.

## II. Method of Collection

The survey will be sent to potential respondents in January and responses are due on March 31, each year following the year covered by the survey. All U.S. persons who, in the year covered by the survey, had more than \$1,000,000 of purchases from, or sales to, unaffiliated foreign persons in a covered service must report data. U.S. persons who receive a copy of the survey and who had purchases and sales transactions in a covered service with unaffiliated foreign persons of \$1,000,000 or less may voluntarily report the data, or they must file an exemption claim.

## III. Data

*OMB Number:* 0608-0060.

*Form Number:* BE-22.

*Type of Review:* Regular submission.

*Affected Public:* Businesses,

government agencies, or others engaging in international transactions in covered services.

*Estimated Number of Responses:* 1,500.

*Estimated Time Per Response:* 11.5 hours.

*Estimated Total Annual Burden Hours:* 17,250.

*Estimated Total Annual Cost:* \$517,500 (based on an estimated reporting burden of 17,250 hours and an estimated hourly cost of \$30).

## IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 2, 1997.

**Linda Engelmeier,**

*Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 97-14754 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-06-P

## DEPARTMENT OF COMMERCE

### Bureau of Export Administration

#### National Security Assessment of the U.S. Optoelectronics Industry

**ACTION:** Proposed collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 5, 1997.

**ADDRESSES:** Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Karen Swasey, Acting Director, Economic Analysis Division, Bureau of Export Administration (BXA), Department of Commerce, Room 3882, 14th and Constitution Avenue, NW., Washington, DC 20230 (telephone no. (202) 482-0452).

## SUPPLEMENTARY INFORMATION:

### I. Abstract

Commerce/BXA is conducting an assessment of the domestic optoelectronics industry in order to determine the competitiveness of the U.S. industry and its ability to support current and future defense needs.

### II. Method of Collection

The information will be collected using a non-recurring, mandatory survey. It will be collected in written form.

### III. Data

The survey will collect information on the nature of the business performed by each firm; estimated sales and employment data; financial information; research and development expenditures and funding sources; capital expenditures and funding sources; and competitiveness issues.

*OMB Number:* N/A.

*Form Number:* N/A.

*Type of Review:* Regular Submission.

*Affected Public:* The domestic optoelectronics industry.

*Estimated Number of Respondents:* 600.

*Estimated Time Per Response:* 4.0 hours.

*Estimated Total Annual Burden Hours:* 2,400 hours.

*Estimated Total Annual Cost:* \$63,024 for respondents—no equipment or other materials will need to be purchased to comply with the requirement.

### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques

or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 2, 1997.

**Linda Engelmeier,**

*Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 97-14755 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DT-P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[Docket No. 43-97]

#### Proposed Foreign-Trade Zone; Wood and Jackson Counties, WV Application and Public Hearing

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Wood County Development Authority (a West Virginia public corporation), to establish a general-purpose foreign-trade zone at sites in Wood and Jackson Counties, West Virginia, adjacent to the Charleston, West Virginia port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on May 23, 1997. The applicant is authorized to make the proposal under West Virginia Code § 31-15-31.

The proposed zone would consist of 4 sites (178 acres) in Wood and Jackson Counties: *Site 1* (10 acres)—within the 158-acre Erickson/Wood County Public Port facility (owned by the Erickson Foundation), located between WV Route 95 and the Little Kanawha River, Wood County; *Site 2* (15 acres)—within the 1,119-acre Gill Robb Wilson Field-Wood County Airport (owned by the Wood County Airport Authority), WV Route 31, Wood County; *Site 3* (72 acres)—within the 159-acre Jackson County Maritime & Industrial Centre (owned by the Jackson County Development Authority), WV Route 2, Jackson County; and, *Site 4* (81 acres)—within the 500-acre Mineral Wells Industrial Park (owned by the Parkersburg/Wood County Area Development Corporation), south of Parkersburg on I-77, north of the Mineral Wells Interchange, Wood County.

The application contains evidence of the need for foreign-trade zone services in the Wood and Jackson Counties area.

Several firms have indicated an interest in using zone procedures within the proposed project for warehousing/distribution activity. Specific manufacturing approvals are not being sought at this time. Requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

As part of the investigation, the Commerce examiner will hold a public hearing on June 25, 1997, at 9:00 a.m., Parkersburg City Council Chambers, One Government Square, Parkersburg, West Virginia 26101.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is August 5, 1997. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period August 20, 1997.

A copy of the application and accompanying exhibits will be available during this time for public inspection at the following locations:

Office of the Wood County Development Authority, 631 1/2 Juliana Street, Parkersburg, WV 26102

Office of the Executive Secretary, Foreign-Trade Zones Board, Room 3716, U.S. Department of Commerce, 14th & Pennsylvania Avenue, N.W., Washington, DC 20230.

Dated: May 28, 1997.

**John J. Da Ponte, Jr.,**

*Executive Secretary.*

[FR Doc. 97-14871 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-583-008]

#### Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Preliminary Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of preliminary results of Antidumping Duty Administrative Review.

**SUMMARY:** In response to a request from the petitioners, the Department of

Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain circular welded steel pipes and tubes from Taiwan. The review covers one manufacturer/exporter of the subject merchandise to the United States and the period May 1, 1995 through April 30, 1996. The review indicates the existence of sales below normal value during the period of review.

If these preliminary results are adopted in our final results of review, we will instruct the U.S. Customs Service to assess antidumping duties on all appropriate entries.

Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument (1) a statement of the issue and (2) a brief summary of the argument (no longer than five pages, including footnotes).

**EFFECTIVE DATE:** June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** Michael J. Heaney or Linda Ludwig, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482-4475/3833.

#### Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act) are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations, as amended by the interim regulations published in the **Federal Register** on May 11, 1995 (60 FR 25130).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Department published an antidumping duty order on certain circular welded carbon steel pipes and tubes from Taiwan on May 7, 1984 (49 FR 19369). The Department published a notice of "Opportunity To Request Administrative Review" of the antidumping duty order for the 1995/1996 reviewing period on May 8, 1996 (61 FR 20791). On May 24, 1996, the petitioners, Allied Tube & Conduit Corp., Wheatland Tube Company, Sawhill Tubular Corp., Division of Armco Inc., and Laclede Steel Co., filed a request for review of Yieh Hsing Enterprise Co., Ltd. (Yieh Hsing) on May 24, 1996. We initiated the review of

Yieh Hsing on June 25, 1996 (61 FR 32771).

### Scope of the Review

Imports covered by this review are shipments of certain circular welded carbon steel pipes and tubes. The Department defines such merchandise as welded carbon steel pipes and tubes of circular cross section, with walls not thinner than 0.065 inch and 0.375 inch or more but not over 4½ inches in outside diameter. These products are commonly referred to in the industry as "standard pipe" and are produced to various American Society for Testing Materials specifications, most notably A-53, A-120 or A-135. Standard pipe is currently classified under Harmonized Tariff schedule of the United States (HTSUS) item numbers 7306.30.5025, 7306.30.5032, 7306.30.5040, and 7306.30.5055. Although the HSTUS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

The review covers the period May 1, 1995 through April 30, 1996. The Department is conducting this review in accordance with section 751 of the Act, as amended.

### United States Price (USP)

In calculating USP, the Department treated Yieh Hsing's sales as export price (EP) sales, as defined in section 772(a) of the Act, because the merchandise was sold to unaffiliated U.S. purchasers prior to the date of importation and the constructed export price methodology was not warranted by the facts of the record. EP was based on the delivered, packed prices to unrelated purchasers in the United States. We made adjustments, where applicable, for foreign inland freight, foreign brokerage charges, and ocean freight in accordance with section 772(c) of the Act.

### Normal Value

In order to determine whether there were sufficient sales of certain circular welded carbon steel pipes and tubes in the home market (HM) to serve as a viable basis for calculating normal value (NV), we compared the volume of home market sales of subject merchandise to the volume of subject merchandise sold in the United States, in accordance with section 773(a)(1)(C) of the Act. Yieh Hsing's aggregate volume of HM sales of the foreign like product was greater than five percent of its respective aggregate volume of U.S. sales of the subject merchandise. Therefore, we have based NV on HM sales.

In accordance with section 773(a)(6), we adjusted NV, where appropriate, by deducting home market packing expenses and adding U.S. packing expenses. We also made deductions to NV for HM inland freight, and quantity discounts. Finally, we made an adjustment to NV for differences in credit expenses pursuant to section 773(a)(6)(C) of the Act.

### Level of Trade

In accordance with section 773(a)(7)(A) of the Act, to the extent practicable, the Department will calculate NV based on sales at the same level of trade as the U.S. sale. When there are no sales in the comparison market at the same level of trade as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at a different level of trade. The NV level of trade is that of the starting-price sales in the home market. For EP sales, the relevant transaction for the level of trade analysis is the sale from the exporter to the unaffiliated purchaser.

To determine whether home market sales are a different level of trade than U.S. sales, we examine whether the home market sales are at different stages in the marketing process than the U.S. sales. The marketing process in both markets begins with goods being sold by the producer and extends to the sale to the final user. We review and compare the distribution systems in the home market and the United States, including selling functions, class of customer, and the extent and level of selling expenses for each claimed level of trade. Customer categories such as distributor, retailers or end-users are commonly used by respondents to describe levels of trade, but without substantiation, they are insufficient to establish that a claimed level of trade is valid. An analysis of the chain of distribution and of the selling functions substantiates or invalidates the claimed customer categorization levels. If the claimed levels are different, the selling functions performed in selling to each level should also be different. Conversely, if customer levels are nominally the same, the selling functions performed should also be the same. Different levels of trade necessarily involve differences in selling functions, but differences in selling functions, even substantial ones, are not alone sufficient to establish a difference in the levels of trade. Differences in levels of trade are characterized by purchasers at different stages in the chain of distribution and sellers performing qualitatively different functions in selling to them.

When we compare U.S. sales to home market sales at a different level of trade, we make a level-of-trade adjustment if the difference in level of trade affects price comparability. We determine any effect on price comparability by examining sales at different levels of trade in a single market, the home market. Any price effect must be manifested in a pattern of consistent price differences between home market sales used for comparison and sales at the equivalent level of trade of the export transaction. To quantify the price differences, we calculate the difference in the average of the net prices of the same models sold at different levels of trade. We use the average percentage difference between these net prices to adjust NV when the level of trade of NV is different from that of the export sale. If there is a pattern of no price differences, then the difference in level of trade does not have a price effect and, therefore, no adjustment is necessary.

In this review, Yieh Hsing provided information with respect to its selling activities associated with home market and EP sales. We determined that there is no difference in selling functions between Yieh Hsing's three classes of HM customers. Each of the three classes of customers (distributors, retailers, and end-users) are offered the same degree of nominal sales support, such as immediate delivery and the opportunity to either purchase merchandise out of inventory, or have it made to order. We, therefore, determined that Yieh Hsing sells to one level of trade in the home market.

Yieh Hsing contended that EP sales were at a different level of trade than its home market sales. Each of Yieh Hsing's EP sales were made to one trading company. That trading company purchased large quantities of pipe on a made-to-order basis. The long lead-times associated with shipments from Taiwan to the U.S. make it impossible for the trading company to avail itself of the immediate delivery and inventory-maintenance services that Yieh Hsing provided to some of its home market customers. Based on this distinction, Yieh Hsing argued that EP sales were at a different level of trade than its home market sales.

While Yieh Hsing was able to provide a greater degree of inventory maintenance services on its home market sales than on its EP sales, we disagree with Yieh Hsing's contention that EP sales were at a different level of trade than were home market sales. The levels of customer assistance and sales support provided by Yieh Hsing on its home market and U.S. sales were not significantly different. Moreover, Yieh

Hsing conducted made-to-order sales in both the home market and the United States. The fact that Yieh Hsing had a greater concentration of made-to-order sales in the United States than in the home market does not distinguish its EP sales as being at a separate level of trade than its home market sales. Accordingly, for purposes of this review, we determined that EP sales were at the same level of trade as Yieh Hsing's home market sales.

#### Sales Comparisons

To determine whether sales of certain circular welded carbon steel pipes and tubes in the United States were made at less than NV, we compared USP to the NV, as described in the "United States Price" and "Normal Value" sections of this notice. In accordance with section 777(A) of the Act, we calculated monthly weighted-average prices for NV and compared these to individual U.S. transactions.

#### Preliminary Results of Review

We preliminarily determine that a margin of 0.67 percent exists for Yieh Hsing for the period June 1, 1995 through May 31, 1996.

Parties to this proceeding may request disclosure within five days of publication of this notice and any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication, or the first working day thereafter. Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 37 days after the date of publication. The Department will publish the final results of this administrative review, which will include the results of its analysis of issues raised in any such written comments or at a hearing, within 120 days after the publication of this notice.

The Department shall determine, and Customs shall assess, antidumping duties on all appropriate entries. Because the inability to link sales with specific entries prevents calculation of duties on an entry-by-entry basis, we have calculated an importer specific *ad valorem* duty assessment rate for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate these duties. This rate will be assessed uniformly on all entries of that particular importer made during the

POR. (This is equivalent to dividing the total amount of antidumping duties, which are calculated by taking the difference between NV and U.S. Price, by the total U.S. value of the sales compared, and adjusting the result by the average difference between U.S. price and customs value for all merchandise examined during the POR.) The Department will issue appraisement instructions directly to Customs. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the determination and for future deposits of estimated duties.

Furthermore, the following deposit requirements will be effective upon completion of the final results of these administrative reviews for all shipments of certain circular welded carbon steel pipes and tubes from Taiwan entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of these administrative reviews, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for reviewed firms will be the rate established in the final results of administrative review, except if the rate is less than 0.50 percent, and therefore, de minimis within the meaning of 19 CFR 353.6, in which case the cash deposit rate will be zero; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original less-than-fair-value (LTFV) investigation or a previous review, the cash deposit will continue to be the most recent rate published in the final determination or final results for which the manufacturer or exporter received a company-specific rate; (3) if the exporter is not a firm covered in this review, or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in the final results of these reviews, or the LTFV investigation; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews or the original fair value investigation, the cash deposit rate will be 9.7%, the "all others" rate established in the LTFV investigation.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26(b) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during these review periods. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: June 8, 1997.

**Robert S. LaRussa,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 97-14874 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DS-M

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-533-809]

#### Certain Forged Stainless Steel Flanges From India; Notice of Termination of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of Termination of Antidumping Duty Administrative Review.

**SUMMARY:** On March 18, 1997, the Department of Commerce (the Department) published in the **Federal Register** (62 FR 12793) a notice announcing the initiation of an administrative review of the antidumping duty order on certain forged stainless steel flanges from India, covering the period February 1, 1996 through January 31, 1997, and two manufacturer/exporters of the subject merchandise, Akai Impex Ltd. (Akai) and Mukand, Ltd. (Mukand). This review has now been terminated as a result of the withdrawal of the requests for administrative review by the interested parties.

**EFFECTIVE DATE:** June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** Thomas Killiam or John Kugelman, AD/CVD Enforcement, Group III, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230, telephone (202) 482-2704 or 482-0649, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

On February 28, 1997, Akai and Mukand requested reviews of their U.S. sales of subject merchandise. On March 18, 1997, in accordance with 19 CFR § 353.22(c), we initiated the administrative review of this order for the period February 1, 1996 through January 31, 1997. On May 12, 1997, respondents Akai and Mukand withdrew their requests for review.

**Termination of Review**

The respondents withdrew their requests within the time limit provided by the Department's regulations at 19 CFR § 353.22(a)(5)(1996). No other party requested the review. Therefore, the Department is terminating this review.

This notice serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning disposition of proprietary information disclosed under APO in accordance with section 353.34(d) of the Department's regulations. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is published in accordance with 19 CFR § 353.22(a)(5).

Dated: May 26, 1997.

**Joseph A. Spetrini,**

*Deputy Assistant Secretary, Enforcement Group III.*

[FR Doc. 97-14872 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DS-M

**DEPARTMENT OF COMMERCE****International Trade Administration**

[A-423-602]

**Industrial Phosphoric Acid From Belgium; Preliminary Results of Antidumping Duty Administrative Review**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of preliminary results of Antidumping Duty Administrative Review.

**SUMMARY:** In response to a request from the petitioners, FMC Corporation and Albright & Wilson Americas, two domestic producers of industrial phosphoric acid (IPA), the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on IPA from Belgium. The review covers exports by one manufacturer, Société Chimique Prayon-Rupel (Prayon), during the period August 1, 1995 through July 31, 1996.

We have preliminarily determined that sales have been made below normal value (NV). If these preliminary results are adopted in our final results of administrative review, we will instruct the U.S. Customs Service (Customs) to assess antidumping duties on all

appropriate entries. Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument: (1) A statement of the issue; and (2) a brief summary of the argument.

**EFFECTIVE DATE:** June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** David Genovese or Jim Terpstra, Office of Antidumping/Countervailing Duty Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482-4697/3965.

**SUPPLEMENTARY INFORMATION:****The Applicable Statute**

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations, as amended by the interim regulations published in the **Federal Register** on May 11, 1995 (60 FR 25130).

**Background**

The Department published in the **Federal Register** the antidumping duty order on IPA from Belgium on August 20, 1987 (52 FR 31439). The Department published in the **Federal Register** a notice of "Opportunity To Request an Administrative Review" of the antidumping duty order on IPA from Belgium covering entries during the period August 1, 1995 through July 31, 1996, on August 12, 1996 (61 FR 41768). On August 30, 1996, petitioners requested that the Department conduct an administrative review of sales by Prayon during the 1995-96 period of review. The Department initiated the review on September 17, 1996 (61 FR 48882). The Department is conducting this administrative review in accordance with section 751 of the Act.

**Scope of the Review**

The products covered by this review include shipments of IPA from Belgium. This merchandise is currently classifiable under the Harmonized Tariff Schedule (HTS) item number 2809.20. The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

**Verification**

In accordance with section 353.25(c)(2)(ii) of the Department's regulations, we verified information provided by Prayon using standard verification procedures, including the examination of relevant sales and financial records, and selection of original documentation. Our verification results are outlined in the public version of the verification report.

**Level of Trade**

Differences in levels of trade exist when sales are made at different stages in the marketing process, as determined by different classes of customers and the performance of qualitatively or quantitatively different selling functions in selling to them. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Review*, 62 FR 2081, 2105, (January 15, 1997).

In its questionnaire response, Prayon did not state that there were differences in selling activities by customer categories within each market or between markets. Therefore, in the absence of information in Prayon's questionnaire responses which might lead us to a different conclusion, we have determined for purposes of these preliminary results that all sales in the home market and the U.S. market were made at the same level of trade and no adjustment pursuant to section 773(a)(7)(A) of the Act is warranted.

**Commissions**

The Department operates under the assumption that commission payments to affiliated parties (in either the United States or home market) are not at arm's length. The Court of International Trade has held that this is a reasonable assumption. See *Outokumpu Copper Rolled Products AB v. United States*, 850 F. Supp. 16, 22 (1994).

Accordingly, the Department has established guidelines to determine whether affiliated party commissions are paid on an arm's-length basis such that an adjustment for such commissions can be made. See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 61 FR 57,629 (November 7, 1996). First, we compare the commissions paid to affiliated and unaffiliated sales agents in the same market. If there are no commissions paid to unaffiliated

parties, we then compare the commissions earned by the affiliated selling agent on sales of merchandise produced by the respondent to commissions earned on sales of merchandise produced by unaffiliated sellers or manufacturers. If there is no benchmark which can be used to determine whether the affiliated party commission is an arm's-length value (*i.e.*, the producer does not use an unaffiliated selling agent and the affiliated selling agent does not sell subject merchandise for an unaffiliated producer), the Department assumes that the affiliated party commissions are not paid on an arm's-length basis.

In this case, Prayon used an affiliated sales agent in the home market and a different affiliated sales agent in the United States. Prayon did not use unaffiliated commissionaires during the POR and Prayon's affiliated home market and U.S. selling agents did not act as commissionaires for unaffiliated producers of the subject merchandise. As a result, we were unable to establish a benchmark for use in determining whether commission payments Prayon made to the affiliated selling agents were at arm's length. Accordingly, we did not make a circumstance of sale adjustment for commissions in either market.

#### United States Price

We based our margin calculations on export price (EP), as defined in section 772(a) of the Act, because Prayon sold the merchandise directly to unaffiliated U.S. purchasers prior to the date of importation and the constructed export methodology was not indicated by information on the record. We based EP on the delivered price to unaffiliated purchasers in the United States. In accordance with section 772(c)(2)(A) of the Act, we made deductions for inland and marine insurance, brokerage and handling costs and freight expenses incurred to deliver the merchandise to the first unaffiliated customer in the United States. We also made a deduction for early payment discounts.

No other adjustments to EP were claimed or allowed.

#### Normal Value

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared Prayon's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(B) of the Act. Because Prayon's aggregate volume of home market sales of the foreign like product was greater than

five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market provides a viable basis for calculating NV for Prayon, pursuant to section 773(a)(1)(B) of the Act.

Pursuant to section 777A(d)(2) of the Act, we compared the EP of individual transactions to the monthly weighted-average price of sales of the foreign like product. We based NV on the delivered or ex-works price at which the foreign like product is first sold to unaffiliated purchasers for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade, and to the extent practicable, at the same level of trade as the export price, as required by section 773(a)(1)(B)(i) of the Act.

We excluded from our analysis of NV sales to an affiliated home market customer because the weighted-average sales price to the affiliated party was less than 99.5 percent of the weighted-average sales price to unaffiliated parties. *See Usinor Sacilor v. United States*, 872 F. Supp. 1000, 1004 (CIT 1994).

We reduced NV by freight costs, including inland insurance costs, incurred in the home market, in accordance with section 773(a)(6)(B)(ii). We also reduced NV for rebates and early payment discounts. We made a circumstance of sale adjustment to NV to account for any differences between EP and NV due to differences in credit expenses, pursuant to 773(a)(6)(C)(iii) of the Act.

In calculating credit expense, Prayon reported the weighted-average discount on accounts receivable sold to its affiliated coordination center. Since the reported weighted-average credit expense is greater than the weighted-average credit expense calculated using the standard credit calculation (*i.e.*, (date of payment less date of shipment/365)\*monthly home market short-term interest rates \* gross price), we have determined that the discount transaction between Prayon and its affiliated coordination center is not conducted at arm's-length. Accordingly, we have used the standard credit calculation when calculating the amount of credit to deduct from normal value. We used the monthly home market short-term borrowing rates provided by Prayon in calculating inventory carrying costs as the basis for the monthly home market short-term interest rates used in the credit calculation.

No other adjustments were claimed or allowed.

#### Preliminary Results

As a result of this review, we preliminarily determine that a margin of 8.54 percent exists for Prayon for the period August 1, 1995, through July 31, 1996.

Parties to this proceeding may request disclosure within five days of publication of this notice and any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication, or the first working day thereafter. Interested parties may submit case briefs no later than 30 days after the date of publication. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed no later than 37 days after the date of publication. Parties who submit arguments are requested to submit with the argument (1) a statement of the issue and (2) a brief summary of the argument. The Department will publish a notice of the final results of the administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of this notice.

The Department shall determine, and Customs shall assess, antidumping duties on all appropriate entries. Individual differences between USP and NV may vary from the percentage stated above. Upon completion of this review, the Department will issue appraisal instructions directly to Customs.

Furthermore, the following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of IPA from Belgium entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Prayon will be the rate established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original less than fair value (LTFV) investigation or a previous review, the cash deposit will continue to be the rate established for the most recent period for which the manufacturer or exporter received a company-specific rate; (3) if the exporter is not a firm covered in this review, or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews,

the cash deposit rate will be 14.67 percent, the all-others rate established in the LTFV investigation.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26(b) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with section 751(a)(1) of the Act and 19 CFR 353.22.

Dated: May 30, 1997.

**Robert S. LaRussa,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 97-14870 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-201-504]

#### Porcelain-on-Steel Cookware From Mexico; Notice of Extension of Time Limit for Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** Kate Johnson/Dolores Peck at (202) 482-4929, or David Goldberger at (202) 482-4136, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

**SUMMARY:** The Department of Commerce (the Department) is extending the time limit for the final results of the ninth administrative review of the antidumping duty order on porcelain-on-steel cookware from Mexico. The period of review is December 1, 1994, through November 30, 1995. This extension is made pursuant to the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (hereinafter, "the Act").

### Postponement

Under the Act, the Department may extend the deadline for completion of an administrative review if it determines it is not practicable to complete the review within the statutory time limit. The Department finds that it is not practicable to complete the ninth administrative review of porcelain-on-steel cookware from Mexico within this time limit due to the complex nature of certain issues in this review which require further investigation.

In accordance with section 751(a)(3)(A) of the Act, the Department will extend the time for completion for the final results of this review to 180 days after the date on which notice of the preliminary results was published in the **Federal Register**.

Dated: May 29, 1997.

**Jeffrey P. Bialos,**

*Principal Deputy Assistant Secretary for Import Administration.*

[FR Doc. 97-14873 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-485-602]

#### Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Romania; Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of Antidumping Duty Administrative Review.

**SUMMARY:** On December 2, 1996, the Department of Commerce ("the Department") published the preliminary results of its administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished or unfinished, (TRBs) from Romania (61 FR 63826-28). The review covers one exporter and two producers of subject merchandise for the period June 1, 1993 through May 31, 1994. We received comments from interested parties with regard to the Department's preliminary determination to deny Tehnoimportexport a separate rate for this review (see Comment 4 below). Upon consideration of interested parties' comments, for the final results of review, we reaffirm our determination that TIE is not entitled to a separate rate. Based on our analysis of

all comments received, we determine the country-wide dumping margin for Romania to be zero percent for this review period.

**EFFECTIVE DATE:** June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** Rick Johnson or Jean Kemp, AD/CVD Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., N.W., Washington, D.C. 20230; telephone: (202) 482-3793.

### SUPPLEMENTARY INFORMATION:

#### Applicable Statutes and Regulations

Unless otherwise stated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994.

#### Background

On December 2, 1996, the Department published in the **Federal Register** (61 FR 63826) the preliminary results of its administrative review of the antidumping duty order on TRBs from Romania (52 FR 23320). We have now completed this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act), and 19 C.F.R. 355.22.

#### Scope of Review

Imports covered by this review are shipments of TRBs from Romania. These products include flange, take-up cartridge, and hanger units incorporating tapered roller bearings, and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use. This merchandise is currently classifiable under Harmonized Tariff Schedule (HTS) item numbers 8482.20.00, 8482.91.00, 8482.99.30, 8483.20.40, 8483.30.40, and 8483.90.20. Although the HTS item numbers are provided for convenience and Customs purposes, the written description of the scope of this order remains dispositive.

This review covers eight companies and the period June 1, 1993 through May 31, 1994. Of the eight companies for which petitioner requested a review, only Tehnoimportexport, S.A. ("TIE") made shipments of the subject merchandise to the United States during the period of review. S.C. Rulmenti Alexandria and S.C. Rulmenti S.A. Brasov produced the merchandise sold by TIE to the United States, but have stated that they did not ship TRBs directly to the United States. Tehnoimportexport, Rulmenti S.A. Birlad, S.C. Rulmenti Grei S.A. Ploiesti,

S.C. Rulmenti S.A. Slatina, and S.C. URB Rulmenti S.A. Suceava have responded that they did not produce or sell TRBs subject to this review.

#### Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received comments from respondent, TIE; petitioner, the Timken Company; and Universal Automotive Trading Company, Ltd. (Universal), an interested party. Comments submitted consisted of petitioner's case brief of December 31, 1996 and rebuttal brief of January 9, 1997; respondents' case brief of January 2, 1997 and rebuttal brief of January 8, 1997; and Universal's rebuttal brief of January 8, 1997.

*Comment 1:* Petitioner asserts that the Department's use of factory overhead and selling, general and administrative (SG&A) data from the *Preliminary Results of Review: Welded Carbon Steel Pipe and Tube from Turkey* is contrary to law and otherwise unreasonable for several reasons. First, petitioner claims that the Department had available to it overhead and SG&A information for producers of bearings in Thailand, which the Department used in the 1994/95 review of this order. Petitioner maintains that the determination in the 1994/95 review that Thailand is at a level of economic development comparable to that of Romania should also apply to this review period, as the per capita GNP of Thailand in 1993 was closer to that of Romania than either Poland's or Turkey's (according to the World Bank's *World Development Report 1995*).

Second, petitioner argues that the use of data for pipes and tubes is inappropriate because the statute, at 19 U.S.C. § 1677b(c) (1)(B) and (2)(A), requires use of surrogate values for production of comparable merchandise. Petitioner stresses that pipes and tubes are not comparable to bearings. Specifically, petitioner notes that the pipe and tube industry is a basic steel industry which does not require the same degree of precision and technology required to produce subject merchandise. Additionally, petitioner argues that no domestic or international classification system places pipes and tubes and bearings within groups of products or industries that can be defined as encompassing similar or comparable merchandise.

Third, because the final results have not been issued in *Turkish Pipe and Tube*, petitioner argues that its results have not been approved or adopted by the Department as reliable.

Respondent maintains that the Department should continue to use the statutory minimum for SG&A expenses for the purposes of the final results, rather than relying on the Thai data. Respondent argues that petitioner's proposal to use Thai data would be contrary to law and unacceptable for several reasons. First, respondent notes that Thailand was not selected as a potential surrogate country for Romania in this administrative review.

Second, respondent argues that the Thailand data, which is from the period 1988-90, is out of date. In contrast, the Turkish data is based upon contemporaneous data and is therefore, according to respondent, more appropriate.

Third, respondent asserts that the Thai data is flawed in numerous ways: (1) there are vast differences between the Thai producers and the Romanian producers of TRBs; (2) the Department's use of the Thai data from a previous review was based solely upon best information available (BIA); (3) the Thai data includes certain inapplicable SG&A and other expenses; and (4) the Thai data is aberrational, constituting the highest SG&A rate ever found by the Department.

With regard to petitioner's assertion that the Turkish data is unusable because it pertains to an industry other than bearings, respondent claims that the Department "regularly" uses surrogate data from sources which are not identical to the industry being reviewed. Respondent also claims that the Turkish rate used was for galvanized pipe, a more complex product than regular pipe. Moreover, respondent states that the Thai data applies to the production of miniature bearings used in high-tech applications, while the Romanian factories employ a technology more akin to the manufacture of pipe than to "highly complex" miniature bearings.

Regarding petitioner's assertion that the Turkish data has not been "approved" by the Department because it has not been used for a final results notice, respondent argues that the Department "regularly" uses unverified financial statements from companies which are not involved in antidumping reviews as the basis for surrogate data. Respondent stresses that it is public data of the type commonly used by the Department for NME cases.

*Department's Position:* We disagree with petitioner that Thailand should be used as a surrogate instead of Turkey for overhead and SG&A values.

While petitioner has stressed that Thailand's per capita GNP was similar to Romania's for the POR, we note that

this factor does not provide the sole basis for determining economic comparability. As discussed in the Department's surrogate country selection memorandum, "the countries selected as potential surrogates were determined to be at a level of economic development comparable to Romania in terms of national distribution of labor and growth rates, as well as per capita GNP." See *Memorandum to the File: Selection of the surrogate country in the 1993/1994 administrative review of tapered roller bearings and parts thereof, finished or unfinished, from Romania*, page 3 (May 4, 1996), which is on file in the Central Records Unit (room B099 of the Main Commerce Building). Considering all three factors together, Thailand was not included on the Department's list of surrogate countries for this review period. Therefore, Thailand is not the most appropriate choice to meet the requirement, under section 773(c)(4)(A), to use a surrogate country that is at a level of economic development comparable to that of Romania.

With regard to petitioner's objection to the use of data from the Turkish pipe and tube industry because it is not an industry comparable to tapered roller bearings, as we noted in the Department's first surrogate country selection memorandum, the term "comparable" encompasses a larger set of products than "such or similar." The Department also noted that it has, in past cases, identified comparable merchandise on the basis of similarities in production factors (physical and non-physical) and factor intensities. See *Memorandum for Michael Rill: Surrogate Country Selection for Tapered Roller Bearings from Romania*, page 1 (March 24, 1995), on file in the Central Records Unit, citing *Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Determinations: Magnesium and Alloy Magnesium from the PRC*, 59 FR 55424 (1994). Moreover, in *Beryllium from Kazakstan*, the Department selected a surrogate country which was not a producer of either the same or comparable merchandise, because there was no information on a market economy country which produced beryllium and was at a level of development comparable to that of Kazakstan. See *Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Beryllium Metal and High Beryllium Alloys from Kazakstan*, 61 FR 44213, 44295 (August 28, 1996).

Concerning petitioner's assertion that the Department should not rely on data which has not been "approved" by the

Department because it has not been used for the final results, we note that this information is publicly available published information. Absent information on the record which leads the Department to question the accuracy and appropriateness of such data, the Department normally accepts publicly available published information as reliable.

Because the Department had no useable information from Poland for this expense, and because both industries are processors of primary hot- and cold-rolled carbon steel products, the Department determines that the utilization of Turkish pipe and tube data is consistent with its statutory requirement.

*Comment 2:* Petitioner claims that there is no assurance that the Turkish overhead and SG&A data includes costs for indirect labor. Petitioner states that the Department must assure that indirect labor is included in the final foreign market value.

Respondent argues that the Turkish response implies that indirect labor costs have been included. Therefore, the derivation of a separate value for indirect labor would result in a double-counting of this factor.

*Department's Position:* We disagree with petitioner's supposition that indirect labor costs and wages and salaries for non-production workers, which are standard components of a company's reported overhead and SG&A, have not been included in the Turkish data merely because this component has not been explicitly itemized in the public versions of the cost responses in *Turkish Pipe and Tube*. In the Turkish case, the Department asked for direct labor to be reported separately. The Department did not make this request for indirect labor or for the salaries paid to non-production workers. This Departmental practice should in no way be interpreted as an implication that indirect labor costs have not been included in the overhead and SG&A data. As the questionnaire in *Turkish Pipe and Tube* stated, general and administrative expenses would include "general and administrative expenses of the corporate headquarters" (at page 68), and variable overhead expenses "may include \* \* \* indirect labor" (at page 67). Respondent Yücelboru Ihracat, İthalat ve Pazarlama A.S., elaborated on its reporting in a November 7, 1996 submission, stating that variable overhead "includes all overhead expenses except for depreciation." Therefore, there is no evidence suggesting that indirect labor has been excluded from the Turkish respondent's overhead and SG&A data.

*Comment 3:* Petitioner maintains that the value used for Polish hot-rolled scrap is unreasonably high in comparison with the value of the finished product, as scrap is assigned a value that is over 50% of the value of bar for cups and cones and over 40% of the value of the rod for rollers. Instead of the hot-rolled scrap value, petitioner asserts that the Department should apply values that bear the same relationship to the hot-rolled bar and rod values as the cold-rolled scrap value bears to the cold-rolled sheet value. Petitioner asserts that the Court of International Trade in fact has rejected scrap values that, when compared with the value of finished steel, were unreasonably high.

Respondent supports the Department's allocation of steel scrap values. Respondent suggests that there is nothing aberrant about the fact that scrap values vary over time. Additionally, respondent states that the use of a steel scrap ratio derived from cold-rolled components would be, by its very nature, less accurate.

*Department's Position:* We disagree with petitioner that the value for Polish hot-rolled scrap is unreasonably high in comparison with the value of the finished product. Petitioner seems to object to the use of the Polish hot-rolled scrap price based solely on the fact that the price is, in petitioner's opinion, too high. However, petitioner offers no evidentiary support to its claim that the scrap price is aberrant, or in any way out of line with hot-rolled scrap prices for that time period.

Petitioner's claim that the Court of International Trade has rejected scrap values that were unreasonably high when compared with the value of finished steel is incorrect. In *Timken Co. v. United States*, 699 F. Supp. 300 (CIT 1988), the Court rejected the Department's use of two telexes whose "inconsistency is laid bare when used in conjunction with the raw material prices listed in the Steel Authority of India's *Statistics for Iron and Steel Industry in India*." The inconsistency to which the Court refers is with regard to the information presented in the telexes (not with regard to the Indian raw material prices), as the Court stated that the Department "provides no contemporaneous rationale for concluding that one cost quotation in the telex is more appropriate than the other." See *Timken Co. v. United States*, 699 F. Supp. at 307. Clearly, if all the information in the two telexes had indicated that a high scrap value relative to material cost was appropriate, no inconsistency would have existed. Thus, we find that

petitioner's cite to *Timken Co. v. United States* is inapposite.

As discussed above, petitioner has not shown why the Department should not use the Polish hot-rolled scrap value. Moreover, petitioner has failed to support its proposal that the Department should apply a hot-rolled scrap value based on the ratio of cold-rolled scrap value to cold-rolled sheet value. Even assuming that the hot-rolled scrap value is inappropriate, petitioner has not explained why the use of a ratio for cold-rolled components is an appropriate alternative (e.g., as opposed to some other type of steel, or a hot-rolled scrap value from another period).

*Comment 4:* Respondent claims that it meets the criteria for a separate rate, and that the Department, in refusing to provide a separate rate for TIE, has overlooked "substantial" changes both in Romania and at TIE.

Respondent states that the progression into private ownership of TIE, in which there is no government control over the daily activities of TIE or with respect to TIE's exports, substantiates a separate rate determination. Additionally, respondent argues that the Department has failed to establish a causal connection between governmental selection of management and actual control of export prices. Finally, TIE claims that, even in the context of a test for market-economy status, the Department does not determine that "government ownership" of state-owned enterprises precludes their independence.

Universal Automotive Trading, Inc. ("Universal"), an interested party in this proceeding, supports respondent's argument.

Petitioner argues that, because the Department found in a subsequent review that respondents did not meet the criteria for a separate rate, and nothing in the record of this review indicates any less government involvement, the Department should uphold its preliminary determination in this review that TIE is not entitled to a separate rate.

*Department's Position:* We agree with petitioner. In the final results of review notice for the period 1994/95, the Department described the ownership and management structure of TIE. See *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the Republic of Romania; Final Results and Rescission in Part of Antidumping Duty Administrative Review*, ("TRBs from Romania") 61 FR 51427, 51431 (October 2, 1996) (Comment 15). Significantly, there is no difference on the record in either the ownership or the management structure between that

review and this one. Therefore, for this review period, we find that TIE has not established that it has autonomy in making decisions regarding the selection of its management. For this reason, there is insufficient record evidence of the absence of *de facto* government control over TIE to entitle TIE to a separate rate.

*Comment 5:* Respondent claims that the Department's labor calculation, based on Polish data, is erroneous. First, respondent claims that, in the event the Department utilizes the Polish data for the final results, it should exclude bonus payments from profits, as it assumes profits were made by Polish bearing companies. Universal supports respondent's argument.

Second, respondent asserts that it is unfair to use a labor rate from Poland, a country with an allegedly much larger per capita income, without adjusting such labor rates to account for the disparity in incomes. Respondent proposes that the Department use an average labor rate, taking the simple average of Ecuador (a country with a similar per capita GNP to Romania) and Poland.

Petitioner maintains that bonus payments are part of employees' remuneration and are properly included in a company's labor costs, and that it is irrelevant whether part of the compensation is paid in the form of bonuses or other fringe benefits. As costs incurred by the employer, petitioner claims that they must be included in any fully-loaded calculation of labor costs.

Petitioner rebuts respondent's assertion regarding the use of a Polish labor rate by noting that surrogate values are used in the Department's NME methodology because so-called "actual" costs incurred and prices paid in a nonmarket economy do not reflect market forces. Therefore, according to petitioner, costs and prices in Romania are irrelevant. Additionally, petitioner rejects respondent's proposal to incorporate Ecuadorean labor data, because there is no record evidence that Ecuador produces TRBs or any other kind of antifriction bearing.

*Department's Position:* We agree with petitioner. The Department responded to these arguments in the final results notice for the 1994/95 review. See *TRBs from Romania*, 51430-31. As discussed therein, the Department generally does not dissect the wage rate of a surrogate country and apply only certain components to the producing company; rather, it is our practice to accept a valid surrogate wage rate as wholly applicable to the NME respondent in question. Because there are no factually

significant differences between that review and this one, the Department's determinations for the 1994/95 review apply here as well. Therefore, the Department will continue to apply the Polish labor rate, including bonus payments.

*Comment 6:* Respondent objects to the Department's methodology of adding freight costs to raw materials costs by the CIF/FOB conversion factor of 1.15. Respondent claims that, because Poland is contiguous to the European Union, and because the Department has utilized steel prices for exports from the European Union to Poland, the use of a figure based on average costs around the world greatly overstates the actual freight cost. Respondent concludes that in the alternative, the Department should use inland freight rates selected for shipping bearings to the port as the basis for calculating the freight rates to be attached to raw material costs. Universal supports respondent's argument.

Petitioner claims that respondent's assertion that most Polish steel was exported from Germany has no basis and is not logical, as steel imports are not dictated only or primarily by geographical proximity. Also, petitioner states that this issue was decided in the 1994/95 review, and TIE has not offered any better alternative in its case brief for this segment of the proceeding.

*Department's Position:* We disagree with respondent. As the Department noted in the final results notice of the 1994/95 review, although freight distances for steel imported into Poland might differ from the average freight distance reflected in the conversion factor, we have no way to ascertain that difference. See *TRBs from Romania* at 51433 (Comment 21).

With regard to respondent's proposed alternative, the Department's established methodology is to utilize information available from the primary surrogate country before turning to data pertaining to the secondary surrogate country. The CIF/FOB data is specific to Poland, our primary surrogate country for this review. Further, the Department only resorted to use of the Turkish freight rates for foreign inland freight because the Department had "no useable information for this expense." See *Memorandum to the File: Analysis for the preliminary results of the 1993/1994 administrative review of tapered roller bearings and parts thereof, finished or unfinished, from Romania—Tehnoimportexport, S.A.*, October 28, 1996, page 2, which is on file in the Central Records Unit. Clearly, the Department had useable information pertaining to Poland for freight and

insurance for raw materials inputs. Finally, use of the Turkish data would not provide a more acceptable alternative because the record of that case does not indicate whether the Turkish data includes insurance.

*Comment 7:* Respondent states that the Department should utilize the former statutory minimum of eight percent to calculate profit. Universal supports respondent's assertion.

Petitioner notes that respondent has offered no reason in support of its proposal. Petitioner maintains that the statutory minimum is only to be used if no data above the minimum are available. Therefore, the Department should continue to use the profit rate from the Turkish pipe and tube producer used in the preliminary results.

*Department's Position:* We agree with petitioner. First, we note that, as this segment of the proceeding is controlled by the pre-URAA statute, the provision of that statute and the corresponding regulation regarding the eight percent statutory minimum for profit are fully applicable to this review. See section 773(e)(1)(B)(ii) of the Act; 19 CFR § 353.50(a)(2).

The Department's Antidumping Manual states the Department's practice with regard to the calculation of profit when using the factors of production methodology. Specifically, it states that "if the profit in the surrogate were higher than the eight percent statutory minimum, we would use the actual profit." See *Antidumping Manual*, Chapter 8, pp. 72-73.

Moreover, as the Department noted in another case involving a non-market economy, the statute requires that we "value profit in a surrogate country, provided that the surrogate's profit percentage exceeds the statutory minimum of eight percent." See *Comment 4, Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings from the People's Republic of China*, 57 FR 10644 (March 27, 1992). As discussed in response to Comment 1, for purposes of this review, the Department has found that the Turkish pipe and tube industry is sufficiently comparable to Romania's tapered roller bearing industry to justify using values from that industry to calculate FMV in this review. Therefore, in the absence of surrogate profit information from bearing producers, it is appropriate for the Department to utilize the profit rate from the Turkish pipe and tube producer.

**Final Results of the Review**

As a result of our review, we determine that the following margin exists:

Manufacturer/exporter	Time period	Margin (percent)
Romania Rate .....	6/1/93-5/31/94	0.00

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisal instructions directly to the Customs Service. Deposit rates are governed by the final results of the 1994/95 administrative review of this proceeding. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Romania; Final Results of Antidumping Duty Administrative Review*, 61 FR 51434 (October 2, 1996).

This notice serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d)(1). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested.

Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: May 27, 1997.

**Robert S. LaRussa,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 97-14869 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DS-P

**DEPARTMENT OF COMMERCE****International Trade Administration**

[C-401-056]

**Viscose Rayon Staple Fiber from Sweden; Preliminary Results of Countervailing Duty Administrative Review**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of preliminary results of Countervailing Duty Administrative Review.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the countervailing duty order on viscose rayon staple fiber from Sweden for the period January 1, 1995 through December 31, 1995. We preliminarily determine the net subsidy to be zero percent *ad valorem* for Svenska Rayon AB (Svenska) for the period January 1, 1995 through December 31, 1995. If the final results of this review remain the same as these preliminary results, the Department intends to instruct the U.S. Customs Service to liquidate, without regard to countervailing duties, all shipments of the subject merchandise from Svenska exported on or after January 1, 1995 and on or before December 31, 1995. Interested parties are invited to comment on the preliminary results. (See **PUBLIC COMMENT** section of this notice.)

**EFFECTIVE DATE:** June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Moore or Russell Morris, Office CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-2786.

**SUPPLEMENTARY INFORMATION:****Background**

On May 15, 1979, the Department published in the **Federal Register** (44 FR 28319) the countervailing duty order on viscose rayon staple fiber from Sweden. On May 8, 1996, the Department published a notice of "Opportunity to Request Administrative Review" (61 FR 20791) of this countervailing duty order for the period January 1, 1995 through December 31, 1995. We received a timely request for review from the petitioners, and we initiated the review on June 25, 1996, as published in the **Federal Register** (61 FR 32771).

In accordance with 19 CFR 355.22(a), this review covers only the producer or

exporter of the subject merchandise for which a review was specifically requested. Accordingly, this review covers Svenska. This review also covers ten programs.

**Applicable Statute**

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995 (the Act). The Department is conducting this administrative review in accordance with section 751(a) of the Act.

**Scope of the Review**

Imports covered by this review are shipments from Sweden of regular viscose rayon staple fiber and high-wet modulus (modal) viscose rayon staple fiber. Such merchandise is classifiable under item number 5504.10.00 of the Harmonized Tariff Schedule (HTS). The HTS item is provided for convenience and Customs purposes. The written description remains dispositive.

**Analysis of Programs**

In its questionnaire response the Government of Sweden (GOS) reported that Svenska benefitted from the following programs during the period of review: (1) Investment Grants from the Working Life Fund, (2) Recruitment Incentive, (3) Trainee Temporary Replacement, and (4) Recruitment Subsidy. The Department has not previously examined these programs in this case or in other Swedish cases. Therefore, for purposes of this review, we have analyzed whether these programs confer countervailable subsidies.

**I. Programs Preliminarily Determined Not to Confer Subsidies****A. Investment Grants From the Working Life Fund**

On June 7, 1989, the Swedish Parliament signed Act SFS 1989:484, which stated that employers were obligated to pay a work environment charge of 1.5 percent of the basic pension contribution paid by all employers during the period September 1989 to December 1990. This contribution was for the Working Life Fund, which is a trust held by the Swedish National Judicial Board and managed by the National Judicial Board for Public Lands and Funds. As stated in Decree number 1990:130, the GOS provided aid to companies from the Working Life Fund to pay for: (1) The cost of rehabilitation measures for employees suffering from long-term impaired health; (2) costs incurred in

implementing measures to reduce employee absenteeism; and (3) costs incurred in investing in a better work environment where the employer is not bound by existing law or statute to make such an investment. The aid was in the form of grants which could be provided to companies in all sectors of the economy. The last date for granting aid was March 31, 1995. However, in exceptional cases, the Fund could grant aid after March 31, 1995 but before July 1, 1995, when the Fund was abolished.

According to the questionnaire responses, these grants were provided to a large number of sectors in Sweden ranging from aviation, construction, energy, and banks and insurance to forestry, land transportation, and mining, among many others. The data in the questionnaire response shows that Svenska received two small grants under this program.

We preliminarily determine that this program is not limited to a specific enterprise or industry, or group thereof as defined in section 771(5A)(D) of the Act because the benefits are provided to a large number and wide variety of industries, and because there is no evidence of record to indicate that the program is otherwise specific. Therefore, we preliminarily determine that this program is not countervailable.

#### *B. Recruitment Incentive Program*

The Recruitment Incentive Program was a temporary labor market measure aiming to compensate companies for costs relating to recruiting the long-term unemployed who had a lower level of competency than the company normally would require. It was established by governmental ordinance SFS: 1995:287. This program allowed all companies with less than 500 employees to deduct from their payroll taxes up to 6,000 SEK for twelve months for each new employee, hired between January 1, 1995 through May 31, 1995, who worked at least 17 hours per week. The deduction was automatically claimed on a company's tax form. There were no restrictions to claiming the deduction based on either location or type of industry. The last date that a company could claim the tax reduction was June 30, 1996. During the period of review, Svenska claimed a small deduction under this program.

We preliminarily determine that this program is not limited to a specific enterprise or industry, or group thereof within the meaning of 771(5A)(D) of the Act, because all companies in Sweden with less than 500 employees, regardless of the type of industry or geographic location, can claim this tax deduction, and because there is no

evidence of record to indicate that the program is otherwise specific. Therefore, we preliminarily determine that this program is not countervailable.

#### *C. Trainee Temporary Replacement*

The Trainee Temporary Replacement Program, which was enacted by the GOS under Act 1991:329 on July 1, 1991, implements a labor market policy measure that allows employers to deduct from their social security contributions certain expenses related to the training of employees and the hiring of temporary replacements when those employees are in training. The objectives of the program are: (1) To give unemployed persons the chance of employment in temporary positions when staff are undergoing training, (2) to help employers improve the competence of their staff and in so doing improve the competitive strength of the company, and (3) to reduce the company's need for overtime when staff are undergoing training and to make future staff recruitment easier.

The replacement employee must be referred to the employer by the county labor board. The employer provides details of the company and its training program as well as anticipated costs to the county labor board, which then assigns a replacement. The employer then automatically deducts from its social security contributions the cost of hiring the temporary worker and certain costs related to training of the permanent employee. According to the questionnaire response, all companies were entitled to claim this deduction if there was a temporary replacement employee available.

There were no restrictions to claiming the deduction based on either location or type of industry. The deductions are accounted for in a revenue declaration form that is submitted by the company to the tax authorities on a regular basis. The data in the questionnaire response shows that Svenska only claimed a small deduction under this program.

We preliminarily determine that this program is not limited to a specific enterprise or industry, or group thereof within the meaning of 771(5A)(D) of the Act, because all companies in Sweden, regardless of the type of industry or geographic location, can claim these deductions from their social security contributions when temporary replacement workers are hired, and because there is no evidence of record to indicate that the program is otherwise specific. Therefore, we preliminarily determine that this program is not countervailable.

#### *D. Recruitment Subsidy Program*

The purpose of the Recruitment Subsidy Program, commenced in 1984, is to increase employment among long-term unemployed persons. Aid is provided to employers for a period of six months through grants covering a maximum of 50 percent of monthly wage costs for the person hired up to a maximum of 7,000 SEK per month. Under certain conditions, the time period for a company to receive aid under this program can be extended to 12 months.

The legislation states that this program is available to all employers, except for state employers. Applications for aid are submitted to the local employment office which decides whether aid should be granted. Hence, depending on circumstances in each case, the local employment offices can approve aid at a level below 50 percent of wage costs and/or for a shorter or longer period than six months.

The GOS stated that it had no information on the distribution of these grants; however, the subsidy rate that would be attributable to Svenska under this program, if it were specific, would be 0.0002 percent *ad valorem*. A rate this small would not change the overall subsidy rate for Svenska. Because any benefit we would calculate for this program would not affect the overall subsidy rate, the lack of information regarding the specificity of this program does not affect the results of this administrative review. See, e.g., Certain Cut-to-Length Carbon Steel Plate from Sweden; Preliminary Results of Countervailing Duty Administrative Review, 61 FR 51683, 51686 (October 3, 1996) and Certain Cut-to-Length Carbon Steel Plate from Sweden; Final Results of Countervailing Duty Administrative Review, 62 FR 16551, 16553 (April 7, 1997). We will reexamine this program in any future administrative reviews of this order.

## **II. Programs Preliminarily Determined To Be Not Used**

We examined the following programs and preliminarily determine that the producers and/or exporters of the subject merchandise did not apply for or receive benefits under these programs during the period of review:

- A. Manpower Reduction Grants
- B. Grants for Temporary Employment for Public Works
- C. Regional Development Grant
- D. Transportation Grants
- E. Location-of-Industry Loans

### III. Terminated Program

#### *Elderly Employment Compensation Program*

In Viscose Rayon Fiber from Sweden; Final Results of Countervailing Duty Administrative Review, 57 FR 12912 (April 14, 1992), the Department found this program to be *de jure* specific because the program's legislation expressly made it available only to certain companies within the textile and apparel industries through a special employment contribution for older workers. Svenska received its last payment under this program in July 1982. In January 1983, the Swedish government excluded the rayon fiber industry, including Svenska, from eligibility to receive benefits under this program. Effective June 30, 1989, Government Resolution Number: SFS 1989:333 discontinued the entire program.

We had determined that the grants under this program were non-recurring. As such they were allocated over time. The last grant was received in 1982 and was allocated over the 10-year average useful life of assets in the rayon fiber industry, according to the "Asset Guideline Classes: of the Internal Revenue Service." Because the 10-year benefit stream from the last grant received by Svenska ended in 1991, and because this program was discontinued in its entirety as of June 30, 1989, we preliminarily determine that this program has been terminated.

#### **Preliminary Results of Review**

For the period January 1, 1995 through December 31, 1995, we preliminarily determine that no countervailable subsidies were conferred on Svenska. If the final results of this review remain the same as these preliminary results, the Department intends to instruct the U.S. Customs Service (Customs) to liquidate without regard to countervailing duties, all shipments of this merchandise exported on or after January 1, 1995, and on or before December 31, 1995.

The Department also intends to instruct Customs to collect a cash deposit of estimated countervailing duties of zero percent *ad valorem*, as provided for by section 751(a)(1) of the Act, on all shipments of this merchandise from Svenska, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Because the URAA replaced the general rule in favor of a countrywide rate with a general rule in favor of individual rates for investigated and

reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Act. The requested review will normally cover only those companies specifically named. See 19 CFR § 355.22(a). Pursuant to 19 CFR § 355.22(g), for all companies for which a review was not requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected, at the rate previously ordered. As such, the countervailing duty cash deposit rate applicable to a company can no longer change, except pursuant to a request for a review of that company. See *Federal-Mogul Corporation and The Torrington Company v. United States*, 822 F.Supp. 782 (CIT 1993) and *Floral Trade Council v. United States*, 822 F.Supp. 766 (CIT 1993) (interpreting 19 CFR § 353.22(e), the antidumping regulation on automatic assessment, which is identical to 19 CFR § 355.22(g)). Therefore, the cash deposit rates for all companies except those covered by this review will be unchanged by the results of this review.

We will instruct Customs to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or countrywide rate applicable to the company.

#### **Public Comment**

Parties to the proceeding may request disclosure of the calculation methodology and interested parties may request a hearing not later than 10 days after the date of publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Parties who submit argument in this proceeding are requested to submit with the argument (1) a statement of the issue and (2) a brief summary of the argument. Any hearing, if requested, will be held seven days after the scheduled date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR § 355.38.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later

than the date the case briefs, under 19 CFR § 355.38, are due. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)).

Dated: May 30, 1997.

**Robert S. LaRussa,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 97-14868 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-DS-P

### DEPARTMENT OF COMMERCE

#### **National Oceanic and Atmospheric Administration**

#### **Management and Oversight of the National Estuarine Research Reserve System**

**ACTION:** Proposed Collection; Comment Request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 5, 1997.

**ADDRESSES:** Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Doris Grimm, Sanctuaries and Reserves Division, Rm 12158, 1305 East-West Highway, Silver Spring, MD 20910 (301-713-3132).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Abstract**

The National Estuarine Research Reserve System (NERRS) consists of carefully selected estuarine areas of the United States that are designated, preserved, and managed for research and educational purposes. Information from states is needed to review their proposals for site designations, to evaluate state requests for funding of the

development of management plans and Environmental Impact Statements, and to ensure that national standards continue to be met (the latter information is contained in annual reports and work plans). While individuals and organizations can apply for grants to conduct research within the NERRS, that application process utilizes standard Federal forms and procedures that are approved separately by Office of Management and Budget (OMB) and are not part of the proposed clearance request to OMB.

## II. Method of Collection

Applicants follow procedures given in regulations (15 CFR PART 921) and guidance. Funding requests are initiated by the applicant. States with established reserves must file annual reports and work plans.

## III. Data

*OMB Number:* 0648-0121.

*Form Number:* None.

*Type of Review:* Regular Submission.

*Affected Public:* States, non-for-profit institutions, individuals.

*Estimated Number of Respondents:* 31.

*Estimated Time Per Response:* 2,012 hours for Management Plans, 15 hours for annual reports/work plans, and 1 hour for a "Federal Consistency Certification" or a "Categorical Exclusion Checklist" when required as part of a grant application.

*Estimated Total Annual Burden Hours:* 2,149.

*Estimated Total Annual Cost to Public (excluding valuation of respondents' response time):* \$0.

## IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 2, 1997.

**Linda Engelmeier,**

*Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 97-14831 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-08-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Southeast Region Logbook Family of Forms

**ACTION:** Proposed collection; comment request.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 5, 1997.

**ADDRESSES:** Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to John Poffenberger, Southeast Fisheries Science Center, 75 Virginia Beach Drive, Miami, Florida 33149, (305) 361-4263.

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

Reporting requirements for 11 fisheries are included in this family of forms. The authority for these mandatory reporting requirements is 50 CFR 622.5. The National Marine Fisheries Service needs information on species composition, quantity caught/landed by species, the amount of fishing effort and the location of the fishing in order to provide scientifically reliable data in support of the mandated stewardship responsibilities delegated by Congress. Collecting this critical information using logbooks that are completed by fishermen is desirable for two important reasons. First, the fishermen are the best source of this information. They are doing the fishing; thus, they know the most about it. Secondly, this method involves the

fishermen directly. Because they are the people being regulated, it is reasonable to use information that they provide to determine the best scenario of measures to meet the conservation and regulatory requirements placed on the NMFS.

## II. Method of Collection

Mandatory logbook forms are the data collection instrument employed in this family of forms. Under 50 CFR 622.5, the Science and Research Director for the Southeast Fisheries Science Center has the authority to select fishermen to report from those who have been issued a Federal vessel permit.

## III. Data

*OMB Number:* 0648-0016.

*Form Number:* Various.

*Type of Review:* Regular Submission.

*Affected Public:* Businesses of other for-profit (commercial fishery vessel owners that have been issued a Federal vessel permit).

*Estimated Number of Respondents:* 8,523.

*Estimated Time Per Response:* 2 to 15 minutes, depending upon the logbook involved.

*Estimated Total Annual Burden Hours:* 22,121 hours.

*Estimated Total Annual Cost to Public:* No cost to the public other than the time required to complete the logbook forms. The forms are provided, along with pre-addressed, postage-paid envelopes.

## IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 2, 1997.

**Linda Engelmeier,**

*Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 97-14832 Filed 6-5-97; 8:45 am]

BILLING CODE 3510-22-P

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

[I.D. 052397C]

**Marine Mammals; Photography Permit (File No. 867-1388)**

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

**ACTION:** Receipt of application.

**SUMMARY:** Notice is hereby given that Moana Productions, Inc., 311 Portlock Road, Honolulu, HI 96825, has applied in due form for a permit to take several species of non-threatened, non-endangered small cetaceans for purposes of commercial photography.

**DATES:** Written comments must be received on or before July 7, 1997.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713-2289);

Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802-4213 (310/980-4001);

Protected Species Program Manager, Pacific Area Office, NMFS, 2570 Dole Street, Room 106, Honolulu, HI 96822-2396 (808-973-2987); and

Regional Administrator, Southeast Region, NMFS, 9721 Executive Center Drive, St. Petersburg, FL 33702-2432 (813/570-5301).

Written data or views, or requests for a public hearing on this request, should be submitted to the Director, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of § 104(c)(6) of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216). Section 104(c)(6) provides for photography for educational or

commercial purposes involving non-endangered and non-threatened marine mammals in the wild. NMFS is currently working on proposed regulations to implement this provision. However, in the meantime, NMFS has received and is processing this request as a "pilot" application for Level B Harassment of non-listed and non-depleted marine mammals for photographic purposes. The applicant seeks authorization to photograph the following marine mammals: bottlenose dolphins (*Tursiops truncatus*), spinner dolphins (*Stenella longirostris*), pantropical spotted dolphins (*Stenella attenuata*), common dolphins (*Delphinus delphis*), Risso's dolphins (*Grampus griseus*), rough-toothed dolphins (*Steno bredanensis*), short-finned pilot whales (*Globicephala macrorhynchus*), false killer whales (*Pseudorca crassidens*), pygmy killer whales (*Feresa attenuata*), and melon-headed whales (*Peponocephala electra*) in Hawaii and South Carolina waters. The applicant proposes to initiate this work upon receipt of the permit.

Dated: May 27, 1997.

**Ann D. Terbush,**

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97-14776 Filed 6-5-97; 8:45 am]

**BILLING CODE 3510-22-F**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

[I.D.060397C]

**Marine Mammals; Scientific Research Permit PHF#782-1355**

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

**ACTION:** Receipt of application.

**SUMMARY:** Notice is hereby given that NMFS, Alaska Fisheries Science Center, National Marine Mammal Laboratory, 7600 Sand Point Way, NE, BIN C15700, Seattle, WA 98115-0070, has applied in due form for a permit to take Alaskan harbor seals (*Phoca vitulina richardsi*) for purposes of scientific research.

**DATES:** Written comments must be received on or before July 7, 1997.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits Division, Office of Protected Resources, NMFS, 1315 East-West

Highway, Room 13130, Silver Spring, MD 20910 (301/713-2289);

Regional Administrator, NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802-1668 (907/586-7221).

Written data or views, or requests for a public hearing on this request, should be submitted to the Chief, Permits Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The applicant requests a permit to take harbor seals in the following manner: harassment during census flights; capture, restrain, measure (weight, length, girth), sample (flipper punch, vibrissae, blood drawn, blubber/muscle biopsy, ultra sound, enema), radio tag, flipper tag and release up to 500 animals; and incidentally harass up to 2000 during the conduct of these activities and during collection of scat samples from haulouts.

Dated: June 3, 1997.

**Ann D. Terbush,**

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97-14951 Filed 6-4-97; 8:45 am]

**BILLING CODE 3510-22-F**

**DEPARTMENT OF COMMERCE****National Telecommunications and Information Administration****Public Telecommunications Facilities Program Application Form**

**ACTION:** Proposed collection: comment request.

**SUMMARY:** The Department of Commerce, as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the

Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506 (c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 5, 1997.

**ADDRESSES:** Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Gay Shrum, National Telecommunications and Information Administration (NTIA), Room 4892, 14th and Constitution Avenue NW., Washington, DC 20230 (202-482-1056).

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The purpose of the Public Telecommunications Facilities Program (PTFP) is to assist, through matching grants, in the planning and construction of public telecommunications facilities in order to achieve the following objectives:

- Extend delivery of public telecommunications services to as many citizens in the United States as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies;
- Increase public telecommunications services and facilities available to, operated by, and owned by minorities and women; and
- Strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public.

Under the Authority of 47 U.S.C. 390-394, 397-399b, the National

Telecommunications and Information Administration administers the Public Telecommunications Facilities Program (PTFP). Members of the public telecommunications community must complete a standardized form to provide information for evaluation by PTFP through a competitive review process.

**II. Method of Collection**

The information collection instrument to be used is in written form.

- Application form distributed to all potential applicants who have notified PTFP that they wish to be placed on the mailing list for applications.

**III. Data**

OMB Number: 0660-0003.

Form Number: NA.

Type of Review: Regular Submission.

Affected Public: State and Local Government and Non-Profit Institutions.

Burden Hours Calculations/Reporting:

Requirement	Hours/appl- icant	Number of applicants	Burden hours
Application Form .....	120	450	54,000 1,530 (see note)
Total .....			55,530

**Note:** In every grant cycle, PTFP requires revised information to be submitted by applicants under serious consideration for awards. We estimate this information requires 9 hours of work by about 170 of the 450 total applicants. (9x170=1,530).

*Estimated Total Annual Cost:* Cost to respondents is consistent with their normal administrative overhead. No material or equipment will need to be purchased to provide information.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the program, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection;

they also become a matter of public record.

Dated: June 2, 1997.

**Linda Engelmeier,**  
Departmental Form Clearance Officer, Office of Management and Organization.

[FR Doc. 97-14756 Filed 6-5-97; 8:45 am]

BILLING CODE: 3510-60-P

**COMMODITY FUTURES TRADING COMMISSION**

**Public Information Collection Requirement Submitted to Office of Management and Budget for Review**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of submission of information collection #3038-0017, market surveys.

**SUMMARY:** The Commodity Futures Trading Commission has submitted information collection 3038-0017,

Market Surveys, to OMB for review and clearance under the Paperwork Reduction Act of 1995, (Pub. L 104-13). The information collected pursuant to these rules is in the public interest and is necessary for market surveillance.

**DATES:** Comments must be received on or before July 7, 1997.

**ADDRESSES:** Persons wishing to comment on this information collection should contact the Desk Officer, CFTC, Office of Management and Budget, Room 3228, NEOB, Washington, DC 20503, (202) 395-7340. Copies of the submission are available from the Agency Clearance Officer, (202) 418-5160.

Title: Market Surveys.

Control Number: 3038-0017.

Action: Extension.

Respondents: Business (excluding small businesses).

Estimated Annual Burden: 700 total hours.

Respondents	Regulation (17 CFR)	Estimated number of respondents	Annual re- sponses	Est. avg. hours per response
Businesses .....	21.02	400	400	1.75

Issued in Washington, DC on May 30, 1997.

**Jean A. Webb,**

*Secretary to the Commission.*

[FR Doc. 97-14788 Filed 6-5-97; 8:45 am]

BILLING CODE 6351-01-M

## CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 97-C0006]

### In the Matter of the Toro Company, a Corporation; 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 Section 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with the Toro Company, a corporation.

**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 June 23, 1997.

**ADDRESSES:** Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 97-C0006, Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207.

**FOR FURTHER INFORMATION CONTACT:** Melvin I. Kramer, Trial Attorney, Office of Compliance and Enforcement, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504-0626.

**SUPPLEMENTARY INFORMATION:** The text of the Agreement and Order appears below.

Dated: June 3, 1997.

**Sadye E. Dunn,**

*Secretary.*

### Settlement Agreement and Order

1. This Settlement Agreement and Order, entered into between the Toro Company, a corporation (hereinafter, "Toro"), and the staff of the Consumer Product Safety Commission (hereinafter, "staff"), pursuant to the procedures set forth in 16 CFR 1118.20, is a compromise resolution of the matter described herein, without a hearing or determination of issues of law and fact.

### The Parties

2. The "Staff" is the staff of the Consumer Product Safety Commission (hereinafter, "Commission"), an independent federal regulatory agency of the United States government, established by Congress pursuant to section 4 of the Consumer Product Safety Act (hereinafter, "CPSA"), as amended, 15 U.S.C. § 2053.

3. Respondent Toro is a corporation organized and existing under the laws of the State of Delaware with its principal corporate offices located at 8111 Lyndale Ave. South, Bloomington, MN 55420.

### Staff Allegations

4. Section 15(b) of the CPSA, 15 U.S.C. § 2064(b), requires a manufacturer of a consumer product who, *inter alia*, obtains information that reasonably supports the conclusion that the product contains a defect which could create a substantial product hazard or that the product creates an unreasonable risk of serious injury or death, to immediately inform the Commission of the defect or risk.

### Count I

5. Among other lawn and garden products manufactured and distributed by Toro, between 1986 and 1988 Toro manufactured certain rear engine riding lawnmowers (hereinafter, "riding mowers"), model #'s 51638, 56145, 56150, 56155, 56170, and 56175, 8-12 horsepower mowers with 32" cutting decks. Toro manufactured and distributed approximately 81,000 of these mowers for sale to and use by consumers in the United States between 1986 and 1988.

6. The rear wheel axle bolt of the 1986-88 product version of these riding mowers had a short shank, thereby exposing the bolt threads to shear forces beyond its capacity and subjecting the bolt to fatigue and breakage. If the bolt breaks, the brakes may fail and the driver may be unable to stop the riding mower with the brakes.

7. In late June of 1989, after learning of at least 4 incidents of bolt failure, Toro sent letters to known customers asking them to replace the original bolt with a replacement bolt of a different design. However, Toro failed to notify the Commission.

8. In April of 1995, the staff learned of this bolt problem and sent a letter or inquiry to Toro. Toro responded on June 5, 1995 and filed a full report with the Commission.

9. By April of 1995, Toro had notice of approximately 7 incidents associated with the failure of the original axle bolt,

in all of which cases, consumers or dealers clearly identified the problem and alleged a loss of control of the riding mower. Several of these consumers also alleged that they suffered personal injury.

10. Although Toro obtained sufficient information to reasonably support the conclusion that the riding mowers contained a defect which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, it failed to report such information to the Commission as required by section 15(b) of the CPSA, 15 U.S.C. § 2064(b). This is a violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a) (4).

11. Toro's failure to report to the Commission, as required by section 15(b) of the CPSA, 15 U.S.C. § 2064(b), was committed "knowingly", as that term is defined in Section 20(d) of the CPSA, 15 U.S.C. § 2069(d), and Toro is subject to civil penalties under Section 20 of the CPSA.

### Count II

12. Approximately 6,500 of Toro's Wheel Horse Yard and Garden Tractors (Model #264-6) and its Ford and New Holland brand LS 25 and 45 Gear Yard Tractors, six-speed riding tractors (hereinafter, "yard tractors") were sold to consumers nationwide from January 1994 to May 1996 for about \$2,500 each.

13. These tractors had brakes or braking systems, which, in a number of cases, failed prematurely, suddenly and without warning. If the brakes fail in this manner, while operating the yard tractor on a hill, the driver may be unable to stop the yard tractors with the brakes.

14. From 1994-1996, Toro learned of approximately 24 reports of failures of the brakes on these yard tractors. In 2 incidents the user suffered fractured limbs.

15. In March and May of 1995, Toro issued Service Bulletins to its authorized dealers and service centers advising them of the problem and asking them to correct them in response to complaints they receive.

16. Although Toro did file a report with the Commission staff in April of 1996, Toro had obtained sufficient information to reasonably support the conclusion that the yard tractors contained a defect which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, substantially before that time. Therefore, it failed to make such a report on a timely basis, as required by section 15(b) of the CPSA, 15 U.S.C. § 2064(b). This is a violation of section

19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

17. Toro's failure to report to the Commission as required by section 15(b) of the CPSA, 15 U.S.C. § 2064(b), was committed "knowingly" as that term is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(b), and Toro is subject to civil penalties under section 20 of the CPSA, 15 U.S.C. § 2069.

#### Response of Toro

18. Toro denies each and all of the staff allegations with respect to the products identified in the Agreement. Toro also denies the allegations that its products identified in paragraph 5 and 12 above contained a defect which created or could create a substantial product hazard within the meaning of section 15(a) of the CPSA, 15 U.S.C. § 2064(a), or created an unreasonable risk of serious injury or death. Toro further denies any obligation to report information to the Commission under section 15(b) of the CPSA, 15 U.S.C. § 2064(b), with respect to the products described in paragraphs 5 and 12 above and asserts that its report with respect to the products listed in paragraph 12 was on a timely basis, having been filed after Toro exercised its statutory discretion and determined that only then did a report need be filed. Toro makes no admission of any fault, liability or statutory violation whatsoever. Toro alleges further that there are no design or manufacturing defects with respect to any of the products covered by this Agreement and asserts that the incidents involving the use of the products enumerated in paragraphs 5 and 12 were caused by unusual conditions or through inappropriate use by the operators. Toro does not admit any liability for any accidents or injuries from the products covered by the Agreement. Additionally, Toro has entered into this Settlement Agreement in the interest of avoiding the time and cost of litigation.

19. Specifically and without limitation on any of the denials set out above, Toro states that in each of the cases, as set forth above, it appropriately and responsibly took care of the customers, reworked the products on a timely basis, notified its customers, and issued service bulletins to dealers and distributors. It is Toro's position that the actions taken relating to products referenced in paragraph 5 above were undertaken to deal with non-reportable safety or maintenance issues and to assure customer satisfaction. With respect to the products referenced in paragraph 12 above, only one of the

customers claimed sudden, unexplained failure of the brakes. Gradual fading of the brakes, of which an operator would be aware, was more the rule.

#### Agreement of the Parties

20. The Commission has jurisdiction in this matter for purposes of entry and enforcement of this Settlement Agreement and Order.

21. Toro and the staff agree that this Settlement Agreement does not establish any legal or factual conclusions.

22. Toro knowingly, voluntarily and completely waives any rights it may have (1) To an administrative or judicial hearing with respect to the Commission's claim for a civil penalty, (2) to judicial review or other challenge or contest of the validity of the Commission's action with regard to its claim for a civil penalty, (3) to a determination by the Commission as to whether a violation of Section 15(b) of the CPSA, 15 U.S.C. § 2064(b), has occurred, (4) to a statement of findings of fact and conclusions of law with regard to the Commission's claim for a civil penalty, and (5) to any claims under the Equal Access to Justice Act.

23. This Settlement Agreement and Order settles any allegations of violation of section 15(b) of the CPSA regarding the mowers and tractors described above. It further settles and discharges any claims for violation of any such reporting obligations with respect to old matters which were the subject of a search conducted by Toro at the staff's request, filed by Toro during the negotiations on the subject wheel bolt case, and reviewed by the staff without opening new files. This Settlement Agreement and Order becomes effective only upon its final acceptance by the Commission and service of the incorporated Order upon Respondent.

24. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, the Commission shall place this Agreement and Order on the public record and shall publish it in the **Federal Register** in accordance with the procedure set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Settlement Agreement and Order within 15 days, the Agreement and Order shall be deemed finally accepted on the 16th day after the date it is published in the **Federal Register**, in accordance with 16 CFR § 1118.20(f).

25. Upon final acceptance of this Settlement Agreement and Order, the Commission shall issue the attached Order, incorporated herein by reference.

26. The provisions of this Settlement Agreement and Order shall apply to Toro and its successors and assigns.

27. For purposes of section 6(b) of the CPSA, 15 U.S.C. § 2055(b), this matter shall be treated as if a complaint had issued, and the Commission may publicize the terms of the Settlement Agreement and Order.

28. This Agreement may be used in interpreting the Order. Agreements, understandings, representations, or interpretations made outside of this Settlement Agreement and Order may not be used to vary or to contradict its terms.

Dated: May 9, 1997.

The Toro Company.

J. Lawrence McIntyre,

*Vice President, Secretary, and General Counsel.*

The Consumer Product Safety Commission. David Schmeltzer, Associate Executive Directors, Office of Compliance, Eric L. Stone, Director, Division of Administrative Litigation, Office of Compliance.

Dated: May 15, 1997.

By:

**Melvin I. Kramer,**

*Trial Attorney, Division of Administrative Litigation, Office of Compliance.*

#### Order

Upon consideration of the Settlement Agreement between Respondent The Toro Company, a corporation, and the staff of the Consumer Product Safety Commission, and the Commission having jurisdiction over the subject matter and over The Toro Company, and it appearing the Settlement Agreement is in the public interest, it is

*Ordered*, that the Settlement Agreement be and hereby is accepted, and it is

*Further Ordered*, that within 20 days of the service of the Final Order upon Respondent, The Toro Company shall pay to the order of the U.S. Treasury a civil penalty in the amount of two hundred and fifty thousand dollars (\$250,000).

Provisionally accepted and Provisional Order issued on the 3rd day of June, 1997.

By Order of the Commission.

**Sadye E. Dunn,**

*Secretary Consumer Product Safety Commission.*

[FR Doc. 97-14881 Filed 6-5-97; 8:45 am]

BILLING CODE 6355-01-M

**DEPARTMENT OF DEFENSE****Department of the Army****Environmental Assessment and finding of No Significant Impact for the Relocation of Elements of Information Systems Engineering Command-Continental United States (CONUS) From Fort Ritchie, Maryland to Fort Huachuca, Arizona**

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

**SUMMARY:** In accordance with Public Law 101-510, the Defense Base Closure and Realignment Act of 1990, the Defense Base Closure and Realignment Commission recommended the relocation of a portion of the Information Systems Engineering Command-CONUS and associated base operations support personnel from Fort Ritchie, Maryland, to Fort Huachuca, Arizona.

An Environmental Assessment (EA) examined the proposed transfer of equipment and 198 positions (approximately 136 military and 62 civilians) to Fort Huachuca, Arizona, not later than the fourth quarter of Fiscal Year 1998. Plans for relocation include renovating existing space in Greely Hall. Less than half of the civilian personnel are anticipated to transfer with their positions.

The EA found that no significant adverse environmental impacts would occur as a result of the proposed action. Therefore, based on the analysis found in the EA, which was incorporated into the Finding of No Significant Impact (FNSI), it has been determined that implementation of the proposed action will not have significant individual or cumulative impacts on the quality of the natural or the human environment. Because no significant environmental impacts will result from implementation of the proposed action, an Environmental Impact Statement is not required and will not be prepared.

**DATES:** Public comments will be accepted on or before July 7, 1997, before the Army proceeds with the proposed action.

**ADDRESSES:** Copies of the EA/FNSI may be obtained by writing to, and any inquiries and comments concerning the same should be addressed to, the Commander, U.S. Army Garrison, ATTN, ATZS-EHB (Kent), Fort Huachuca, Arizona, 85613-6000 or by sending a telefax to 520-533-3043. Copies of the EA/FNSI will also be available for review at the public libraries in Sierra Vista, Bisbee, and Benson, AZ, or at the Public Affairs

Office (Building 21115), Fort Huachuca, AZ.

**FOR FURTHER INFORMATION CONTACT:** Ms. Gretchen Kent at (520) 533-2549,

Dated: May 27, 1997.

**Richard E. Newsome,**

*Acting Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health, OASA (I, L&E).*

[FR Doc. 97-14835 Filed 6-5-97; 8:45 am]

BILLING CODE 3710-08-M

**DEPARTMENT OF EDUCATION****Submission for OMB Review; Comment Request**

AGENCY: Department of Education.

ACTION: Submission for OMB review; comment request.

**SUMMARY:** The Director, Information Resources Management Group, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before July 7, 1997.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 600 Independence Avenue, S.W., Room 5624, Regional Office Building 3, Washington, DC 20202-4651.

**FOR FURTHER INFORMATION CONTACT:** Patrick J. Sherrill (202) 708-8196. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its

statutory obligations. The Director of the Information Resources Management Group publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

Dated: June 2, 1997.

**Gloria Parker,**

*Director, Information Resources Management Group.*

**Office of Special Education and Rehabilitative Services**

*Type of Review:* New.

*Title:* Part H Longitudinal Study: Characteristics, Services, and Outcomes of Infants, Toddlers, and Families.

*Frequency:* On occasion, Semi-annually, and Annually.

*Affected Public:* Individuals or households; Business or other for-profit; Not-for-profit institutions; State, local or Tribal Gov't, SEAs and LEAs.

*Annual Reporting and Recordkeeping Hour Burden:*

Responses: 11,182.

Burden Hours: 4,020.

*Abstract:* Data is being collected for a nationally representative sample of infants and toddlers served in early intervention under Part H of Individuals with Disabilities Education Act and their families. Data will be collected from families, service records, and service providers. Findings will inform policy and practice regarding early intervention for young children with disabilities and their families.

[FR Doc. 97-14782 Filed 6-5-97; 8:45 am]

BILLING CODE 4000-01-P

**DEPARTMENT OF ENERGY****Chicago Operations Office; Office of Industrial Technologies (OIT); Notice of Solicitation for the Glass Industry Initiative**

AGENCY: (DOE).

ACTION: Notice of solicitation availability.

**SUMMARY:** The Department of Energy (DOE) Office of Industrial Technologies

(OIT) announces its interest in receiving applications for innovative research and development (R&D) in support of the "Glass Industry Initiative" to improve efficiencies of production, energy, environment and innovative types or uses of glass. This R&D will deal with improvements in the manufacture of glass in the U.S. focusing on four aspects of glass manufacturing, namely: production efficiency, energy efficiency, innovative types or uses of glass and environmental protection and recycling. The R&D also covers several specific subtopics supporting one or more of the four topical areas.

**DATES AND ADDRESSES:** The complete solicitation document will be available on or about June 6, 1997 on the internet by accessing either the OIT grant program home page at (<http://www.oit.doe.gov>) or the DOE Chicago Operations Office Acquisition and Assistance Group home page at (<http://www.ch.doe.gov/business/ACQ.html>) under the heading "Current Acquisition Activities" Solicitation No. DE-SC02-97CH10875. Preapplications referencing DE-SC02-97CH10875 are due no later than 3:00 p.m. Central Daylight Time (CDT), July 7, 1997, and full applications are due no later than 3:00 p.m. (CDT), September 15, 1997. Initial awards are anticipated by December 19, 1997.

Completed applications referencing Solicitation Notice DE-SC02-97CH10875 must be submitted to: U.S. Department of Energy, Chicago Operations Office, Attn.: Barbara Lewandowski, Bldg. 201, Rm. 3D-08, 9800 South Cass Avenue, Argonne, IL 60439-4899.

**SUPPLEMENTARY INFORMATION:** DOE's Office of Industrial Technologies supports industry efforts to increase energy efficiency, reduce waste, and increase productivity. OIT's goal is to accelerate research, development, demonstration and commercialization of energy efficient, renewable and pollution-prevention technologies benefiting industry, the environment and U.S. energy security. The key objectives of this solicitation and the resulting projects are improvements of the competitive position of, and employment opportunities in, the U.S. glass industry. These objectives are intended to be achieved through several avenues, such as the development of improved technologies and better application of existing technologies. As a result of this solicitation, DOE expects to award three (3) to eight (8) cooperative agreements with an anticipated \$2 million in total funding

for FY 98. The total estimated funding over a five-year period is \$5 million.

The solicitation invites applications from any non-profit or for-profit organization, university or other institution of higher education or non-federal agency or entity. National laboratories are not eligible for awards as prime recipients. A minimum cost-sharing commitment of 20 percent of the total cost of the project in each of the Phases I and II will be required from non-federal sources for R&D projects.

For demonstration or commercial application projects in Phase III, the cost sharing requirement from non-federal sources is a minimum of 50 percent.

**FOR FURTHER INFORMATION CONTACT:**

Barbara Lewandowski at (630) 252-2069, U.S. Department of Energy, 9800 South Cass Avenue, Argonne, IL 60439-4899; by fax at (630) 252-5045; or by e-mail at [barbara.lewandowski@ch.doe.gov](mailto:barbara.lewandowski@ch.doe.gov).

Issued in Chicago, Illinois, on May 30, 1997.

**J.D. Greenwood,**

*Acquisition and Assistance Group Manager.*

[FR Doc. 97-14814 Filed 6-5-97; 8:45 am]

BILLING CODE 6450-01-P

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. RP97-173-004]

**Carnegie Interstate Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff**

June 2, 1997.

Take notice that on May 29, 1997, Carnegie Interstate Pipeline Company (CIPCO), tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following pro forma tariff sheets, to be effective June 1, 1997.

Substitute First Revised Sheet No. 42  
Substitute First Revised Sheet No. 79  
Substitute First Revised Sheet No. 81  
Substitute First Revised Sheet No. 86  
Substitute First Revised Sheet No. 87  
Substitute First Revised Sheet No. 102  
Substitute First Revised Sheet No. 128

CIPCO states that this filing is being made in compliance with Commission Order Nos. 587 and 587-B and the Commission's May 19 and May 23 Letter Orders in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be

filed in accordance with Section 154.210 of the Commission's Regulations. 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.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14819 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. CP97-548-000]

**Columbia Gas Transmission Corporation; Notice of Request Under Blanket Authorization**

June 2, 1997.

Take notice that on May 27, 1997, Columbia Gas Transmission Corporation (Columbia), 1700 MacCorkle Avenue, S.E., Charleston, West Virginia 25314-1599, filed a request with the Commission in Docket No. CP97-548-000, pursuant to Sections 157.205, and 157.211 of the Commission's Regulations under the Natural Gas Act (NGA) for authorization to construct a new delivery point to Northeast Ohio Natural Gas Corporation (Northeast Ohio), in Holmes County, Ohio, authorized in blanket certificate issued in Docket No. CP83-76-000, all as more fully set forth in the request on file with the Commission and open to public inspection.

Columbia modified an existing 2-inch tap and constructed approximately 20 feet of 2-inch pipe to Northeast Ohio's meter. Northeast Ohio has constructed the remaining interconnecting facilities. The point of delivery was put in-service on February 10, 1997 to provide FTS transportation service. The actual cost to establish this new point of delivery was \$3,394. Northeast Ohio has reimbursed Columbia 100% of the total cost.

Any person or the Commission's staff may, within 45 days after the Commission has issued this notice, 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 NGA (18 CFR 157.205) a protest to the request. If no protest is filed within the allowed time, 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 NGA.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14824 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-162-003]

#### Cove Point LNG Limited Partnership; Notice of Compliance Filing

June 2, 1997.

Take notice that on May 27, 1997, Cove Point LNG Limited Partnership (Cove Point) tendered for filing a request to become a part of Cove Point's FERC Gas Tariff, First Revised Volume No. 1, 1st Rev. First Revised Sheet No. 136, is to be effective June 1, 1997.

Cove Point states that this tariff sheet is being filed in order to implement Order Nos. 587 and 587-B as well as to comply with the Commission's Order issued in the above-captioned proceeding on May 15, 1997.

Cove Point states that copies of the filing were served upon Cove Point's customers and all parties to the proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practice and Procedure. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. All protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14820 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Meeting

June 2, 1997.

On June 4, 1997, Commission staff will meet with representatives of Egan Hub Partners, L.P. (Egan). The meeting is in response to a request by Egan for a pre-filing conference to discuss an application proposed to be filed in the future to expand Egan's facilities. The meeting will occur at 10:00 am, in Room 72-76 at the Commission's headquarters, 888 First Street N.E., Washington, D.C.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14830 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-114-004]

#### Equitrans, L.P., Notice of Proposed Changes In Ferc Gas Tariff

June 2, 1997.

Take notice that on May 28, 1997, Equitrans, L.P. (Equitrans) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, to be effective June 1, 1997:

Substitute Fourth Revised Sheet No. 7  
Substitute First Revised Sheet No. 73  
Substitute Original Sheet No. 232B  
Substitute Original Sheet No. 268

Equitrans states that the purpose of this filing is to comply with the Commission's "Order on Compliance Filing and Rehearing" issued on May 15, 1997 in the captioned docket, and to adopt certain protocols relating to business transactions over the Internet which were adopted in Order No. 587-B.

Equitrans states that copies of its filing are being served on Equitrans' customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. 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 proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14822 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP85-221-093]

#### Frontier Gas Storage Company; Notice of Sale Pursuant to Settlement Agreement

June 2, 1997.

Take notice that on May 28, 1997, Frontier Gas Storage Company (Frontier), c/o Reid & Priest, Market Square, 701 Pennsylvania Ave., N.W., Suite 800, Washington, D.C. 20004, in compliance with provisions of the Commission's February 13, 1985, Order in Docket No. CP82-487-000, *et al.*, submitted an executed Service Agreement under Rate Schedule LVS-1 providing for the possible sale of 500,000 MMBtu of Frontier's gas storage inventory on an "in place" basis to Rainbow Gas Company.

Under Subpart (b) of Ordering Paragraph (G) of the Commission's February 13, 1985, Order, Frontier is "authorized to consummate the proposed sale in place unless the Commission issues an order within 20 days after expiration of such notice period either directing that the sale not take place and setting it for hearing or permitting the sale to go forward and establishing other procedures for resolving the matter. Deliveries of gas sold in place shall be made pursuant to a schedule to be set forth in an exhibit to the executed service agreement."

Any person desiring to be heard or to make a protest with reference to said filing should, within 10 days of the publication of such notice in the **Federal Register**, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426 a motion to intervene or protest in accordance with the requirements of the Commission's Rules of Practice and Procedures, 18 CFR 385.214 or 385.211. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are

on file with the Commission and are available for public inspection.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-14829 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-174-003]

#### Gulf States Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

June 2, 1997.

Take notice that on May 28, 1997, Gulf States Transmission Corporation (GSTC) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, certain tariff sheets to be effective June 1, 1997.

GSTC states that the purpose of the filing is to comply with the Commission's Staff's letter order of May 13, 1997 in Docket No. RP97-174-001.

GSTC submits one tariff sheet including GISB Standard 1.3.1, which was inadvertently omitted from GSTC's previous compliance in Docket No. RP97-174-001. GSTC also notes that GISB Standard 3.3.21 was included, verbatim, in the previous filing, and its location is Sheet 47, § 7(c), ¶ 3. This standard was inadvertently omitted from the chart included with GSTC's compliance filing; the chart in this filing includes 3.3.21.

GSTC states that copies of the filing are being mailed to its jurisdictional customers and interested state regulatory agencies.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. 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.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-14818 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project Nos. 2375 and 8277]

#### International Paper Company Otis; Hydroelectric Company; Notice of Commission Staff Meeting With International Paper Company on Re-licensing of Riley-Jay-Livermore and Otis Hydroelectric Projects

June 2, 1997.

International Paper Company and Otis Hydroelectric Company are preparing License Applications and a Draft Environmental Assessment (DEA) for the Riley-Jay-Livermore Project (No. 2375) and the Otis Project (No. 8277) located on the Androscoggin River, Maine. The DEA is being prepared in coordination with the "Collaborative Team", a group of representatives from various federal, state and local agencies, non-governmental organizations, and local interest groups. The DEA and license applications will be filed with the Commission no later than September 30, 1997.

International Paper Company mailed a copy of a preliminary DEA and Draft License Applications to all parties on March 28, 1997. The Commission received a copies of these documents on April 1, 1997. Commission staff has reviewed the documents and will attend a meeting, as follows, to discuss and make recommendations on the preliminary DEA.

*Meeting Date:* June 16, 1997 from 1:00 p.m. to 3:00 p.m.

*Location:* International Paper Forestry Building, 9 Green St., Augusta, Maine 04330-7443

Interested parties are welcome to attend this meeting. For further information please contact the following individuals:

*Steve Groves,* B-1, International Paper Company, Jay, ME 04239, 207-897-1389 and

*Monte TerHaar,* Federal Energy Reg. Comm., 888 First Street, NE, Mailstop HL-11.3, Washington, DC 20426, 202-219-2768.

In addition, Commission Staff will attend a regularly scheduled Collaborative Team Meeting on June 17, 1997 at 9:30 a.m. at the International Paper Forestry Building in Augusta.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-14823 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-140-004]

#### Louisiana-Nevada Transit Company; Notice of Proposed Changes In FERC Gas Tariff

June 2, 1997.

Take notice that on May 29, 1997, Louisiana-Nevada Transit Company (LNT), tendered for filing as part of its Second Revised FERC Gas Tariff, Volume No. 1, the tariff sheets listed below to be effective June 1, 1997:

Substitute Original Sheet No. 47A  
Substitute Second Revised Sheet No. 49

LNT asserts that the purpose of the filing is to reflect the Commission's rulings made in its May 21, 1997, Order in the referenced proceeding.

LNT states that copies of the filing were served on all affected entities.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 and available for public inspection in the Public Reference Room.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-14821 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP97-531-000]

#### Mississippi Valley Gas Company; Notice of Application

June 2, 1997.

Take notice that on March 19, 1997, Mississippi Valley Gas Company (MVGC), Post Office Box 3348, Jackson, Mississippi 39207-3348, filed in Docket No. CP97-531-000, an application pursuant to Section 7(b) of the Natural Gas Act for permission and approval to abandon MVGC's certificate of public convenience and necessity, which was authorized in Docket No. CP82-41-000,

all as more fully set forth in the application on file with the Commission and open to public inspection.

MVGC states that it is seeking to abandon its certificate and related service because it is not now conducting any such Natural Gas Policy Act of 1978 Section 311 transportation service, and has not conducted any such services during the past six years. MVGC further states that it has no contracts for, and no plans to provide, any such services and therefore no longer has any use for the certificate.

Any person desiring to be heard or to make protest with reference to said application should on or before June 23, 1997, 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 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 provided for, unless otherwise advised, it will be unnecessary for MVGC to appear or be represented at the hearing.

**Lois D. Cashell,**  
Secretary.  
[FR Doc. 97-14826 Filed 6-5-97; 8:45 am]  
BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. RP97-275-004]

**Northern Natural Gas Company; Notice of Compliance Filing**

June 2, 1997.

Take notice that on May 29, 1997, Northern Natural Gas Company (Northern), tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets proposed to become effective on May 1, 1997:

- Substitute Fourth Revised Sheet No. 61
- Substitute Fourth Revised Sheet No. 62
- Substitute Fourth Revised Sheet No. 63
- Substitute Fourth Revised Sheet No. 64
- Fourth Revised Sheet No. 109
- Third Revised Sheet No. 124
- Fourth Revised Sheet No. 132

Northern states that this filing is made in compliance with the Commission's Order issued May 14, 1997 in Docket No. RP97-275-001, to (1) revise the fuel retention percentages to reflect a single, combined Field Area ML fuel use and unaccounted-for retention percentage for each transportation path, (2) revise the footnote on Sheet Nos. 61-64 to provide that ML fuel and unaccounted-for percentages cannot be separately stated, and (3) revise Sheet Nos. 109, 124 and 132 to add an explanation of how the fuel percentages on Sheet No. 61-64 will be used to calculate the amount of fuel and unaccounted-for to be retained.

Northern states that copies of the filing were served upon Northern's customers and interested State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make protestant a party to the proceeding. Copies of this filing are on file with the

Commission and are available for inspection.

**Lois D. Cashell,**  
Secretary.  
[FR Doc. 97-14817 Filed 6-5-97; 8:45 am]  
BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. CP97-526-000]

**Southern Natural Gas Company; Notice of Application**

June 2, 1997.

Take notice that on May 15, 1997, as supplemented on May 23, 1997, and May 29, 1997, Southern Natural Gas Company (Southern), Post Office Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP97-526-000 an application, pursuant to section 7(c) of the Natural Gas Act, for a certificate of public convenience and necessity for authorization to construct, install, modify, and operate certain pipeline loops, compressors, and appurtenant facilities to permit increased firm transportation services in Southern's Zone 2 and 3 market areas, and for permission to roll in the costs attributable to those facilities, all as more fully set forth in the application, which is on file with the Commission and open for public inspection.

Southern states that it has undertaken an intensive effort to serve new markets that can be attached economically to its system and to develop markets already attached to its system. It is indicated that, as part of this effort, and in response to inquiries received by Southern concerning the availability of capacity, Southern conducted an open season beginning October 1996 to determine whether there was sufficient demand for transportation service to support an expansion of its system. It is also indicated that, as a result of this open season and discussions with interested customers, Southern received requests for long-term transportation service to be available beginning in November 1998, with other services to commence in November 1999 and November 2000. Southern states that it received fifteen requests for service totaling 64,911 Mcf per day. Southern lists the following requests for service noting the year that the customer requests the service to commence:

Customer	Mcf/day
Knoxville Utilities Board (1998) .....	15,000

Customer	Mcf/day
Knoxville Utilities Board (2000) .....	10,000
United Cities Gas Company (1998) .....	15,000
Middle Tennessee Natural Gas Utilities District (1998) .....	4,000
Louden Utility Board (1998) .....	500
Louden Utility Board (1999) .....	500
Louden Utility Board (2000) .....	500
City of Cookeville Gas Dept. (1998) .....	500
City of Cookeville Gas Dept. (2000) .....	500
Nat. Gas Utility Dist. of Hawkins County (1998) .....	300
Nat. Gas Utility Gas Dept. of Hawkins County (1999) .....	300
Nat. Gas Utility Gas Dept. of Hawkins County (2000) .....	300
Thomaston Mills (1998) .....	3,430
Cullman-Jefferson Counties Gas Dist. (1998) .....	1,000
Cullman-Jefferson Counties Gas Dist. (1999) .....	1,500
Cullman-Jefferson Counties Gas Dist. (2000) .....	1,500
Savannah Foods Industrial, Inc. (1998) .....	500
The Energy Spring Inc. (1998) .....	2,448
ITT Automotive, Inc. (1998) .....	1,000
Armstrong World Industries, Inc. (1998) .....	1,000
Town of Calera (1998) .....	250
Georgia-Pacific Corp. (1998) .....	2,700
Comm. of Dalton, Water, Light and Light Sinking Fund (1998) .....	683
Comm. of Dalton, Water, Light and Sinking Fund (2000) .....	1,000
<b>Total</b> .....	<b>64,911</b>

Southern states that each of the above shippers has executed a service agreement under Rate Schedule FT with a primary term of 12 Years.

To provide the requested service, Southern proposes to construct, install, modify and operate pipeline and compression facilities. More specifically, Southern proposes to construct (1) approximately 2.86 miles of new 8-inch pipeline on its existing Cleveland Branch Line extending from a point in Catoosa County, Georgia to new point of interconnection with East Tennessee Natural Gas Company in Hamilton County, Tennessee; (2) approximately 10.2 miles of 16-inch pipeline to replace the existing 12-inch pipe on the Macon Branch Loop Line in Fulton and Clayton Counties, Georgia; (3) approximately 6.015 miles of new 30-inch pipeline in Spalding and Henry Counties, Georgia to be known as the Ocmulgee Atlanta Loop Line; (4) approximately 2.77 miles of 24-inch 2nd North Main Loop Line in Pickens County, South Carolina; (5) approximately 4.6 miles of 30-inch South Main 3rd Loop line in Perry County, Alabama; and (6) the Cartersville Gate Regulator Station on the 12-inch Chattanooga Line in Floyd County, Georgia. Southern also indicates that in relation to (2) above, it will remove the existing 12-inch pipeline located in the same right-of-way.

Southern also proposes to rewheel the four Dresser-Rand compressors at the York Compressor Station in Sumter County, Alabama and at the Auburn

Compressor Station in Lee County, Alabama, which would increase the rated horsepower at an 80 degree ambient temperature from 6,500 to 9,160 of each engine. Southern also proposes to add a turbine unit rated at 1,600 horsepower at the existing Bell Mill Compressor Station, and install a new compressor station in Floyd County, Georgia, consisting of one Solar T4700 turbine unit ISO-rated at 4,700 horsepower, to be known as the Rome Compressor Station. In addition, Southern proposes to uprate the maximum allowable operating pressure of the Chattanooga Line from 1114 to 1200 psig. Southern also indicates it will construct metering facilities.

Southern estimates a facilities cost of \$52,179,005, which would be financed initially through the use of short term financing, available cash from operations of use of both alternatives and ultimately from permanent financing.

Southern also requests that the Commission issue a predetermination that rolled-in rates are appropriate for the proposed facilities. In support of that request, Southern states that the proposed facilities will be physically and operationally integrated with existing facilities that serve Southern's current customers and that the new facilities will be used for the benefit of all shippers on Southern's system. Southern states that the estimated revenues generated from the proposed facilities will exceed the estimated cost of service from the facilities in every year after the first year, and even in the

first year, rolling in of the costs would not increase the rates in any zone by more than 0.4 percent.

Southern claims that shippers will experience both monetary and operational benefit as a result of the expansion. Southern submits that, with respect to financial benefits, Exhibit N of the application demonstrates that, over the 12-year primary terms of the new firm agreements associated with the expansion, the related revenues will exceed the costs incurred by approximately \$18.1 million. Southern also submits the expansion will also provide specific operational benefits to its shippers. Southern notes that the facilities will be installed throughout a three-state area and will be an integral part of Southern's system, by providing system enhancement and increasing system reliability. Southern states that the additional pipeline loops and compression uprates would allow Southern to provide increased delivery pressures to its existing customers during off-peak periods. It is stated that the compression uprates would permit the stations to operate at a level closer to their maximum operating efficiency, thus increasing the overall efficiency of Southern's pipeline system. Southern also notes that by replacing some of the old compressor components with new uprated components, future maintenance costs for these compressors should be reduced.

Any person desiring to be heard or to make any protest with reference to said application should on or before June 23, 1997, 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 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 Southern to appear or be represented at the hearing.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14827 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP97-516-000]

#### Transwestern Pipeline Company; Notice of Application

June 2, 1997.

Take notice that on May 19, 1997, Transwestern Pipeline Company (Transwestern), 1400 Smith Street, Houston, Texas 77002, filed in Docket No. CP97-516-000 an application pursuant to Section 7(c) of the Natural Gas Act and Part 157 of the Commission's Regulations for a certificate of public convenience and necessity to construct, own, and operate

compression facilities on its existing San Juan Lateral, all as more fully described in the application which is on file with the Commission and open to public inspection.

Specifically, Transwestern proposes to: (1) construct and operate a new compressor station near Standing Rock, New Mexico (Standing Rock Compressor Station) consisting of a 15,000 ISO rated horsepower gas turbine compressor and appurtenant facilities, located on Transwestern's San Juan Lateral in McKinley County, New Mexico; and (2) construct and operate an additional 2,000 ISO rated horsepower electric compressor unit and appurtenant facilities at Transwestern's existing La Plata "A" Compressor Station in La Plata County, Colorado.

Transwestern states that the proposed facilities will provide incremental capacity of 115,000 dth per day on its existing San Juan Lateral from Ignacio to Blanco and 130,000 dth per day from Blanco to Thoreau. Transwestern estimates the cost for the proposed facilities to be approximately \$17.2 million which will be financed with internally generated funds.

Transwestern requests certificate authorization by November 15, 1997 in order to place the facilities into service by April 1, 1998.

Transwestern says that it held an open season for additional San Juan Lateral capacity between May 7, 1996 and June 14, 1996. Transwestern says that it is currently in the process of finalizing contracts with interested parties.

The Commission staff will defer all processing of Transwestern's application until Transwestern demonstrates contract commitments in support of the project.

Any person desiring to be heard or to make any protest with reference to said application should on or before June 23, 1997, 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 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 approval for the proposed application is 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 Transwestern to appear or be represented at the hearing.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14828 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP97-539-000]

#### Williams Natural Gas Company; Notice of Application

June 2, 1997.

Take notice that on May 21, 1997, Williams Natural Gas Company (WNG), One Williams Center, P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP97-539-000 an application pursuant to Section 7(b) of the Natural Gas Act and Part 157 of the Federal Energy Regulatory Commission's Regulations for permission and approval to abandon by reclaim the Beloit compressor station consisting of two 169 horsepower Cooper compressor units, one 500 horsepower White Superior compressor unit, miscellaneous coolers and piping, all in Mitchell County, Kansas, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

WNG states that the Beloit compressor station was authorized pursuant to Docket No. G-1795 and placed in service on January 6, 1952. The Beloit compressor station was constructed on the Superior 8-inch line to provide the Holnam Cement plant with increased pressure needed to produce cement. WNG notes that at the time of construction, the annual volume of gas

delivered to Holnam was approximately 1,627,491 Mcf. However, WNG states that in the 1980's the volume of gas used at the Holnam plant declined as cement production decreased. According to WNG, the Beloit compressor station has not been in operation since March 1993. WNG states that Holnam advised WNG that the plant is no longer used as a manufacturing facility but as a distribution terminal and, as a result, gas usage will be limited to hot water heaters and winter time space heating. WNG claims that it can provide these volumes without the Beloit station. WNG notes that the most recent annual volume delivered to Holnam was 4,719 Mcf.

WNG estimates that the cost of the proposed abandonment will be \$49,060 with an estimated salvage value of \$50,000. WNG states that it will retain the Beloit station site and the compressor building and foundation will be abandoned in place. Additionally, WNG notes that it intends to return the units to stock to be used for parts or sold as scrap. WNG claims that although it identifies Beloit station as an operating unit, WNG proposes to treat the abandonment as a retirement, with no recognition of a gain or a loss. WNG states that this accounting treatment is proposed because no sale or transfer of the station to an outside party is involved. WNG asserts that since the reclaim will take place on previously disturbed WNG property, no environmental clearances are required. WNG states that it will follow the applicable portions of the Upland Erosion Control, Revegetation and Maintenance Plan.

Any person desiring to be heard or to make any protest with reference to said application should on or before June 23, 1997, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., 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 385.211) 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 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 WNG to appear or be represented at the hearing.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14825 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER97-121-000, et al.]

#### Cinergy Services, Inc., et al.; Electric Rate and Corporate Regulation Filings

May 29, 1997.

Take notice that the following filings have been made with the Commission:

##### 1. Cinergy Services, Inc.

[Docket No. ER97-121-000]

Take notice that on May 7, 1997, Cinergy Services, Inc. tendered for filing an amendment in the above-referenced docket.

*Comment date:* June 11, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 2. Commonwealth Edison Company

[Docket No. ER97-1864-000]

Take notice that on May 8, 1997, Commonwealth Edison Company tendered for filing an amendment in the above-referenced docket.

*Comment date:* June 11, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 3. New York Power Authority

[Docket No. ER97-2567-000]

Take notice that on May 19, 1997, New York Power Authority tendered for filing a letter requesting a withdrawal of the Enabling Agreement.

*Comment date:* June 11, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 4. Cinergy Services, Inc.

[Docket No. ER97-2922-000]

Take notice that on May 12, 1997, Cinergy Services, Inc. (Cinergy), tendered for filing a service agreement under Cinergy's Power Sales Standard Tariff (the Tariff) entered into between Cinergy and The Detroit Edison Company.

Cinergy and The Detroit Edison Company are requesting an effective date of May 9, 1997.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 5. Rochester Gas and Electric Corporation

[Docket No. ER97-2923-000]

Take notice that on May 12, 1997, Rochester Gas and Electric Corporation (RG&E), filed a new Service Agreement between RG&E and the Sonat Power Marketing L.P. (Customer). This Service Agreement will supersede the original agreement dated November 26, 1996, designated as No. 35, to reflect the Customer's change in corporate structure. This Service Agreement specifies that the Customer has agreed to the rates, terms and conditions of RG&E's FERC Electric Rate Schedule, Original Volume No. 1 (Power Sales Tariff) accepted by the Commission in Docket No. ER94-1279-000, as amended by RG&E's December 31, 1996, filing in Docket No. OA97-243-000 (pending).

RG&E requests waiver of the Commission's sixty (60) day notice requirements and an effective date of May 5, 1997 for the Sonat Power Marketing L.P., Service Agreement. RG&E has served copies of the filing on the New York State Public Service Commission and on the Customer.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 6. Interstate Power Company

[Docket No. ER97-2924-000]

Take notice that on May 12, 1997, Interstate Power Company (IPW), tendered for filing two Transmission Service Agreements between IPW and Dairyland Power Cooperative (Dairyland). Under the Transmission Service Agreement, IPW will provide point-to-point transmission service to Dairyland.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**7. Minnesota Power & Light Company**

[Docket No. ER97-2925-000]

Take notice that on May 12, 1997, Minnesota Power & Light Company, tendered for filing a signed Service Agreement with Enron Power Marketing, Inc., under its market-based Wholesale Coordination Sales Tariff (WCS-2) to satisfy its filing requirements under this tariff.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**8. MidAmerican Energy Company**

[Docket No. ER97-2926-000]

Take notice that on May 12, 1997, MidAmerican Energy Company (MidAmerican), 666 Grand Avenue, Des Moines, Iowa 50303 submitted for filing with the Commission a Service Agreement dated April 2, 1997 with the City of Sergeant Bluff, Iowa (Sergeant Bluff) entered into pursuant to MidAmerican's Rate Schedule for Power Sales, FERC Electric Tariff, Original Volume No. 5 (Tariff), and a Wholesale Requirements Power Sales Agreement dated April 2, 1997 with Sergeant Bluff entered into pursuant to the Service Agreement and the Tariff.

MidAmerican requests an effective date of July 1, 1997 for these Agreements, and accordingly seeks a waiver of the Commission's notice requirement. MidAmerican has served a copy of the filing on Sergeant Bluff, the Iowa Utilities Board, the Illinois Commerce Commission and the South Dakota Public Utilities Commission.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**9. Central Vermont Public Service Corporation**

[Docket No. ER97-2927-000]

Take notice that on May 12, 1997, Central Vermont Public Service Corporation (Central Vermont), tendered for filing a Service Agreement with Commonwealth Electric Company under its FERC Electric Tariff No. 5. The tariff provides for the sale by Central Vermont of power and energy at or below Central Vermont's fully allocated costs.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**10. Central Vermont Public Service Corporation**

[Docket No. ER97-2928-000]

Take notice that on May 12, 1997, Central Vermont Public Service Corporation (Central Vermont), tendered for filing a Service Agreement with

Strategic Energy, Ltd. under its FERC Electric Tariff No. 5. The tariff provides for the sale by Central Vermont of power and energy at or below Central Vermont's fully allocated costs.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**11. Interstate Power Company**

[Docket No. ER97-2929-000]

Take notice that on May 12, 1997, Interstate Power Company (IPW), tendered for filing a Power Sales Service Agreement between IPW and Delhi Energy Services, Inc. (Delhi). Under the Agreement, IPW will sell Capacity & Energy to Delhi as agreed to by both companies.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**12. Northern Indiana Public Service Company**

[Docket No. ER97-2930-000]

Take notice that on May 12, 1997, Northern Indiana Public Service Company, tendered for filing an executed Standard Transmission Service Agreement for Non-Firm Point-to-Point Transmission Service between Northern Indiana Public Service Company and Vastar Power Marketing, Inc.

Under the Transmission Service Agreement, Northern Indiana Public Service Company will provide Point-to-Point Transmission Service to Vastar Power Marketing, Inc. pursuant to the Transmission Service Tariff filed by Northern Indiana Public Service Company in Docket No. OA96-47-000 and allowed to become effective by the Commission. Northern Indiana Public Service Company has requested that the Service Agreement be allowed to become effective as of April 22, 1997.

Copies of this filing have been sent to the Indiana Utility Regulatory Commission and the Indiana Office of Utility Consumer Counselor.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**13. San Diego Gas & Electric Company**

[Docket No. ER97-2931-000]

Take notice that on May 12, 1997, San Diego Gas & Electric Company (SDG&E), tendered for filing a Notice of Termination for the Interchange Agreement between SDG&E and Sonat Power Marketing, Inc. (SDG&E Rate Schedule FERC No. 122 and Sonat Rate Schedule FERC No. 5). Termination of the Interchange Agreement is to be effective as of May 15, 1997. SDG&E

requests waiver of the applicable notice requirements.

Copies of this filing were served upon the Public Utilities Commission of the State of California and Sonat Power Marketing, L.P.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**14. Interstate Power Company**

[Docket No. ER97-2932-000]

Take notice that on May 12, 1997, Interstate Power Company (IPW), tendered for filing a Power Sales Service Agreement between IPW and Equitable Power Services Company (EPS). Under the Agreement, IPW will sell Capacity & Energy to EPS as agreed to by both companies.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**15. Interstate Power Company**

[Docket No. ER97-2933-000]

Take notice that on May 12, 1997, Interstate Power Company (IPW), tendered for filing a Network Transmission Service and Operating Agreement between IPW and the City of Rushford. Under the Service Agreement, IPW will provide Network Integration Transmission Service to the City of Rushford.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

**16. MidAmerican Energy Company**

[Docket No. ER97-2934-000]

Take notice that on May 12, 1997, MidAmerican Energy Company (MidAmerican), 666 Grand Avenue, Des Moines, Iowa 50303 submitted for filing with the Commission a Service Agreement dated May 1, 1997 with the Resale Power Group of Iowa (RPGI) entered into pursuant to MidAmerican's Rate Schedule for Power Sales, FERC Electric Tariff, Original Volume No. 5 (Tariff).

MidAmerican requests an effective date which is consistent with Section 2.03 of the Agreement and, therefore, requests a waiver of the Commission's notice requirement to the extent necessary. MidAmerican anticipates that the conditions precedent to the effectiveness of the Agreement as set forth in Section 2.03 of the Agreement will be met by RPGI in early July, 1997, thereby enabling the Agreement to become effective on August 1, 1997. MidAmerican has served a copy of the filing on RPGI, the Iowa Utilities Board, the Illinois Commerce Commission and the South Dakota Public Utilities Commission.

*Comment date:* June 12, 1997, in accordance with Standard Paragraph E at the end of this notice.

### 17. Texas-New Mexico Power Company

[Docket No. OA96-30-003]

Take notice that on May 5, 1997, Texas-New Mexico Power Company tendered for filing its refund report in the above-referenced docket.

*Comment date:* June 11, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### Standard Paragraph

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, 888 First 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.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-14779 Filed 6-5-97; 8:45 am]

BILLING CODE 6717-01-P

### ENVIRONMENTAL PROTECTION AGENCY

[FRL-5837-5]

#### Agency Information Collection Activities Under OMB Review; Standards of Performance for New Stationary Sources; Phosphate Fertilizer Industry

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. § 3507(a)(1)(D)), this notice announces that the Information Collection Request (ICR) for Standards of Performance for New Stationary Sources—Phosphate Fertilizer Industry—NSPS Subparts T, U, V, W, and X (OMB# 2060-0037, expiration date: 6/30/97) described below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection

and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before July 7, 1997.

**FOR FURTHER INFORMATION OR A COPY CALL:** Sandy Farmer at EPA, (202) 260-2740, and refer to EPA ICR No. 1061.07

#### SUPPLEMENTARY INFORMATION:

**Title:** Standards of Performance for Phosphate Fertilizer Industry (OMB Control No. 2060-0037; EPA ICR No. 1061.07 expiration date: 6/30/97). This is a request for extension of a currently approved collection.

**Abstract:** The Administrator has judged that fluoride emissions from the phosphate fertilizer industry cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Phosphate fertilizer plant and phosphate bearing feed owners/operators of phosphate fertilizer plants must notify EPA of construction, modification, start-ups, shutdowns, malfunctions, and dates and results of the initial performance test. Owners/operators must install, calibrate, and maintain monitoring devices to continuously measure/record pressure drop across scrubbers.

**Recordkeeping Shall Consist Of:** the occurrence and duration of all startups and malfunctions as described; initial performance tests results; amount of phosphate feed material; equivalent calculated amounts of P<sub>2</sub>O<sub>5</sub>, and pressure drops across scrubber systems. Startups, shutdowns and malfunctions must be recorded as they occur. Performance test records must contain information necessary to determine conditions of performance test and performance test measurements. Equivalent P<sub>2</sub>O<sub>5</sub> stored or amount of feed must be recorded daily. The CMS shall record pressure drop across scrubbers continuously and automatically.

**Reporting Shall Include:** initial notifications listed; and initial performance test results.

In order to ensure compliance with the standards promulgated to protect public health, adequate reporting and recordkeeping is necessary. In the absence of such information enforcement personnel would be unable to determine whether the standards are being met on a continuous basis, as required by the Clean Air Act.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed

in 40 CFR Part 9 and 48 CFR Chapter 15. The **Federal Register** Notice required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on December 2, 1996. No comments were received.

**Burden Statement:** The annual public reporting and recordkeeping burden for this collection of information is estimated to average 87.5 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

**Respondents/Affected Entities:** Phosphate Fertilizer Industry.

**Estimated Number of Respondents:** 11.

**Frequency of Response:** 1.

**Estimated Number of Responses:** 11.

**Estimated Total Annual Hour Burden:** 963 hours.

**Estimated Total Annualized Cost Burden:** 0.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to EPA ICR No. 1061.07 and OMB Control No. 2060-0037 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, OPPE Regulatory Information Division (2137), 401 M Street, SW., Washington, DC 20460 and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503

Dated: June 3, 1997.

**Joseph Retzer,**

*Director, Regulatory Information Division.*

[FR Doc. 97-14849 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL-5837-3]

**Air Pollution Control; Proposed Action on Clean Air Act Grant to the Bay Area Air Quality Management District****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed determination with request for comments and notice of opportunity for public hearing.

**SUMMARY:** The EPA has made two proposed determinations that reductions in expenditures of non-Federal funds for the Bay Area Air Quality Management District (BAAQMD) in San Francisco, California are a result of non-selective reductions in expenditures. These determinations, when final, will permit the BAAQMD to keep the financial assistance awarded to it by EPA for FY-96 and to be awarded financial assistance for FY-97 by EPA under section 105(c) of the Clean Air Act (CAA).

**DATES:** Comments and/or requests for a public hearing must be received by EPA at the address stated below by July 7, 1997.

**ADDRESSES:** All comments and/or requests for a public hearing should be mailed to: Valerie Cooper, Grants and Program Integration Office AIR-8, Air Division, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105-3901; FAX (415) 744-1076.

**FOR FURTHER INFORMATION CONTACT:** Valerie Cooper, Grants and Program Integration Office AIR-8, Air Division, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105-3901 at (415) 744-1237.

**SUPPLEMENTARY INFORMATION:** Under the authority of Section 105 of the CAA, EPA provides financial assistance to the BAAQMD, whose jurisdiction includes Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, and part of Solano and Sonoma Counties in California, to aid in the operation of its air pollution control programs. In FY-95, EPA awarded the BAAQMD \$1,320,885 which represented approximately 5% of the BAAQMD's budget, and in FY-96 \$1,768,617 which represented approximately 7% of the BAAQMD's budget.

Section 105(c)(1) of the CAA, 42 U.S.C. 7405(c)(1), provides that "[n]o agency shall receive any grant under this section during any fiscal year when its expenditures of non-Federal funds for recurrent expenditures for air

pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year. In order for [EPA] to award grants under this section in a timely manner each fiscal year, [EPA] shall compare an agency's prospective expenditure level to that of its second preceding year." EPA may still award financial assistance to an agency not meeting this requirement, however, if EPA, "after notice and opportunity for public hearing, determines that a reduction in expenditures is attributable to a non-selective reduction in the expenditures in the programs of all Executive branch agencies of the applicable unit of Government." CAA Section 105(c)(2). These statutory requirements are repeated in EPA's implementing regulations at 40 CFR 35.210(a).

In its FY-96 section 105 application, which EPA reviewed in August 1995, the BAAQMD projected expenditures of non-Federal funds for recurrent expenditures (or its maintenance of effort (MOE)) of \$24,778,132 which included fees collected by BAAQMD for permits it issues under Title V of the CAA.<sup>1</sup> In January of 1997, however, the BAAQMD submitted to EPA documentation which shows that its actual FY-96 MOE was \$23,273,665, which is exclusive of Title V. This amount represents a shortfall of \$489,518 from the MOE of the preceding fiscal year. In addition, the projected FY-97 MOE of \$21,555,635 represents a shortfall of \$1,718,030 from the FY-96 MOE of \$23,273,665. In order for the BAAQMD to be eligible to keep its FY-96 grant and to be awarded an FY-97 grant, EPA must make a determination under section 105(c)(2).

In FY-96, the BAAQMD determined that its MOE would decrease because revenues from property taxes and permit fees decreased. For FY-97 the BAAQMD once again determined that there would be continued reductions in these revenue sources and, in addition, the State of California Retirement System (PERS) mandated that the District use the credit in their account in lieu of payment to PERS. Therefore, the usual contribution to PERS for 105 programs (which is a "recurrent expenditure") was not made and could not be counted towards the MOE. The reductions resulted in the loss of 12.5 full time permanent positions. In addition to the reduction in revenues, a general reserve and fund balance account were no longer available

<sup>1</sup> A CAA section 105 grantee's MOE may be reduced to reflect the transfer of activities to an EPA approved Title V program previously funded through section 105 grants. See 60 FR 366, 368 (January 4, 1995) and 40 CFR 35.205(b).

(because they had been depleted) to make up for shortages as they had in previous years. These were the contributing factors to a reduction in BAAQMD's FY-96 and FY-97 MOE level.

The BAAQMD's MOE reductions resulted from a loss of revenue from property taxes and permit fees. This loss of revenue and MOE reduction resulted from circumstances beyond the District's control. EPA proposes to determine that the BAAQMD's lower FY-96 and FY-97 MOE level meets the section 105(c)(2) criteria as resulting from a non-selective reduction of expenditures. Pursuant to 40 CFR 35.210, this determination will allow the BAAQMD to keep the funds received from EPA for FY-96 and to be eligible for an FY-97 award.

This notice constitutes a request for public comment and an opportunity for public hearing as required by the Clean Air Act. All written comments received by July 7, 1997 on this proposal will be considered. EPA will conduct a public hearing on this proposal only if a written request for such is received by EPA at the address above by July 7, 1997. If no written request for a hearing is received, EPA will proceed to a final determination.

Dated: May 21, 1997.

**David P. Howekamp,**  
Director, Air Division.

[FR Doc. 97-14854 Filed 6-5-97; 8:45 am]  
BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL-5837-4]

**Proposed Settlement; Industrial and Commercial Waste Incineration Rulemaking; Deadline Litigation****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of proposed settlement; request for public comment.

**SUMMARY:** In accordance with section 113(g) of the Clean Air Act ("Act"), notice is hereby given of a proposed partial settlement of *Sierra Club v. Browner*, No. 97-CV00675 (D.C. Cir.).

The case was brought by Sierra Club, which seeks to compel defendant Carol Browner, EPA Administrator, to take two actions mandated by the Clean Air Act ("the Act"). The first count seeks to compel Defendant to transmit to Congress the report specified in section 112(f)(1) of the Act. The second count seeks to compel Defendant to promulgate regulations for solid waste

incinerators combusting industrial and commercial waste pursuant to section 129(a)(1)(D) of the Act.

The proposed partial settlement relates only to the second count raised by the petitioner in the case and provides a date by which the Administrator will promulgate regulations applicable to solid waste incinerators combusting industrial and commercial waste.

For a period of thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement from persons who were not named as parties to the litigation in question. EPA or the Department of Justice may withhold or withdraw consent to the proposed settlement if the comments disclose facts or circumstances that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Copies of the settlement are available from Phyllis Cochran, Air and Radiation Division (2344), Office of General Counsel, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 260-7606. Written comments should be sent to Leslye M. Fraser at the above address and must be submitted on or before July 7, 1997.

**Scott C. Fulton,**

*Acting General Counsel.*

[FR Doc. 97-14855 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-5481-3]

### Environmental Impact Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564-7167 OR (202) 564-7153.

Weekly receipt of Environmental Impact Statements

Filed May 26, 1997 Through May 30, 1997

Pursuant to 40 CFR 1506.9

EIS No. 970197, Final Supplement, NOA, TX, MS, FL, LA, AL, Fishery Management Plan (FMP) for the Shrimp Fishery of the Gulf of Mexico portions of the Exclusive Economic Zone (EEZ), Amendment 9 Concerning Reduction of Unwanted Bycatch of Juvenile Red Snapper with Ancillary Benefits to Other Finfish Species, adjacent to State Waters of TX, LA, MS, AL and FL, Due: July 07, 1997, Contact: Wayne E. Swingle (813) 228-2815.

EIS No. 970198, Revised Final EIS, USA, AR, Disposal of Chemical Agents and Munitions Stored at Pine Bluff Arsenal, Site-Specific Impacts Associated with On-Site Disposal, Construction and Operation and Approval of Permits, Jefferson County, AR, Due: July 07, 1997, Contact: Matt Hurlburt (410) 612-7027.

EIS No. 970199, Final EIS, BLM, MT, SD, ND, Standards for Rangeland Health and Guidelines for Livestock Grazing Management on Bureau of Land Management Administered Lands, Implementation, MT, ND and SD, Due: July 07, 1997, Contact: Sandy Brooks (406) 255-2929.

EIS No. 970200, Final EIS, USA, AZ, Western Army National Guard Aviation Training Site Expansion Project, Designation of an Expanded Tactical Flight Training Area (TFTA), Development or Use of a Helicopter Gunnery Range and Construction and Operation of various Facilities on the Silver Bell Army Heliport (SBAH), Maricopa, Pima and Pinal Counties, AZ, Due: July 07, 1997, Contact: Lt. Richard Murphy (520) 682-4590.

The US Army, National Guard Bureau and the US Air Force are Joint Lead Agencies for the above project.

EIS No. 970201, Final EIS, AFS, WA, Snoqualmie Pass Adaptive Management Area Plan, Implementation, Wenatchee and Mt. Baker-Snoqualmie National Forests, Cle Elum and North Bend Ranger Districts, Kittitas and King Counties, WA, Due: July 07, 1997, Contact: Floyd Rogalski (509) 674-4411.

EIS No. 970202, Final EIS, DOE, Programmatic EIS—Waste Management, Managing Treatment, Storage and/or Disposal of Radioactive and Hazardous Waste for Five Types of Waste: Low-Level Radioactive; Low-Level Mixed; Transuranic Radioactive; High-Level Radioactive and Hazardous Waste, Site Selections Around the United States, Due: July 07, 1997, Contact: David Hoel (202) 586-3977.

EIS No. 970203, Final EIS, AFS, OR, Robinson-Scott Landscape Management Project, Timber Harvest and other Vegetation Management, Willamette National Forest, McKenzie Ranger District, Lane and Linn Counties, OR, Due: July 07, 1997, Contact: John Allen (541) 822-3381.

EIS No. 970204, Final EIS, FRC, MA, NH, VT, ME, Portland Natural Gas Transmission System Project (PNGTS) and (PNGTS)/Maritimes & Northeast Pipeline L.L.C., Phase II Joint Facilities Project, Construction and Operation, COE Section 10 and 404

Permits, MA, York and Cumberland Counties, ME, Coos County, NH and Essex County, VT, Due: July 21, 1997, Contact: Paul McKee (202) 208-1088.

EIS No. 970205, Draft EIS, NOA, MI, Thunder Bay National Marine Sanctuary Management Plan, Comprehensive and Long-Term Management for Shipwrecks and other Underwater Cultural Resources, extending from Presque Isle Harbor to Sturgeon Point and eastward into Lake Huron, Alpena, Alcona and Presque Isle Counties, MI, Due: July 21, 1997, Contact: Stephanie M. Thornton (301) 713-3125.

EIS No. 970206, Draft EIS, AFS, ID, WY, UT, MT, NV, Upper Columbia River Basin Ecosystem Based Lands Management Plan, Implementation, Interior Columbia Basin Ecosystem Management Project, ID, MT, WY, NV, and UT, Due: October 03, 1997, Contact: James E. May (208) 334-1770.

The U.S. Department of Agriculture, Forest Service and the U.S. Department of Interior, Bureau of Land Management are Joint Lead Agencies on the above project.

EIS No. 970207, Final Supplement, COE, FL, Palm Beach County Beach Erosion Project, Updated Information concerning Shore Protection for the Ocean Ridge Segment from the Martin County Line to Lake Worth Inlet and from the South Lake Worth Inlet to the Broward County Line, Palm Beach, Martin and Broward Counties, FL, Due: July 07, 1997, Contact: Michael Dupes (904) 232-1689.

EIS No. 970208, Draft EIS, AFS, WA, ID, OR, MT, Eastside Ecosystem Based Lands Management Plan, Implementation, Interior Columbia Basin Ecosystem Management Project, WA, OR, ID and MT, Due: October 03, 1997, Contact: Jeff Blackwood (509) 522-4030.

The US Department of Agriculture, Forest Service and the US Department of the Interior, Bureau of Land Management are Joint Lead Agencies on the above project.

### Amended Notices

EIS No. 970029, Draft EIS, OSM, Valid Existing Rights—Proposed Revisions to the Permanent Program Regulations Implementing Section 522(E) of the Surface Mining Control and Reclamation Act of 1977 and Proposed Rulemaking Clarifying the Applicability of Section 522(E) to Subsidence from Underground Mining, Due: August 01, 1997, Contact: Andrew F. DeVito (202) 208-

2701. Published FR 01-31-97—  
Review Period extended.

Dated: June 3, 1997.

**William D. Dickerson,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 97-14889 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-44640; FRL-5722-3]

### TSCA Chemical Testing; Receipt of Test Data

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's receipt of test data on cyclohexane (CAS No. 110-82-7). These data were submitted pursuant to an enforceable testing consent agreement/order issued by EPA under section 4 of the Toxic Substances Control Act (TSCA). Publication of this notice is in compliance with section 4(d) of TSCA.

**FOR FURTHER INFORMATION CONTACT:**

Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-543B, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551; e-mail: TSCA-Hotline@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** Under 40 CFR 790.60, all TSCA section 4 enforceable consent agreements/orders must contain a statement that results of testing conducted pursuant to testing enforceable consent agreements/orders will be announced to the public in accordance with section 4(d).

#### I. Test Data Submissions

Test data for cyclohexane were submitted by the Chemical Manufacturers Association on behalf of the following test sponsors which comprise the CMA Cyclohexane Panel: Chevron Chemical Company; CITGO Refining Chemicals Co., LP; E.I. du Pont de Nemours Company; Huntsman Corporation; Koch Industries Inc.; Phillips Petroleum Company; and Sun Company, Inc. The report was submitted pursuant to a TSCA section 4 enforceable testing consent agreement/order at 40 CFR 799.5000 and was received by EPA on April 18, 1997. The submission includes a final report entitled "Reproductive and Fertility Effects with Cyclohexane Inhalation Multigeneration Reproduction Study in

Rats." This chemical is found in a number of consumer products including spray paint and spray adhesives. It is also available as a laboratory solvent.

EPA has initiated its review and evaluation process for this data submission. At this time, the Agency is unable to provide any determination as to the completeness of the submission.

#### II. Public Record

EPA has established a public record for this TSCA section 4(d) receipt of data notice (docket number OPPTS-44640). This record includes (copies of all studies) (a copy of the study) reported in this notice. The record is available for inspection from 12 noon to 4 p.m., Monday through Friday, except legal holidays, in the TSCA Nonconfidential Information Center (also known as the TSCA Public Docket Office), Rm. B-607 Northeast Mall, 401 M St., SW., Washington, DC 20460, e-mail address:

oppt.ncic@epamail.epa.gov.

**Authority:** 15 U.S.C. 2603.

#### List of Subjects

Environmental protection, Test data.

Dated: May 28, 1997.

**Charles M. Auer,**

*Director, Chemical Control Division, Office of Pollution Prevention and Toxics.*

[FR Doc. 97-14850 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-F

## FEDERAL COMMUNICATIONS COMMISSION

[DA 97-1106]

### Pleading Cycle Established for Comments and Reply Comments on Petition for Rule Making Filed by Intelligent Transportation Society of America (RM-9096)

May 28, 1997.

On May 19, 1997, the Intelligent Transportation Society of America (ITS America) filed a Petition for Rule Making requesting an allocation of 75 megahertz of spectrum in the 5.850-5.925 GHz band for use by Intelligent Transportation Systems (ITS). This allocation is requested to provide for Dedicated Short Range Communication (DSRC) systems in the deployment of a nationwide ITS infrastructure. DSRC systems provide short range, wireless communications links between vehicles traveling at highway speeds and roadside systems.

ITS America states that existing, emerging and future DSRC services can dramatically improve safety, mobility,

productivity and the environment on our nation's roadways. Presently there are two existing DSRC based services, electronic payment and commercial vehicle electronic clearance. Some of the emerging DSRC services are traffic control, incident management, en-route driver information, automated roadside safety inspection, public transportation management, freight mobility tracking and highway-rail intersection monitoring. Future DSRC services include an intersection collision warning system and an automated highway system. ITS America believes the allocation of 75 megahertz in the 5.850-5.925 GHz band is necessary to accommodate such services.

Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on ITS America's petition on or before July 28, 1997, and reply comments on or before August 18, 1997, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. For purposes of this proceeding, we hereby waive those provisions of our rules that require formal comments to be filed on paper, and encourage parties to file comments electronically. Electronically filed comments that conform to the guidelines of this section will be considered part of the record in this proceeding and accorded the same treatment as comments filed on paper pursuant to our rules.

To file electronic comments in this proceeding, you must use the electronic filing interface available on the FCC's World Wide Web site at: <<http://gulfoss.fcc.gov/cgi-bin/websql/cgi-bin/comment/comment.hts>>. Further information on the process of submitting comments electronically is available at <<http://www.fcc.gov/comments/commurls.html>>. Parties that file comments electronically should also send a copy of any documents filed with the Commission in this docket to the Commission's copy contractor, International Transcription Services, Inc. (ITS), by email to <[its\\_inc@ix.netcom.com](mailto:its_inc@ix.netcom.com)>. Information about ITS is available on the World Wide Web at <<http://www.itsi.com>>.

Copies of the petition, comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), and may also be obtained from the Commission's duplication contractor, International Transcription Service, (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

For further information contact Tom Derenge, Office of Engineering and Technology, at (202) 418-2451.

Federal Communications Commission.

**Shirley S. Suggs,**

*Chief, Publication Branch.*

[FR Doc. 97-14747 Filed 6-5-97; 8:45 am]

BILLING CODE 6712-01-P

## FEDERAL MARITIME COMMISSION

[Docket No. 97-10]

### **Apex Maritime Co., Inc., Possible Violations of Section 10(a)(1) of the Shipping Act of 1984 and 46 CFR 510.22(i); Order of Investigation and Hearing**

Apex Maritime Co., Inc. ("Apex") is a tariffed and bonded non-vessel-operating common carrier ("NVOCC") and a licensed ocean freight forwarder located at 206 Utah Avenue, South San Francisco, CA 94080. Apex currently holds itself out as an NVOCC pursuant to its Automated Tariff Filing and Information System ("ATFI") tariff, FMC No. 008937-002, effective November 30, 1993. Apex's NVOCC bond, No. 0074, is in the amount of \$50,000 and was issued by American Motorists Insurance Company, located in New York. In addition, Apex maintains its ocean freight forwarder license, FMC No. 3338.

The Federal Maritime Commission's ("Commission") rules, at 46 CFR 510.22(i), provide that "(n)o licensee shall render, or offer to render, any freight forwarding service free of charge or at a reduced fee in consideration of receiving compensation from a common carrier or for any other reason."<sup>1</sup> Between January 1, 1993 and April 30, 1997, Apex appears to have provided freight forwarding services free of charge or at reduced fees to certain preferred shippers in violation of 46 CFR 510.22(i). In 1993, Apex provided freight forwarding services to certain customers but apparently failed to charge forwarding fees for those services. In 1994, Apex provided forwarding services to certain customers but failed to charge forwarding fees for those services until contacted by the Commission. After being contacted by the Commission, Apex seems to have charged these shippers reduced forwarding fees for their 1994 shipments.

In addition, it appears that Apex, in concert with Topocean Consolidation services Ltd. of Taiwan ("Topocean

Taiwan"), obtained or attempted to obtain ocean transportation for cargo at less than the applicable rates in violation of section 10(a)(1) of the 1984 Act, 46 U.S.C. 1709(a)(1), by means of misdescription of commodities for numerous shipments transported by ocean common carriers between September 1, 1995 and April 30, 1997. Section 10(a)(1) of the 1984 Act prohibits any person knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means, to obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

It appears that the misdescribed shipments originated in Taiwan or Hong Kong, and were discharged at or via United States west coast ports. In each of these instances, Topocean Taiwan usually was listed as shipper on the ocean carrier's bill of lading, and the destination agent, Apex, acted as the consignee or notify party. Each shipment generally reflects that Topocean Taiwan "house", or NVOCC, bill of lading, which correctly describes the commodity shipped, was issued for tender by the ultimate consignee to Apex upon arrival of the cargo at destination. The commodity descriptions on the NVOCC bills of lading do not match the commodity descriptions set forth on the ocean common carriers' bills of lading. According to the ocean common carriers' tariffs and service contracts, the commodities described in the NVOCC's bills of lading.

It further appears that the ocean common carriers rated the commodities in accordance with the inaccurate descriptions, while Apex accepted delivery of the cargo and paid ocean freight to the ocean common carriers on the basis of the lower rates attributable to the inaccurate commodity descriptions. Contemporaneous with the payment of freight, Apex issued arrival notices to the U.S. importers, which correctly described the commodity based on actual contents shipped. The resulting profit on these shipments would be divided equally between Apex and Topocean Taiwan. Thus, Apex appears to have increased its profits on these shipments because of the misdescriptions. Therefore, it seems that Apex obtained or attempted to obtain ocean transportation for property at less than the applicable rates in violation of section 10(a)(1) of the 1984 Act.

Between September 1, 1995 and April 30, 1997, Apex, in concert with

Topocean Taiwan, appears to have obtained or attempted to obtain ocean transportation for property at less than the applicable rates by means of false cargo measurements.

Between September 1, 1995 and April 30, 1997, it appears that Apex, in concert with Topocean Taiwan, knowingly and willfully obtained or attempted to obtain ocean transportation for property at less than the applicable rates in violation of section 10(a)(1) of the 1984 Act by means of false cargo measurements. In each instance, the ocean common carrier substituted a larger container for the container presumably requested by Topocean Taiwan. In accordance with the ocean common carrier's "equipment substitution" rule, the ocean freight for the requested container would be charged if the cargo's measurement did not exceed that which could be loaded into the requested container. The shipment record indicates that the substituted container was loaded beyond the cubic capacity of the requested container, but the ocean common carrier's bill of lading shows a cargo measurement which is less than that which could have been loaded into the requested container. As a result, Apex paid the ocean freight for the requested containers rather than the higher ocean freight for the substituted containers.

The shipment records demonstrate the Apex was cognizant that the shipments had been misdeclared as to the cubic measurement and were loaded at higher measurements only possible through the provision of a larger container. However, Apex apparently paid the ocean freight according to the inaccurate measurement shown on the ocean common carrier's bill of lading. Therefore, it appears that Apex knowingly and willfully obtained or attempted to obtain ocean transportation for property at less than the applicable rates between September 1, 1995 and April 30, 1997 in violation of section 10(a)(1).

Section 13 of the 1984 Act, 46 USC app. 1712, provides that a person is subject to a civil penalty of not more than \$25,000 for each knowing and willful violation of the 1984 Act or Commission rule promulgated in accordance with the 1984 Act. Section 19(b) of the 1984 Act, 46 USC app. 1718(b), states that the Commission shall revoke or suspend an ocean freight forwarder license where the forwarder "willfully failed to comply" with the 1984 Act or with a lawful rule of the Commission. In addition, section 23 of the 1984 Act, 46 USC app. 1721, provides that the Commission may

<sup>1</sup> This Commission rule was promulgated in accordance with the Shipping Act of 1984.

suspend or cancel a NVOCC's tariff where a NVOCC has violated section 10(a)(1) of the 1984 Act.

Now therefore, it is ordered, That pursuant to sections 10, 11, 13, 14, 19 and 23 of the 1984 Act, 46 USC app. 1709, 1710, 1712, 1713, 1718 and 1721, and 46 CFR 510.22(i), an investigation is instituted to determine:

(1) Whether Apex Maritime Co., Inc. violated section 10(a)(1) of the 1984 Act between September 1, 1995 and April 30, 1997, by directly or indirectly obtaining or attempting to obtain ocean transportation at less than the rates and charges otherwise applicable by means of misdescribing the commodities actually shipped;

(2) Whether Apex Maritime Co., Inc. violated section 10(a)(1) of the 1984 Act between September 1, 1995 and April 30, 1997, by directly or indirectly obtaining or attempting to obtain ocean transportation at less than the rates and charges otherwise applicable by means of false cargo measurements;

(3) Whether Apex Maritime Co., Inc. in its capacity as an ocean freight forwarder, violated 46 CFR 510.22(i) between March 1, 1993 and April 30, 1997, by rendering freight forwarding services free of charge or at a reduced fees;

(4) Whether, in the event violations of section 10(a)(1) of the 1984 Act and 46 CFR 510.22(i) are found, civil penalties should be assessed against Apex Maritime Co., Inc. and, if so, the amount of penalties to be assessed;

(5) Whether, in the event violations of section 10(a)(1) of the 1984 Act are found, the tariff of Apex Maritime Co., Inc. should be suspended or canceled;

(6) Whether, in the event violations of 46 CFR 510.22(i) are found, the ocean freight forwarder license of Apex Maritime Co., Inc. should be suspended or revoked; and

(7) Whether, in the event violations are found, an appropriate cease and desist order should be issued against Apex Maritime Co., Inc.

It is further ordered, That a public hearing be held in this proceeding and that this matter be assigned for hearing before an Administrative Law Judge of the Commission's Office of Administrative Law Judge at a date and place to be hereafter determined by the Administrative Law Judges in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the Presiding Administrative Law Judge only after consideration has been given by the parties and the Presiding Administrative Law Judge to the use of

alternative forms of dispute resolution, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record;

It is further ordered, That Apex Maritime Co., Inc. is designated as Respondent in this proceeding;

It is further ordered, That the Commission's Bureau of Enforcement is designated a party to this proceeding;

It is further ordered, That notice of this Order be published in the **Federal Register**, and a copy be served on parties of record;

It is further ordered, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72;

It is further ordered, That all further notices, order, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on parties of record;

It is further ordered, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 CFR 502.118, and shall be served on parties of record; and

It is further ordered, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, the initial decision of the Administrative Law Judge shall be issued by June 2, 1998 and the final decision of the Commission shall be issued by September 30, 1998.

**Joseph C. Polking,**

*Secretary.*

[FR Doc. 97-14758 Filed 6-5-97; 8:45 am]

BILLING CODE 6730-01-M

## FEDERAL RESERVE SYSTEM

### 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 June 23, 1997.

**A. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. *Waymon Heriot Welch, Jr.*, Memphis, Tennessee; to acquire an additional 3.14 percent, for a total of 12.76 percent, of the voting shares of Noshoba Bancshares, Inc., Memphis, Tennessee, and thereby indirectly acquire Noshoba Bank, Germantown, Tennessee.

**B. Federal Reserve Bank of Minneapolis** (Karen L. Grandstrand, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480-2171:

1. *Cobb Limited Partnership*, St. Croix Falls, Wisconsin; to acquire a total of 55.7 percent of the voting shares of Financial Services of St. Croix Falls, Inc., St. Croix Falls, Wisconsin, and thereby indirectly acquire First National Bank of St. Croix Falls, St. Croix Falls, Wisconsin.

**C. Federal Reserve Bank of San Francisco** (Pat Marshall, Manager of Analytical Support, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. *Randall M. Proctor*, Sandy, Oregon; to retain a total of 24 percent of the voting shares of CCB Financial Corporation, Sandy, Oregon, and thereby indirectly acquire Clackamas County Bank, Sandy, Oregon.

Board of Governors of the Federal Reserve System, June 3, 1997.

**Jennifer J. Johnson,**

*Deputy Secretary of the Board.*

[FR Doc. 97-14867 Filed 6-5-97; 8:45 am]

BILLING CODE 6210-01-F

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes

and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are 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 standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 30, 1997.

**A. Federal Reserve Bank of Chicago** (Philip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690-1413:

1. *Edgar County Banc Shares, Inc.*, Paris, Illinois; to merge with Kansas Banc Corporation, Kansas, Illinois, and thereby indirectly acquire Kansas State Bank, Kansas, Illinois, and Edgar County Bank & Trust Co., Paris, Illinois.

In addition, Applicant has also applied to become a bank holding company by acquiring 100 percent of the voting shares of Kansas Banc Corporation, Kansas, Illinois, and thereby indirectly acquire Kansas State Bank, Kansas, Illinois, and Edgar County Bank & Trust Co., Paris, Illinois.

**B. Federal Reserve Bank of Kansas City** (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. *Lauritzen Corporation*, Omaha, Nebraska; to acquire 3.68 percent, for a total of 24.9 percent, of the voting shares of First National of Nebraska, Inc., Omaha, Nebraska, and thereby indirectly acquire First National Bank South Dakota, Yankton, South Dakota; First National Bank, Fort Collins, Colorado; Union Colony Bank, Greeley, Colorado; and The Bank of Boulder, Boulder, Colorado.

Comments regarding this application must be received by June 20, 1997.

Board of Governors of the Federal Reserve System, June 2, 1997.

**Jennifer J. Johnson,**

*Deputy Secretary of the Board.*

[FR Doc. 97-14748 Filed 6-5-97; 8:45 am]

BILLING CODE 6210-01-F

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are 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 standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than July 3, 1997.

**A. Federal Reserve Bank of Chicago** (Philip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690-1413:

1. *CoVest Bancshares, Inc.*, Des Plaines, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of CoVest Banc, N.A. (formerly known as First Federal Bank for Savings), Des Plaines, Illinois.

Board of Governors of the Federal Reserve System, June 3, 1997.

**Jennifer J. Johnson,**

*Deputy Secretary of the Board.*

[FR Doc. 97-14865 Filed 6-5-97; 8:45 am]

BILLING CODE 6210-01-F

## FEDERAL RESERVE SYSTEM

### Federal Open Market Committee; Domestic Policy Directive of March 25, 1997

In accordance with § 271.5 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on March 25, 1997.<sup>1</sup> The directive was issued to the Federal Reserve Bank of New York as follows:

The information reviewed at this meeting suggests that relatively strong economic growth has continued in the first quarter. Private nonfarm payroll employment increased substantially further in January and February, and the civilian unemployment rate, at 5.3 percent in February, was unchanged from its level in the second half of 1996. Industrial production rose moderately on balance in January and February. Nominal retail sales increased sharply further over January and February after a considerable advance in the fourth quarter. Housing activity strengthened markedly over January and February, though much of the rise probably related to unusually favorable weather. Recent data on orders and contracts point to a further sizable gain in business fixed investment in the first quarter. The nominal deficit on U.S. trade in goods and services widened substantially in January from its temporarily depressed rate in the fourth quarter. Underlying price inflation has remained subdued.

Most market interest rates have risen somewhat since the Committee meeting on February 4-5, 1997. In foreign exchange markets, the trade-weighted value of the dollar in terms of the other G-10 currencies increased further over the intermeeting period.

Growth of M2 moderated somewhat in January and February from a brisk pace over the fourth quarter while the expansion of M3 remained relatively robust; data for the first part of March pointed to diminished growth in both aggregates. Total domestic nonfinancial debt has expanded moderately on balance over recent months.

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. In furtherance of these objectives, the

<sup>1</sup> Copies of the Minutes of the Federal Open Market Committee meeting of March 25, 1997, which include the domestic policy directive issued at that meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

Committee at its meeting in February established ranges for growth of M2 and M3 of 1 to 5 percent and 2 to 6 percent respectively, measured from the fourth quarter of 1996 to the fourth quarter of 1997. The monitoring range for growth of total domestic nonfinancial debt was set at 3 to 7 percent for the year. The behavior of the monetary aggregates will continue to be evaluated in the light of progress toward price level stability, movements in their velocities, and developments in the economy and financial markets.

In the implementation of policy for the immediate future, the Committee seeks to increase slightly the existing degree of pressure on reserve positions. In the context of the Committee's long-run objectives for price stability and sustainable economic growth, and giving careful consideration to economic, financial, and monetary developments, slightly greater reserve restraint or slightly lesser reserve restraint might be acceptable in the intermeeting period. The contemplated reserve conditions are expected to be consistent with some moderation in the expansion of M2 and M3 over coming months.

By order of the Federal Open Market Committee, May 30, 1997.

**Donald L. Kohn,**

*Secretary, Federal Open Market Committee.*

[FR Doc. 97-14793 Filed 6-5-97; 8:45 am]

BILLING CODE 6210-01-P

## FEDERAL RESERVE SYSTEM

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

**TIME AND DATE:** 10:00 a.m., Wednesday, June 11, 1997.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

**STATUS:** Closed.

#### MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank

holding company applications scheduled for the meeting.

Dated: June 4, 1997.

**Jennifer J. Johnson,**

*Deputy Secretary of the Board.*

[FR Doc. 97-14950 Filed 6-4-97; 11:01 am]

BILLING CODE 6210-01-P

## FEDERAL TRADE COMMISSION

[File No. 971-0060]

### CVS Corporation; Revco D.S., Inc.; Analysis To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before August 5, 1997.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

#### FOR FURTHER INFORMATION CONTACT:

William J. Baer, Federal Trade Commission, H-374, 6th and Pennsylvania Ave, NW., Washington, DC 20580. (202) 326-2932. George S. Cary, Federal Trade Commission, H-374, 6th and Pennsylvania Ave, NW, Washington, DC 20580. (202) 326-3741.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the accompanying complaint. An electronic copy of the full text of the consent agreement package can be obtained from the Commission Actions section of the FTC Home Page (for May 29, 1997), on the World Wide Web, at "http://www.ftc.gov/os/actions/htm." A paper

copy can be obtained from the FTC Public Reference Room, Room H-130, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, either in person or by calling (202) 326-3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

### Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a proposed Consent Order from CVS Corporation and Revco D.S. Inc. (collectively, "the respondents") under which the respondents would be required to divest a total of 114 Revco retail drug stores in the state of Virginia to Eckerd Corporation, a subsidiary of J.C. Penney Company, or to another Commission-approved purchaser, and certain pharmacy assets related to six Revco retail drug stores in the Binghamton, New York metropolitan area to Medicine Shoppe, a subsidiary of Cardinal Health, or another Commission-approved purchaser. The agreement is designed to remedy the anticompetitive effects resulting from CVS's proposed acquisition of Revco.

The proposed Consent Order has been placed on the public record for sixty days for reception of comments by interested persons. Public comment is invited regarding all aspects of the agreement including the proposed divestitures to Eckerd Corporation and Medicine Shoppe. Comments received during this period will become part of the public record. After sixty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed Order.

The proposed complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the market for the retail sale of pharmacy services to third-party payors in the State of Virginia and the Binghamton, New York, metropolitan area.

The retail sale of pharmacy services to third-party payors refers to prescription drugs sold by retail outlets such as drug store chains, independent drug stores, food stores and mass merchandise stores to third-party payors, which include insurance carriers, health maintenance organizations, preferred provider

organizations, and corporate employers. Third-party payors provide retail pharmacy service benefits to their beneficiaries, typically through intermediaries known as pharmacy benefit management ("PBM") firms that create and administer retail pharmacy networks on behalf of third-party payors, whereby third-party payor beneficiaries may go to any pharmacy participating in the network to have prescriptions filled. In establishing these pharmacy networks, third-party payors generally rely on competition among large pharmacy chains to keep the cost of pharmacy services competitive. In markets where only a small number of pharmacy chains compete, third-party payors may pay higher rates for pharmacy services. Where a single pharmacy chain controls a large share of pharmacy locations in a given area, the chain is able to extract higher prices.

For purposes of assessing competitive harm in the market for the retail sale of pharmacy services to third-party payors, both states and metropolitan statistical areas may be appropriate geographic areas. Many third-party payors require coverage for their beneficiaries throughout a state or just in certain metropolitan areas where the majority of their beneficiaries reside. While the geographic areas in which to assess the potential competitive harm of a proposed acquisition depend on where particular third-party payors' beneficiaries reside, states and MSAs are close proxies for such plan-by-plan analysis.

CVS's proposed acquisition of Revco will give the combined entity a dominant position both in the state of Virginia and in the Binghamton, New York, metropolitan area. As a result, the complaint alleges that third-party payors would be unable cost-effectively to assemble pharmacy networks that did not include CVS or Revco stores, and therefore, CVS would be able to increase prices for the retail sale of pharmacy services to third-party payors. The complaint also alleges that timely entry in the market for the retail sale of pharmacy services to third-party payors in these geographic markets on the scale necessary to offset the competitive harm resulting from the combination of CVS and Revco is unlikely.

The proposed Consent Order would remedy the alleged violations by requiring divestitures to restore the lost competition that would result from the acquisitions. Under the proposed Consent Order, the respondents would be required to divest 114 Revco drug stores in Virginia to Eckerd or to a Commission-approved purchaser. The

proposed Consent Order also requires the respondents to divest either specific pharmacy assets related to six Revco drug stores in the Binghamton, New York, metropolitan area to Medicine Shoppe International, Inc., or its subsidiary, Pharmacy Operations, Inc., or, six Revco drug stores in the Binghamton, New York, area to a Commission-approved purchaser. The respondents have ten days from the date the Order becomes final or four months after the Commission accepts the Agreement Containing Consent Order for public comment, whichever is later, to accomplish each divestiture to the named purchaser. Alternatively, if the respondents do not divest to Eckerd or Medicine Shoppe, they must divest to alternative Commission-approved buyers three months from the date the Order becomes final.

The proposed Order requires that the assets being divested in Virginia and Binghamton, New York, each go to a single purchaser in order to ensure competition by recreating a chain of sufficient size and coverage to serve as an alternative anchor pharmacy chain for a PBM retail pharmacy network.

Under the proposed Order, if either divestiture is not accomplished within the required time period, then the Commission may appoint a trustee to divest *all* 234 Revco drug stores in Virginia and the eleven CVS drug stores in the Binghamton, New York, metropolitan area, whichever applies. These "crown jewel" provisions in the proposed Order help ensure that a trustee would be able to accomplish each divestiture. The Order also contains an Asset Maintenance Agreement that requires CVS, pending divestiture, to maintain the Revco stores and assets relating to the Revco stores in the same condition and in the same business as they have been operating prior to the acquisition.

Under the proposed Order, the respondents must submit an initial report on compliance with the terms of the Asset Maintenance Agreement and on how they intend to comply with the divestiture provisions of the proposed Order. In addition, the respondents must provide the Commission with a report of compliance with the divestiture provisions of the Order within thirty days following the date this Order becomes final, and every thirty days thereafter until CVS and Revco have fully complied with the divestiture provisions of the proposed Order.

The purpose of this analysis is to facilitate public comment on the proposed Order, and it is not intended to constitute an official interpretation of

the agreement and proposed Order or to modify in any way their terms.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 97-14745 Filed 6-5-97; 8:45 am]

BILLING CODE 6750-01-M

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

[Announcement Number 762]

### Hemophilia Prevention Education and Peer Support

#### Introduction

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 1997 funds for a cooperative agreement program to enhance the national hemophilia prevention program by supporting community-based peer support and educational programs delivered at the local, regional and national levels. For the purposes of this announcement, the term hemophilia includes all congenital bleeding disorders.

CDC is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a national activity to reduce morbidity and mortality and improve the quality of life. This announcement is related to the priority areas of Immunization and Infectious Diseases and Diabetes and Chronic Disabling Conditions. (For ordering a copy of Healthy People 2000, see the Section Where to Obtain Additional Information.)

#### Authority

This program is authorized under Section 317 of the Public Health Service Act, as amended (42 U.S.C. 247b). Applicable program regulations are found in 42 CFR 51b—Project Grants for Preventive Health Services.

#### Smoke-Free Workplace

CDC strongly encourages all grant recipients to provide a smoke-free workplace and to promote nonuse of all tobacco products, and Public Law 103-227, the Pro-Children Act of 1994, prohibits smoking in certain facilities that receive Federal funds in which education, library, day care, health care, and early childhood development services are provided to children.

#### Eligible Applicants

Assistance will be provided only to a national nonprofit organization that has

a current working relationship with the hemophilia community and can provide an established network and ability to provide technical assistance to lay level hemophilia groups such as local chapters and foundations, as well as national hemophilia consumer networking organizations and hemophilia treatment center provider groups.

Since the purpose of this program is to enhance the national hemophilia prevention program, only organizations that can perform the above listed activities can be considered eligible applicants. The applicant must include evidence of 501(c)(3) nonprofit status and summarize their eligibility status in the Abstract of their application (see Application Content).

**Note:** Effective January 1, 1996, Public Law 104-65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 which engages in Lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant (cooperative agreement), contract, loan, or any other form.

#### Availability of Funds

Approximately \$2.8 million is available in FY 1997 to fund approximately one award. It is expected that the award will begin on or about September 30, 1997, for a 12-month budget period within a project period of up to 5 years. Funding estimates may vary and are subject to change. Continuation awards within the project period will be made on the basis of satisfactory programmatic progress and the availability of funds.

#### Use of Funds

##### *Restrictions on Lobbying*

Applicants should be aware of restrictions on the use of HHS funds for lobbying of Federal or State legislative bodies. Under the provisions of 31 U.S.C. Section 1352 (which has been in effect since December 23, 1989), recipients (and their sub-tier contractors) are prohibited from using appropriated Federal funds (other than profits from a Federal contract) for lobbying Congress or any Federal agency in connection with the award of a particular contract, grant, cooperative agreement, or loan. This includes grants/cooperative agreements that, in whole or in part, involve conferences for which Federal funds cannot be used directly or indirectly to encourage participants to lobby or to instruct participants on how to lobby.

In addition, the FY 1997 HHS Appropriations Act, which became effective October 1, 1996, expressly prohibits the use of 1997 appropriated

funds for indirect or "grass roots" lobbying efforts that are designed to support or defeat legislation pending before State legislatures. This new law, Section 503 of Pub. L. No. 104-208, provides as follows:

Sec. 503(a) No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or video presentation designed to support or defeat legislation pending before the Congress, \* \* \* except in presentation to the Congress or any State legislative body itself.

(b) No part of any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence legislation or appropriations pending before the Congress or any State legislature.

Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1997, as enacted by the Omnibus Consolidated Appropriations Act, 1997, Division A, Title I, Section 101(e), Pub. L. No. 104-208 (September 30, 1996).

#### Background

The primary congenital bleeding disorders consist of hemophilia A and B which affect approximately 1 in 7,500 males, and von Willebrand's Disease which affects approximately 1 in 100 persons (both male and female). Hemophilia A and B are bleeding disorders that result from congenital deficiencies of blood clotting factors VIII and IX, respectively. These deficiencies can result in both spontaneous internal bleeding and bleeding following injuries or surgical procedures. Bleeding episodes can result in severe joint damage, neurologic damage, and damage to other organ systems that are compromised by the hemorrhage and in rare cases, death. The treatment of bleeding episodes involves the prompt and proper use of clotting factor concentrates. Properly trained patients under the guidance of competent health care providers can use clotting factor concentrates to treat bleeding episodes on individualized self treatment programs to prevent most of these seriously disabling and fatal conditions (similarly to diabetes patients). However, inappropriate, misdirected, inadequate or delayed treatment often leads to premature death or a life coupled with pain and disability due to progressive joint and/or neurologic crippling, and, in many cases, loss of employment.

The HIV epidemic has had a devastating impact on the health and

welfare of hemophilia patients and their families. As many as 65 percent of all persons with hemophilia in the United States were infected with HIV by 1985 as a direct result of receiving HIV-contaminated clotting factor products recommended to treat hemophilia. Universal screening and deferral of HIV-infected plasma donors, heat treatment of blood products, and the use of recombinant factor concentrates have virtually eliminated the transmission of HIV through contaminated blood products. However, transmission of other blood borne viruses through blood products remains a serious concern of the community and transmission of HIV and hepatitis from infected patients with hemophilia to their sex partners and offspring has remained an issue of public health concern. Although blood product therapy has improved the quality of life for persons with hemophilia, complications include the transmission of viral agents and diseases, development of inhibitors, liver disease, joint disease, and psychosocial issues related to coping with a chronic disorder are of paramount concern.

The cost of hemophilia care has escalated rapidly in the last decade, mainly due to increases in the cost of clotting factor. The annual product cost per patient with severe hemophilia can now reach \$150,000. Although the annual costs of treating preventable complications of hemophilia have not been well documented, they could be as high as annual product costs. The economic burden of these costs rests with individuals with hemophilia who are reaching their lifetime maximum insurance benefits (for those able to get insurance), and on State programs that pay for hemophilia services such as Medicare, Medicaid, or other special State programs. New health care systems may prevent access to specialized care needed to improve the quality of life for persons with bleeding disorders.

Certain subgroups of the target population have been traditionally under or unserved due to the rarity of the disorder and socioeconomic, cultural, and geographical barriers. These groups include minorities, women, and adolescents. Access to information and services is often limited among these groups.

In response to the CDC's Congressional mandate, the CDC's National Hemophilia Program has adopted the primary mission to reduce or prevent complications of hemophilia and other bleeding and clotting disorders. This national prevention program is directed toward achieving

outcome-based goals to accomplish this mission. The complications of immediate concern are blood safety and prevention of joint disease. These complications were selected as a result of surveillance activities and consultation with representatives from all facets of the hemophilia community. The national program is organized in the functional units of surveillance, coordinated prevention intervention activities for the health care provider and lay populations, education, and epidemiologic and laboratory research directed towards providing the basis for translation into specific prevention focused interventions. Currently, there are several prevention messages and behaviors persons with bleeding disorders should engage in to improve their quality of life. As outcome data is analyzed, new messages will be developed by CDC. The prevention issues are:

1. Universal precautions when handling blood and blood products.
2. Vaccination for hepatitis A and B.
3. Comprehensive evaluation at least annually from hemophilia specialists such as that which exists in Hemophilia Treatment Centers.
4. Serum sample storage for blood safety monitoring and evaluation.
5. Early adequate treatment of bleeding episodes.
6. Development of strong, musculo-skeletal systems through regular physical exercise.

#### **Purpose**

The purpose of this award is to support consumer-based, peer-led prevention activities to increase knowledge about proven prevention strategies so that persons with bleeding disorders can make informed decisions regarding their care and engage in behaviors to reduce or eliminate the complications of hemophilia. This is best accomplished by a national program designed to strengthen and utilize local, regional, and national consumer-organized activities.

#### **Program Requirements**

In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities under A., below, and the CDC will be responsible for conducting activities under B., below:

##### *A. Recipient Activities*

1. Obtain information from representatives from the hemophilia community to determine knowledge, attitudes, beliefs and behaviors of families with bleeding disorders to guide prevention programming

development. Solicit input from a representative sample of the community, including those who are unserved or under served and/or who may have limited or no access to prevention and support programs.

2. In collaboration with CDC, provide information to the public about prevention peer programming directed toward reducing or eliminating complications of bleeding disorders.

3. Evaluate effectiveness of current educational programs and materials, identify gaps, and propose strategies to improve the availability of educational resources and information for prevention.

4. Maintain communication network and develop effective mechanisms to deliver prevention messages, provide information, referral, and updates on significant medical advances, hemophilia related policies, and blood safety issues to families with congenital bleeding disorders through a variety of educational forums and media.

5. Participate in a formalized network of communication with the CDC and the Food and Drug Administration (FDA) when blood safety issues arise.

6. Expand and enhance peer-based prevention and educational activities by coordinating a system to support programs at the local level. Provide technical assistance and financial support in the areas of program planning, development, implementation, evaluation, and public health education to local peer-led activities for the purpose of delivering prevention messages.

7. Obtain input from consumer and provider representatives to explore mechanisms and develop strategies for increasing collaboration between local chapters and hemophilia treatment centers (HTCs) to enhance prevention programs.

8. Provide opportunities for hemophilia care providers to receive state of the art prevention information and training by utilizing prevention messages and educational materials developed by this cooperative agreement.

9. Disseminate any educational or promotional materials, with the exception of regularly distributed newsletters, that are developed with funds from this cooperative agreement. These materials must be reviewed and approved by a program review panel prior to finalization.

10. Report any program income generated from fees or other charges in the Financial Status Report (FSR) as additive income (see Technical Reporting Requirements). This income should be available to be used to

forward the goals of this cooperative agreement.

11. Provide semiannual reports of the progress toward achievement of the goals of this cooperative agreement (see Technical Reporting Requirements).

##### *B. CDC Activities*

1. Provide current scientific and public health information regarding the prevention of complications of hemophilia and other bleeding disorders including technical review of educational and promotional materials developed with funds from this cooperative agreement.

2. Provide consultation and technical assistance in the areas of program planning, development, implementation, and evaluation.

3. As requested, provide consultation and input to committees or working groups whose operations may impact the programs funded through this cooperative agreement.

4. Collaborate in the presentation and dissemination of information resulting from these activities.

5. Provide coordination between the recipient and Regional Hemophilia Treatment Center Programs to provide appropriate mechanisms of provider involvement and collaboration with consumer program activities.

6. Participate in the grantees meetings of consumer organizations to provide information and solicit input, as requested.

#### **Technical Reporting Requirements**

An original and two copies of progress reports must be submitted to CDC semiannually. The first progress report will cover the six-month period from the date of the award. Subsequent progress reports are required 30 days after the end of each successive six-month period and must include the following: (1) A comparison of actual accomplishments to the objectives established for the progress period, (2) the reasons for failing to meet any established objectives, (3) description and explanation of any modification of program activities and protocols, (4) other pertinent information such as key staffing changes or reasons for unexpectedly high or low costs for performance, and (5) these reports should keep the CDC apprised of significant activities of this program or decisions to be made that may impact the progress of the programs funded through this cooperative agreement.

An annual financial status report (FSR) and two copies are required no later than 90 days after the end of each budget period. A final FSR is due no later than 90 days after the end of the

project period. All reports or other correspondence will be submitted to: Sharron P. Orum, Grants Management Officer, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Mailstop E-18, Room 300, Atlanta, Georgia 30305.

#### Application Content

Applicants should describe their ability to address the purpose and required activities of this announcement in a collaborative manner with CDC. Applicants must develop their applications in accordance with (1) the required activities stipulated in the Program Requirements section of this announcement, (2) Public Health Service (PHS) Form 5161-1 (Revised 7/92, OMB number 0937-0189), and (3) the content area provided below. The applicant should provide a detailed description of first-year activities and a brief overview of subsequent four year plan.

#### Content areas

##### A. Abstract (Maximum 3 pages)

Summarize the Eligible Applicant requirements, background, needs, capacity, goals, objectives, methods, and evaluation plan of the proposal.

##### B. Narrative (Maximum 30 pages)

1. *Background and need.* Describe current status of prevention education and support programming in existence, target populations, and areas of need for expansion. Identify source of needs assessment and assumptions and age of data. Identify potential barriers and facilitators to the delivery of a prevention program in this population.

2. *Capacity.* Discuss the scope and magnitude of previous experiences in prevention education and support programming. Characterize the unique capabilities of the applicant to accomplish (a) the hemophilia prevention program and recipient activities as proposed in this announcement, and (b) specific goals and objectives as proposed. Define the roles and responsibilities of participating organizations, and their type of relationship—contractual or voluntary collaboration. Describe roles, responsibilities, and level of expertise of all staff positions to implement this program by providing descriptions for all key project personnel.

3. *Goals and Objectives.* Identify one or more goals of the prevention program as related to the recipient activities. List and briefly describe specific, measurable, realistic, and time-phased

objectives designed to achieve stated goals.

4. *Methods and Activities.* Describe the types of activities and methods used to accomplish each objective within the time frame indicated. Discuss how proposed methods will provide valid and reliable outcomes needed to accomplish proposed objectives. Explain the limitations and anticipated implementation barriers of the principal methods, and how these problems are expected to be resolved.

5. *Program Management and Evaluation.* Discuss the management systems and specific plans of evaluation used to ensure sufficient progress towards achievement of proposed goals and objectives. Describe the types, frequency, and methods of evaluation used. Explain how the above information will be used to improve or redirect program operations.

##### C. Budget

Include all major cost items for implementing the proposed program for twelve months. Submit line-item descriptive justifications for personnel, travel, supplies, and other services on Standard Form 424A, "Budget Information", provided with PHS 5161-1 (Revised 7/92). For each staff position for which funding is requested, submit name of person, title, annual salary, percent time spent on this effort, percent of salary requested from this cooperative agreement, and total dollars requested for each position and total personnel. For applicants requesting funding for contracts, include the name of the person or organization to receive the contract, the method of selection, the period of performance, and a description of the contracted service requested.

##### D. Supporting Materials (Appendices)

1. Letters of agreement from all contracting or voluntary collaborating entities detailing specific roles and responsibilities of each party.

2. Letters of support from other organizations with which the applicant will be collaborating in the development and/or implementation of activities.

3. Curriculum vitae and job descriptions of all project staff.

##### Format

Applicants are required to submit an original application and two copies. The original and two copies of the applications should be unstapled and unbound. Pages must be clearly numbered, and a complete index to the application and its appendices must be included. Begin each separate section on a new page. All materials must be

typewritten, single-spaced and with unreduced type on 8½" by 11" paper. All pages should be printed on one side only, with at least 1" margins, headers, and footers. The application narrative must be limited to 30 pages, excluding abstract, budget, and appendices. Materials that should be part of the basic plan will not be accepted if placed in the appendices.

#### Evaluation Criteria

Applications will be reviewed and evaluated according to the following criteria: (*Total 100 points*)

1. The applicant must have a working relationship with a majority of the current local hemophilia organizations, and the ability to provide technical assistance to the local chapters. The applicant should demonstrate commitment to the national goal of preventing the complications of hemophilia through the provision of strong and effective consumer based programs. (*25 points*)

2. Project personnel are well qualified by training and/or experience to manage, coordinate, and evaluate a national program involving multiple local peer organizations and HTC's. Project personnel have the expertise and capability to provide accurate information from national sources and efficiently disseminate hemophilia related prevention messages and information to families affected by bleeding disorders, lay leadership, and treatment providers. (*20 points*)

3. The applicant organization has adequate facilities and manpower including a mechanism for obtaining input from people with bleeding disorders and related family members representing the demographics of the community. (*15 points*)

4. The proposed activities support the CDC goals to reduce or eliminate the complications of hemophilia through community leadership; and, the capability to mobilize persons with bleeding disorders and their family members to engage in, design, and evaluate community-based prevention activities. (*40 points*)

5. The estimated cost to the Government of the project is reasonable; the budget justifiable and consistent with the intended use of the cooperative agreement funds. (*not scored*)

#### Executive Order 12372 Review

The program is not subject to the Executive Order 12372 review.

### Public Health System Reporting Requirement

The program is not subject to the Public Health System Reporting Requirements.

### Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance number is 93.283, Centers for the Control and Prevention (CDC)—Investigations and Technical Assistance.

### Other Requirements

#### *Paperwork Reduction Act*

Projects that involve collection of information from 10 or more individuals and funded by cooperative agreements will be subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

#### *HIV/AIDS Requirements*

Recipients must comply with the document entitled "Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions" (June 15, 1992), a copy of which is included in the application kit. In complying with the requirements for a program review panel, recipients are encouraged to use an existing program review panel such as the one created by the State health department's HIV/AIDS prevention program. If the recipient forms its own program review panel, at least one member must be an employee (or a designated representative) of a government health department consistent with the content guidelines. The names of the review panel members must be listed on the Assurance of Compliance form CDC 0.1113, which is also included in the application kit. The recipient must submit the program review panel's report that indicates all materials have been reviewed and approved, this includes conference agendas.

### Application Submission and Deadline

The original and two copies of the application PHS Form 5161-1 (OMB number 0937-0189) must be submitted to Sharron Orum, Grants Management Officer, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 300, Mailstop E-18, Atlanta, Georgia 30305, on or before July 25, 1997.

1. *Deadline:* Applications shall be considered as meeting the deadline if they are either: a. Received on or before the deadline date; or b. Sent on or before the deadline date and received in time

for submission to the objective review group. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

2. *Late Applications:* Applications which do not meet the criteria in 1.a. or 1.b. above are considered late applications. Late applications will not be considered and will be returned to the applicant.

### Where To Obtain Additional Information

A complete program description and information on application procedures are contained in the application package.

*Business management technical assistance* may be obtained from Locke Thompson, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 300, Mailstop E-18, Atlanta, Georgia 30305, telephone (404) 842-6595; or by Internet or CDC WONDER electronic mail at: lxt1@cdc.gov.

*Programmatic technical assistance* may be obtained from Sally Crudder, Hematologic Diseases Branch, Division of AIDS, STD, and TB Laboratory Research, National Center for Infectious Diseases, Centers for Disease Control and Prevention (CDC), 1600 Clifton Road, NE., Mailstop E-64, Atlanta, Georgia 30333, telephone (404) 639-4036; or by Internet or CDC WONDER electronic mail at: sic4@cdc.gov.

You may obtain this and other CDC announcements from one of two Internet sites: CDC's homepage at: <http://www.cdc.gov> or the Government Printing Office homepage (including free on-line access to the **Federal Register** at: <http://www.access.gpo.gov>).

Please refer to Announcement Number 762 when requesting information and submitting an application.

Potential applicants may obtain a copy of Healthy People 2000 (Full Report, Stock No. 017-001-00474-0) or Healthy People 2000 (Summary Report, Stock No. 017-001-00473-1) referenced in the Introduction through the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325, telephone (202) 512-1800.

Dated: June 2, 1997.

**Joseph R. Carter,**

*Acting Associate Director for Management and Operations, Centers for Disease Control and Prevention (CDC).*

[FR Doc. 97-14784 Filed 6-5-97; 8:45 am]

BILLING CODE 4163-18-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

[Announcement 753]

### NIOSH: Creating Healthy Work Organizations; Fiscal Year 1997 Funds Availability

#### Introduction

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 1997 funds for a cooperative agreement program to design, implement, and evaluate organizational change interventions to create healthy work organizations.

CDC is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a national activity to reduce morbidity and mortality and improve the quality of life. This announcement is related to the priority area of Occupational Safety and Health. (For ordering a copy of Healthy People 2000, see the section **WHERE TO OBTAIN ADDITIONAL INFORMATION.**)

#### Authority

This program is authorized under Sections 20(a) and 22(e)(7) of the Occupational Safety and Health Act of 1970 [29 U.S.C. 669(a) and 671(e)(7)].

#### Smoke-Free Workplace

CDC strongly encourages all grant recipients to provide a smoke-free workplace and promote the nonuse of all tobacco products, and Public Law 103-227, the Pro-Children Act of 1994, prohibits smoking in certain facilities that receive Federal funds in which education, library, day care, health care, and early childhood development services are provided to children.

#### Eligible Applicants

Applications may be submitted by public and private, non-profit and for-profit organizations and governments, and their agencies. Thus, universities, colleges, research institutions, hospitals, other public and private organizations, State and local health departments or their bona fide agents, federally recognized Indian tribal governments,

Indian tribes or Indian tribal organizations, and small, minority- and/or women-owned businesses are eligible to apply.

**Note:** Public Law 104-65, dated December 19, 1995, prohibits an organization described in section 501(c)(4) of the IRS Code of 1986, that engages in lobbying activities to influence the Federal Government, from receiving Federal funds.

#### Availability of Funds

Approximately \$150,000 is available in FY 1997 to fund one award. The project period may last up to three years, depending on availability of funds, with budget periods of 12 months. It is expected that the award will begin on or about September 30, 1997. The funding estimate is subject to change.

Continuation awards within the project period will be made on the basis of satisfactory progress and availability of funds.

#### Use of Funds

##### Restrictions on Lobbying

Applicants should be aware of restrictions on the use of HHS funds for lobbying of Federal or State legislative bodies. Under the provisions of 31 U.S.C. Section 1352 (which has been in effect since December 23, 1989), recipients (and their sub-tier contractors) are prohibited from using appropriated Federal funds (other than profits from a Federal contract) for lobbying Congress or any Federal agency in connection with the award of a particular contract, grant, cooperative agreement, or loan. This includes grants/cooperative agreements that, in whole or in part, involve conferences for which Federal funds cannot be used directly or indirectly to encourage participants to lobby or to instruct participants on how to lobby.

In addition, the FY 1997 HHS Appropriations Act, which became effective October 1, 1996, expressly prohibits the use of 1997 appropriated funds for indirect or "grass roots" lobbying efforts that are designed to support or defeat legislation pending before State legislatures. This new law, Section 503 of Pub. L. No. 104-208, provides as follows:

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except in presentation to the Congress or any State legislative body itself.

(b) No part of any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence legislation or appropriations pending before the Congress or any State legislature.

Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1997, as enacted by the Omnibus Consolidated Appropriations Act, 1997, Division A, Title I, Section 101(e), Pub. L. No. 104-208 (September 30, 1996).

#### Background

Much research over the past 25 years has identified stressful job factors and work routines which are associated with employee stress and ill-health and has resulted in lengthy lists of both job stressors and stress-related health outcomes. A recent conceptual development has been a broadening of the focus from job stressor-health relationships to global organizational health. Organizational health is a broader, more inclusive concept and refers to enhanced organizational performance (productivity and effectiveness) plus worker good health and well-being. A healthy work organization is one whose culture/climate, values and practices promote employee well-being as well as company productivity and effectiveness. This broad definition suggests an accommodation of heretofore opposing goals: (1) the organizational goals of profitability and competitiveness, and (2) individual worker goals of health and well-being.

In 1991, NIOSH initiated a program of research to study healthy work organizations. The research emphasized the interrelationship of individual worker well-being and organization effectiveness, and focused on macro-organization characteristics, in addition to job-level characteristics, as risk factors for ill health and performance impairment. Working with industry partners, NIOSH analyzed organizational climate survey data obtained from one corporate partner during the years 1993-1995. Over 10,000 workers filled out the anonymous questionnaire, which contained measures of stress and coping, management practices, individual and team performance, organizational culture/climate, values, and organizational performance/effectiveness. Statistical analyses of these cross-sectional data identified several key organizational variables

associated with low employee stress and high organizational productivity.

Based on these analyses, NIOSH developed a provisional model of healthy work organizations which contains three broad, interrelated categories: *organizational values*, *culture/climate*, and *management practices*. Healthy work organizations have a set of company values which emphasize integrity and honesty in communication, workforce diversity, view the individual worker as a valuable human resource, and have a commitment to employee growth/development. These organizations have a culture/climate in which workers (a) feel personally valued, (b) have authority to take actions to solve problems, (c) are encouraged by management to express opinions and become involved in decision-making, and (d) resolve group conflicts effectively. Management practices in a healthy work organization include (1) management is actively engaged in leadership and strategic planning, (2) management makes the necessary changes to follow through on long term business strategies, (3) workers are recognized for problem-solving and rewarded for doing quality work, and (4) first line supervisors provide assistance and resources in helping workers plan for their future.

Beyond these empirically determined characteristics, two additional factors need to be incorporated into the model: *external economic/market conditions* and *physical work conditions*. External market conditions exert a strong influence on company profitability and competitiveness independent of the culture/climate, values, and management practices. Similarly, a healthy work organization should meet certain minimum standards for physical working conditions in order to protect the health and safety of employees. Measures or indicators of these characteristics need to be included in future studies.

In summary, the job and organizational characteristics listed above form a provisional profile of a healthy work organization, and can be used to design preventive interventions aimed at creating healthy work organizations. The model is provisional because it has not been validated in other manufacturing settings and has not been tested across other industry groups. Furthermore, it is not known whether all of the characteristics listed above are necessary and sufficient measures of a healthy work organization or whether certain combinations of characteristics are more important than others.

Proposals are being solicited to conduct field studies which identify characteristics of healthy work organizations.

#### **Purpose**

The purpose of this program is to focus on worksite primary prevention efforts, which can involve:

A. Examination of on-going studies in companies where changes are being, or have been, introduced to improve organizational effectiveness and employee health, or

B. New studies which test models of healthy work organizations.

Interventions can consist of structural and/or functional changes targeting culture/climate, values or management practices.

The major objectives should be development, installation, and evaluation of interventions to create healthy work organizations.

Project results, in combination with other research, will provide the basis for recommendations on how to create healthy work organizations.

#### **Program Requirements**

In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities under A. (Recipient Activities) and CDC/NIOSH will be responsible for activities under B. (CDC/NIOSH Activities).

##### *A. Recipient Activities*

1. Evaluate the effectiveness of healthy work organization interventions in reducing health care costs and stress-related health conditions while improving productivity and effectiveness.

2. Implement the study protocol that reviews the pertinent literature on healthy work organizations and describes the study methodology, data to be collected, and proposed analysis of the data. Present the protocol to a panel of scientific peer reviewers (if required) and revise the protocol as required for final approval.

3. Perform data collection and management. Data will include subjective and objective measures of worker health and performance, company health care costs, and performance/productivity indicators.

4. Prepare a report summarizing the study methodology, results obtained, and conclusions reached. Develop recommendations (e.g., best practices) for creating healthy work organizations.

5. Report study results to the scientific community via presentations at professional conferences and articles in peer-reviewed journals.

##### *B. CDC/NIOSH Activities*

1. Provide scientific and technical collaboration for the successful completion of this project.

2. Identify reviews and/or clearances that must be fulfilled by the recipient and, if necessary, assist in convening a scientific peer review panel to review draft study protocol.

3. Provide technical assistance, if needed, at key stages of the study including study design, survey instrument design, interpretation of results and preparation of written reports.

#### **Technical Reporting Requirements**

An original and two copies of a progress report are required annually. An original and two copies of a final performance report and Financial Status Report are due no later than 90 days after the end of the project period.

Annual progress report should include:

A. A brief program description.  
B. A listing of program goals and objectives accompanied by a comparison of the actual accomplishments related to the goals and objectives established for the period.

C. If established goals and objectives to be accomplished were delayed, describe both the reason for the deviation and anticipated corrective action or deletion of the activity from the project.

D. Other pertinent information, including the status of completeness, timeliness and quality of data.

#### **Application Content**

The entire application, including appendices, should not exceed 40 pages and the Proposal Narrative section contained therein should not exceed 25 pages. Pages should be clearly numbered and a complete index to the application and any appendices included. The original and each copy of the application must be submitted unstapled and unbound. All materials must be typewritten, double-spaced, with unreduced type (font size 12 point) on 8½" by 11" paper, with at least 1" margins, headers, and footers, and printed on one side only. Do not include any spiral or bound materials or pamphlets.

The applicant should provide a detailed description of first-year activities and briefly describe future-years objectives and activities.

##### *A. Title Page*

The heading should include the title of grant program, project title, organization, name, and address, project

director's name address and telephone number.

##### *B. Abstract*

A one page, singled-spaced, typed abstract must be submitted with the application. The heading should include the title of grant program, project title, organization, name and address, project director and telephone number. This abstract should include a work plan identifying activities to be developed, specific activities to be completed, and a time-line for completion of these activities.

##### *C. Proposal Narrative*

The narrative of each application must:

1. Briefly state the applicant's understanding of the need or problem to be addressed and the purpose of this project. Prepare a draft protocol for the study.

2. Proposals must include a description of the intervention or change strategy and an evaluation plan which includes both subjective and objective measures of antecedent factors and outcomes.

3. Describe clearly the objectives of this project, the steps and timelines to be taken in planning and implementing this project, and the respective responsibilities of the applicant for carrying out those steps.

4. Provide a proposed method of evaluating the accomplishments.

5. Provide documentation of access to potential study sites, and provide documentation of management and labor support for the study.

6. Document the applicant's expertise in the area of organizational behavior, organization development, job stress, and psychosocial risk factors as they pertain to healthy work organization research.

7. Provide the name, qualifications, and proposed time allocation of the Project Director who will be responsible for administering the project. Describe staff, experience, facilities, equipment available for performance of this project, and other resources that define the applicant's capacity or potential to accomplish the requirements stated above. List the names (if known), qualifications, and time allocations of the existing professional staff to be assigned to (or recruited for) this project, the support staff available for performance of this project, and the available facilities including space.

8. Human Subjects: State whether or not Humans are subjects in this proposal. (See *Human Subjects* in the Evaluation Criteria and Other Requirements sections.)

9. Inclusion of women, ethnic, and racial groups: Describe how the CDC policy requirements will be met regarding the inclusion of women, ethnic, and racial groups in the proposed research. (See *Women, Racial and Ethnic Minorities* in the Evaluation Criteria and Other Requirements sections.)

10. Provide a detailed budget which indicates: (a) anticipated costs for personnel, travel, communications, postage, equipment, supplies, etc., and (b) all sources of funds to meet those needs.

#### Evaluation Criteria

The application will be reviewed and evaluated according to the following criteria:

##### A. Understanding of the Problem (25%)

Responsiveness to the objective of the cooperative agreement including: (a) applicant's understanding of the general objectives of the proposed cooperative agreement, and (b) evidence of ability to design and evaluate organizational change interventions.

##### B. Program Personnel (15%)

1. Applicant's technical experience (e.g., in the areas of healthy work organizations, job stress, organizational behavior, organization development), and

2. The qualifications and time allocation of the professional staff to be assigned to this project.

##### C. Study Design (35%)

1. Adequacy of the study design and methodology for accomplishing the stated objectives. Steps proposed for implementing this project and the respective responsibilities of the applicant for carrying out those steps. Evidence of the applicant's access to companies who will serve as the study populations (e.g., commitment from company sites for installing and evaluating the interventions and for providing objective data for evaluation).

2. The degree to which the applicant has met the CDC policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed project. This includes: (a) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation; (b) The proposed justification when representation is limited or absent; (c) A statement as to whether the design of the study is adequate to measure differences when warranted; and (d) A statement as to whether the plan for recruitment and outreach for study participants include

the process of establishing partnerships with community(ies) and recognition of mutual benefits.

##### D. Project Planning (15%)

The applicant's schedule proposed for accomplishing the activities to be carried out in this project and for evaluating the accomplishments.

##### E. Facilities and Resources (10%)

The adequacy of the applicant's facilities, equipment, and other resources available for performance of this project.

##### F. Human Subjects (Not Scored)

Whether or not exempt from the Department of Health and Human Services (DHHS) regulations, are procedures adequate for the protection of human subjects? Recommendations on the adequacy of protections include: (1) protections appear adequate, and there are no comments to make or concerns to raise, (2) protections appear adequate, but there are comments regarding the protocol, (3) protections appear inadequate and the Objective Review Group has concerns related to human subjects; or (4) disapproval of the application is recommended because the research risks are sufficiently serious and protection against the risks are inadequate as to make the entire application unacceptable.

##### G. Budget Justification (Not Scored)

The budget will be evaluated to the extent that it is reasonable, clearly justified, and consistent with the intended use of funds.

#### Executive Order 12372 Review

This program is not subject to the Executive Order 12372 review.

#### 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 project is 93.283)

#### Other Requirements

##### Paperwork Reduction Act

Projects that involve the collection of information from ten or more individuals and funded by this cooperative agreement will be subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

#### Human Subjects

If the proposed project involves research on human subjects, the applicant must comply with the DHHS Regulations, 45 CFR Part 46, regarding the protection of human subjects. Assurance must be provided to demonstrate the project will be subject to initial and continuing review by an appropriate institutional review committee. The applicant will be responsible for providing assurance in accordance with the appropriate guidelines and form provided in the application kit.

In addition to other applicable committees, Indian Health Service (IHS) institutional review committees also must review the project if any component of IHS will be involved or will support the research. If any American Indian community is involved, its tribal government must also approve that portion of the project applicable to it.

#### Women, Racial and Ethnic Minorities

It is the policy of the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR) to ensure that individuals of both sexes and the various racial and ethnic groups will be included in CDC/ATSDR-supported research projects involving human subjects, whenever feasible and appropriate. Racial and ethnic groups are those defined in OMB Directive No. 15 and include American Indian, Alaskan Native, Asian, Pacific Islander, Black and Hispanic. Applicants shall ensure that women, racial and ethnic minority populations are appropriately represented in applications for research involving human subjects. Where clear and compelling rationale exist that inclusion is inappropriate or not feasible, this situation must be explained as part of the application. This policy does not apply to research studies when the investigator cannot control the race, ethnicity and/or sex of subjects. Further guidance to this policy is contained in the **Federal Register**, Vol. 60, No. 179, pages 47947-47951, and dated Friday, September 15, 1995.

#### Application Submission and Deadline

##### 1. Preapplication Letter of Intent

Although not a prerequisite of application, a non-binding letter of intent-to-apply is requested from potential applicants. The letter should be submitted to Victoria Sepe, Grants Management Branch, Procurement and Grants Office, CDC at the address listed in this section. It should be postmarked no later than July 8, 1997. The letter

should identify Program Announcement number 753, name of principal investigator, and address of the proposed project. The letter of intent does not influence review or funding decisions, but it will enable CDC to plan the review more efficiently and will ensure that each applicant receives timely and relevant information prior to application submission.

## 2. Application

The original and two copies of the application PHS Form 5161-1 (Revised 7/92, OMB Number 0937-0189) must be submitted to Victoria Sepe, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 321, Atlanta, GA 30305, on or before July 24, 1997.

1. **Deadline:** Applications will be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date, or

(b) Sent on or before the deadline date and received in time for submission to the objective review group. (The applicants must request a legibly dated U.S. Postal Service postmark or obtain a receipt from a commercial carrier or the U.S. Postal Service. Private metered postmarks will not be acceptable as proof of timely mailing.)

2. **Late Applicants:** Applications that do not meet the criteria in 1.(a) or 1.(b) above are considered late applications. Late applications will not be considered and will be returned to the applicants.

## Where To Obtain Additional Information

To receive additional written information call (404) 332-4561. You will be asked to leave your name, address, and telephone number and will need to refer to NIOSH Announcement 753. You will receive a complete program description, information on application procedures, and application forms. CDC will not send application kits by facsimile or express mail. Please refer to announcement number 753 when requesting information and submitting an application.

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from Victoria Sepe, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), Mailstop E-13, Room 321, 255 East Paces Ferry Road, NE., Atlanta, GA

30305, telephone (404) 842-6804, Internet: vxw1@cdc.gov.

Programmatic technical assistance may be obtained from Lawrence R. Murphy, Ph.D., Motivation and Stress Research Section, Applied Psychology and Ergonomics Branch, Division of Biomedical and Behavioral Science, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention (CDC), Mailstop C-24, 4676 Columbia Parkway, Cincinnati, OH 45226-1998, telephone (513) 533-8171, Internet: lrm2@cdc.gov.

Potential applicants may obtain a copy of Healthy People 2000 (Full Report, Stock No. 017-001-00474-0) or Healthy People 2000 (Summary Report, Stock No. 017-001-00473-1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325, telephone (202) 512-1800.

This and other CDC announcements are available through the CDC homepage on the Internet. The address for the CDC homepage is: <http://www.cdc.gov>.

Dated: May 30, 1997.

### Diane D. Porter,

*Acting Director, National Institute for Occupational Safety and Health Centers for Disease Control and Prevention (CDC).*

[FR Doc. 97-14766 Filed 6-5-97; 8:45 am]

BILLING CODE 4163-19-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

[Announcement 755]

#### NIOSH: Demonstration to Motivate Small Businesses to Adopt Appropriate Hazard Control Technology in a Single Small Business Sector; Fiscal Year 1997 Funds Availability

##### Introduction

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 1997 funds for a cooperative agreement program to demonstrate approaches to motivating small businesses to adopt hazard control technology.

CDC is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a national activity to reduce morbidity and mortality and improve the quality of life. This announcement is related to the priority area of Occupational Safety and Health. (For ordering a copy of Healthy People 2000,

see the section **WHERE TO OBTAIN ADDITIONAL INFORMATION.**)

### Authority

This program is authorized under Sections 20(a) and 22(e)(7) of the Occupational Safety and Health Act of 1970 [29 U.S.C. 669(a) and 671(e)(7)].

### Smoke-Free Workplace

CDC strongly encourages all grant recipients to provide a smoke-free workplace and promote the non-use of all tobacco products, and Public Law 103-227, the Pro-Children Act of 1994, prohibits smoking in certain facilities that receive Federal funds in which education, library, day care, health care, and early childhood development services are provided to children.

### Eligible Applicants

Applications may be submitted by public and private, non-profit or for-profit organizations and governments, and their agencies. Thus, universities, colleges, research institutions, hospitals, other public and private organizations, State and local health departments or their bona fide agents, federally recognized Indian tribal governments, Indian tribes or Indian tribal organizations, and small, minority- and/or women-owned businesses are eligible to apply.

**Note:** Public Law 104-65, dated December 19, 1995, prohibits an organization described in section 501(c)(4) of the IRS Code of 1986, that engages in lobbying activities to influence the Federal Government, from receiving Federal funds.

### Availability of Funds

Approximately \$120,000 is available in FY 1997 to fund approximately three awards. It is expected that the average award will be \$40,000, ranging from \$25,000 to \$55,000. It is expected that the awards will begin on or about September 1, 1997, with 12-month budget periods within project periods of up to two years. The funding estimate is subject to change.

Continuation awards within the project period will be determined on the basis of satisfactory progress and the availability of funds.

### Use of Funds

#### Restrictions on Lobbying

Applicants should be aware of restrictions on the use of HHS funds for lobbying of Federal or State legislative bodies. Under the provisions of 31 U.S.C. Section 1352 (which has been in effect since December 23, 1989), recipients (and their sub-tier contractors) are prohibited from using appropriated Federal funds (other than profits from a

Federal contract) for lobbying Congress or any Federal agency in connection with the award of a particular contract, grant, cooperative agreement, or loan. This includes grants/cooperative agreements that, in whole or in part, involve conferences for which Federal funds cannot be used directly or indirectly to encourage participants to lobby or to instruct participants on how to lobby.

In addition, the FY 1997 HHS Appropriations Act, which became effective October 1, 1996, expressly prohibits the use of 1997 appropriated funds for indirect or "grass roots" lobbying efforts that are designed to support or defeat legislation pending before State legislatures. This new law, Section 503 of Pub. L. No. 104-208, provides as follows:

Sec. 503(a) No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or video presentation designed to support or defeat legislation pending before the Congress, \* \* \* except in presentation to the Congress or any State legislative body itself.

(b) No part of any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence legislation or appropriations pending before the Congress or any State legislature.

Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1997, as enacted by the Omnibus Consolidated Appropriations Act, 1997, Division A, Title I, Section 101(e), Pub. L. No. 104-208 (September 30, 1996).

### Background

One of the biggest challenges faced by occupational health researchers and industrial hygiene engineers is the translation of the results of control research into actual improvements in the workplace beyond the individual sites studied. This is particularly difficult in the case of small businesses that require understandable and easy to use occupational safety and health information about cost-effective control technology. Small businesses do not have resources to develop or assess control technology on their own, and since the likelihood of smaller businesses being inspected by the Occupational Safety and Health Administration is much lower than it is

for larger businesses, there is less regulatory incentive to investigate and implement control technologies.

The variety of problems in small business makes it particularly difficult to develop effective prevention strategies. Further, serious accident rates are not likely to be recognized, because a single injury will be seen as a rare occurrence. For instance, with an injury rate of two per hundred person years, a firm with 10 employees could expect a single accident every five years while a firm with 100 employees could expect to have two accidents a year. Small businesses are grouped together for actuarial purposes which masks the workers compensation injury and illness expenses. Large firms, on the other hand, keep better records because their experience rating (based on one's injury and illness rate) will affect their workers' compensation costs. Overwhelming evidence exists that health and safety problems are very serious in small work sites. Innovative means will be required to reach small businesses.

Because of the frequency of their problems, small businesses were identified in Healthy People 2000 Occupational Goals as a group in need of special assistance. Development, identification and implementation of engineering controls and the conduct of intervention research have been both identified as a National Occupational Research Agenda (NORA) priority. This project will address those priorities by testing new approaches. (For ordering a copy of NORA, see section WHERE TO OBTAIN ADDITIONAL INFORMATION.)

### Purpose

This program will address health and safety problems affecting small business by identifying and verifying control solutions. It will develop and carry out a marketing strategy for outreach to affected small businesses. The experiences will be used to develop case studies which will be used individually to expand the adoption of control solutions nationwide and will also be combined to produce a document on general "lessons learned" in conducting this type of work. This document will provide guidance for future prevention efforts with small businesses.

### Program Requirements

In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities under A. (Recipient Activities) and CDC/NIOSH will be responsible for activities under B. (CDC/NIOSH Activities).

### A. Recipient Activities

1. Will identify an occupational hazard affecting a particular small business sector.
2. Plan and implement a demonstration project to identify and/or develop "best hazard control practices" for the selected business sector and implement a marketing strategy for outreach to a targeted affected small business sector. The targeted sector should be from among those known to have a high risk of occupational disease or injury or high levels of exposure to toxic materials. (Example: radiator repair shops, autobody repair shops, furniture strippers, dental offices)
3. Identify the appropriate control technology to reduce the risk of occupational disease in the selected small business sector. The control should be inexpensive enough to be acceptable by small businesses.
4. Plan, implement and evaluate the outreach strategy including audio-visual or printed materials, work with trade associations, labor groups, equipment or material suppliers or manufacturers, State or local government agencies, or other factors especially suited to the selected business sector. Document the success in communicating with, as well as encouraging the sector to take recommended controls/actions to reduce risk.
5. Develop a written case study of the outreach project.

### B. CDC/NIOSH Activities

1. Collaborate and provide technical assistance if needed, in the selection of appropriate small business sector for the outreach;
2. Provide technical assistance and consultation, with identifying needs and the selection of appropriate control technology;
3. Collaborate and provide technical assistance if needed, in the preparation of the case study of the outreach project.

### Technical Reporting Requirements

An original and two copies of semi-annual progress reports are required. Timelines for the semi-annual reports will be established at the time of award. Final financial status and performance reports are required no later than 90 days after the end of the project period. All reports are submitted to the Grants Management Branch, Procurement and Grants Office, CDC.

Semi-annual progress report should include:

- A. A brief program description.
- B. A listing of program goals and objectives, accompanied by a comparison of the actual

accomplishments related to the goals and objectives established for the period.

C. If established goals and objectives that were to be accomplished were delayed, describe both the reason for the deviation and anticipated corrective action or deletion of the activity from the project.

D. Other pertinent information, including the status of completeness, timelines and quality of data.

### Application Content

The entire application, including appendices, should not exceed 40 pages and the Proposal Narrative section contained therein should not exceed 25 pages. Pages should be clearly numbered and a complete index to the application and any appendices included. The original and each copy of the application must be submitted unstapled and unbound. All materials must be typewritten, double-spaced, with unreduced type (font size 12 point) on 8½" by 11" paper, with at least 1" margins, headers, and footers, and printed on one side only. Do not include any spiral or bound materials or pamphlets.

The applicant should provide a detailed description of first-year activities and briefly describe the second-year objective and activities.

#### A. Title Page

The heading should include the title of grant program, project title, organization, name and address, project director, and telephone number.

#### B. Abstract

A one page, singled-spaced, typed abstract must be submitted with the application. The heading should include the title of grant program, project title, organization, name and address, project director and telephone number. This abstract should include a work plan identifying activities to be developed, activities to be completed, and a timeline for completion of these activities.

#### C. Proposal Narrative

The narrative of each application must:

1. Briefly state the applicant's understanding of the need or problem to be addressed, the purpose, and goals over the 2-year period of this cooperative agreement. This may be reflected in a draft protocol for the study.

2. Describe the proposed small business sector, including the type of business, proposed geographical area for outreach, the number of businesses in

the proposed geographic area for outreach, hazard(s) to be addressed and rationale for selecting the sector.

Describe the proposed criteria to be used for selection of the control technology to be recommended, and outreach strategy. Describe how the project will be monitored.

3. Program Objectives and evaluation.

a. Describe in detail the objectives and methods used to achieve the objectives. The objectives should be specific, time-phased, measurable, and achievable during each budget period. The objectives should directly relate to the program goals. Identify the steps to be taken in planning and implementing the objectives and the responsibilities of the applicant for carrying out the steps.

b. Describe in detail the extent to which an evaluation plan describes the method and design for evaluation the outreach strategy.

4. Provide the name, qualifications, and proposed time allocation of the Project Director who will be responsible for administering the project. Describe staff, experience, facilities, equipment available for performance of this project, and other resources that would define the applicant's capacity or potential to accomplish the requirements stated above. List the names (if known), qualifications, and time allocations of the existing professional staff to be assigned to (or recruited for) this project, the support staff available for performance of this project, and the facilities including space.

5. Document the applicant's expertise, length, and magnitude of involvement in the area of conducting small business sector intervention efforts.

6. Human Subjects: State whether or not Humans are subjects in this proposal. (See *Human Subjects* in the Evaluation Criteria and Other Requirements sections.)

7. Inclusion of women, ethnic, and racial groups: Describe how the CDC policy requirements will be met regarding the inclusion of women, ethnic, and racial groups in the proposed research. (See *Women, Racial and Ethnic Minorities* in the Evaluation Criteria and Other Requirements sections.)

#### D. Budget

Provide a detailed budget which indicates anticipated costs for personnel, equipment, travel, communications, supplies, postage, and the sources of funds to meet these needs. The applicant should be precise about the program purpose of each budget item. For contracts described within the application budget, applicants should name the contractor,

if known; describe the services to be performed; and provide an itemized breakdown and justification for the estimated costs of the contract; the kinds of organizations or parties to be selected; the period of performance; and the method of selection. Place the budget narrative pages showing, in detail, how funds in each object class will be spent, directly behind form 424A. Do not put these pages in the body of the application. CDC may not approve or fund all proposed activities.

### Evaluation Criteria

The application will be reviewed and evaluated according to the following criteria:

#### A. Understanding of the Problem (20%)

Responsiveness to the objectives including:

1. Applicant's understanding of the general objectives of the proposed cooperative agreement, and
2. Evidence of ability to understand the problem and to conceive/design effective outreach strategies.

#### B. Program Personnel (25%)

The extent of the applicant's documented experience and prior work in the area of small business occupational health and safety interventions issues is documented, including length of time committed to conducting intervention effort; and collaboration with other individuals or groups is included.

#### C. Study Design (25%)

1. Steps proposed in planning and implementing this project and the respective responsibilities of the applicant for carrying out those steps. This must include how the control technology is to be identified and the process to develop the outreach strategy; and

2. The adequacy of the applicant's evidence of access to the small business sector selected.

#### D. Project Planning (15%)

1. The extent to which the proposed goals and objectives are clearly stated, time-phased, and measurable. The extent to which the methods are sufficiently detailed to allow for assessment of whether the objectives can be achieved for the budget period.

2. The degree to which the applicant has met the CDC policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed project. This includes: (a) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate

representation; (b) The proposed justification when representation is limited or absent; (c) A statement as to whether the design of the study is adequate to measure differences when warranted; and (d) A statement as to whether the plan for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

#### *E. Collaboration (5%)*

The extent to which the applicant provides evidence (e.g., letters of support and/or memoranda of understanding) of support from industry groups, and (or) labor groups, and (or) material/equipment supplier groups and (or) other appropriate groups with whom this collaboration will take place.

#### *F. Project Management and Staffing Plan (5%)*

The extent to which the management staff and their working partners are clearly described, appropriately assigned, and have pertinent skills and experiences. The extent to which the applicant proposes to involve appropriate personnel who have the needed qualifications to implement the proposed plan. The extent to which the applicant has the capacity to design, implement, and evaluate the proposed intervention program.

#### *G. Facilities and Resources (5%)*

The adequacy of the applicant's facilities, equipment, and other resources available for performance of this project.

#### *H. Human Subjects (Not Scored)*

Whether or not exempt from the Department of Health and Human Services (DHHS) regulations, are procedures adequate for the protection of human subjects? Recommendations on the adequacy of protections include: (1) protections appear adequate, and there are no comments to make or concerns to raise, (2) protections appear adequate, but there are comments regarding the protocol, (3) protections appear inadequate and the Objective Review Group has concerns related to human subjects or (4) disapproval of the application is recommended because the research risks are sufficiently serious and protection against the risks are inadequate as to make the entire application unacceptable.

#### *I. Budget Justification (Not Scored)*

The budget will be evaluated to the extent that it is reasonable, clearly justified, and consistent with the intended use of funds.

#### **Executive Order 12372 Review**

Applications are not subject to the Executive Order 12372 review.

#### **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 project is 93.283)

#### **Other Requirements**

##### *Paperwork Reduction Act*

Projects that involve the collection of information from ten or more individuals and funded by this cooperative agreement will be subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

##### **Human Subjects**

If the proposed project involves research on human subjects, the applicant must comply with the DHHS Regulations, 45 CFR Part 46, regarding the protection of human subjects. Assurance must be provided to demonstrate the project will be subject to initial and continuing review by an appropriate institutional review committee. The applicant will be responsible for providing assurance in accordance with the appropriate guidelines and form provided in the application kit.

In addition to other applicable committees, Indian Health Service (IHS) institutional review committees also must review the project if any component of IHS will be involved or will support the research. If any American Indian community is involved, its tribal government must also approve that portion of the project applicable to it.

##### *Women, Racial and Ethnic Minorities*

It is the policy of the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR) to ensure that individuals of both sexes and the various racial and ethnic groups will be included in CDC/ATSDR-supported research projects involving human subjects, whenever feasible and appropriate. Racial and ethnic groups are those defined in OMB Directive No. 15 and include American Indian, Alaskan Native, Asian, Pacific Islander, Black and Hispanic. Applicants shall ensure that women, racial and ethnic minority populations are appropriately

represented in applications for research involving human subjects. Where clear and compelling rationales exist that inclusion is inappropriate or not feasible, this situation must be explained as part of the application. This policy does not apply to research studies when the investigator cannot control the race, ethnicity and/or sex of subjects. Further guidance to this policy is contained in the **Federal Register**, Vol. 60, No. 179, pages 47947-47951, and dated Friday, September 15, 1995.

#### **Application Submission and Deadlines**

##### *A. Preapplication Letter of Intent*

Although not a prerequisite of application, a non-binding letter of intent-to-apply is requested from potential applicants. The letter should be submitted to Victoria F. Sepe, Grants Management Specialist, Grants Management Branch, CDC at the address listed in this section. It should be postmarked no later than July 3, 1997. The letter should identify program announcement number 755 and the name of the principal investigator. The letter of intent does not influence review or funding decisions, but it will enable CDC to plan the review more efficiently and will ensure that each applicant receives timely and relevant information prior to application submission.

##### *B. Application*

The original and two copies of the application PHS Form 5161-1 (Revised 7/92, OMB Number 0937-0189) must be submitted to Victoria Sepe, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 321, Atlanta, GA 30305, on or before July 22, 1997.

1. *Deadline:* Applications will be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date, or

(b) Sent on or before the deadline date and received in time for submission to the objective review group. (The applicants must request a legibly dated U.S. Postal Service postmark or obtain a receipt from a commercial carrier or the U.S. Postal Service. Private metered postmarks will not be acceptable as proof of timely mailing.)

2. *Late Applicants:* Applications that do not meet the criteria in 1.(a) or 1.(b) above are considered late applications. Late applications will not be considered in the current competition and will be returned to the applicants.

### Where To Obtain Additional Information

To receive additional written information call 404 332-4561. You will be asked to leave your name, address, and telephone number and will need to refer to Announcement 755. You will receive a complete program description, information on application procedures, and application forms. CDC will not send application kits by facsimile or express mail. Please refer to announcement number 755 when requesting information and submitting an application.

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from Victoria Sepe, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 321, Mailstop E-13, Atlanta, GA 30305, telephone (404) 842-6804; Internet: vxw1@cdc.gov.

Programmatic technical assistance may be obtained from James H. Jones, CIH, Associate Director for Science, Division of Physical Sciences and Engineering, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention (CDC), Mailstop R-2, 4676 Columbia Parkway, Cincinnati, OH 45226-1998, telephone (513) 841-4371, Internet: jhj1@cdc.gov.

This and other CDC announcements are available through the CDC homepage on the Internet. The address for the CDC homepage is: <http://www.cdc.gov>.

Potential applicants may obtain a copy of Healthy People 2000 (Full Report, Stock No. 017-001-00474-0) or Healthy People 2000 (Summary Report, Stock No. 017-001-00473-1) referenced in the introduction section through the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325, telephone (202) 512-1800.

### The National Occupational Research Agenda

Copies of this publication may be obtained from the National Institute for Occupational Safety and Health, Publications Office, 4676 Columbia Parkway, Cincinnati, OH 45226-1998 or telephone 1-800-356-4674, and is available through the NIOSH Home

Page; <http://www.cdc.gov/niosh/nora.html>.

Dated: May 30, 1997.

**Diane D. Porter,**

*Acting Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention (CDC).*

[FR Doc. 97-14768 Filed 6-5-97; 8:45 am]

BILLING CODE 4163-19-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

[Announcement 748]

#### Cooperative Agreements to Conduct Studies of Illnesses Among Persian Gulf War Veterans Notice of Availability of Funds for Fiscal Year 1997; Amendment

A notice announcing the availability of Fiscal Year 1997 funds for a cooperative agreement to conduct studies of illnesses among Persian Gulf War veterans was published in the **Federal Register** on May 5, 1997 [62 FR 24449]. The notice is amended as follows:

On page 24453, third column, under the heading "Where to Obtain Additional Information," in paragraph two, line ten, the telephone number of the programmatic technical assistance contact has been changed and should read: (770) 488-7300.

All other information and requirements of the May 5, 1997, notice remain the same.

Dated: June 2, 1997.

**Joseph R. Carter,**

*Acting Associate Director for Management and Operations, Centers for Disease Control and Prevention (CDC).*

[FR Doc. 97-14786 Filed 6-5-97; 8:45 am]

BILLING CODE 4163-18-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

#### Agency Information Collection Activities, Proposed Collection; Comment Request

*Title:* Early Head Start Evaluation Father Study.

*OMB No:* New Request.

*Description:* The Head Start Reauthorization Act of 1994 established a special initiative creating funding for services for families with infants and toddlers. In response the Administration on Children, Youth and Families (ACYF) designed the Early Head Start (EHS) program. In September 1995, ACYF awarded grants to 68 local programs to serve families with infants and toddlers. ACYF awarded grants to an additional 75 local programs in September 1996.

EHS programs are designed to produce outcomes in four domains: (1) child development, (2) family development, (3) staff development, and (4) community development. The Reauthorization required that this new initiative be evaluated. To study the effect of the initiative, ACYF awarded a contract through a competitive procurement to Mathematica Policy Research, Inc. (MPR) with a subcontract to Columbia University's Center for Young children and Families and to 15 EHS local research universities. The evaluation will be carried out from October 1, 1995 through September 30, 2000. Data collection activities that are the subject of this **Federal Register** notice are intended for the second phase of the EHS evaluation.

The sample for the assessments will be approximately 1,360 fathers from the 3,400 EHS sample families, whose mothers and infants/toddlers are participating in the study (see OMB #0970-0143) in 16 EHS study sites. Each family is randomly assigned to a treatment group or a control group. The assessments will be conducted through personal interviewing, structured observations and videotaping. All data collection instruments have been designed to minimize the burden on respondents by minimizing interviewing and assessment time. Participation in the study is voluntary and confidential.

The information will be used by government managers, Congress and others to better understand the roles of fathers and father-figures with their children and in the EHS program.

*Respondents:* Fathers or father-figures of children whose families are in the EHS national evaluation sample (both program and control group families).

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
24-Month Father Interview .....	635	1	1.0	635
Father-Child Videotaping Protocol .....	168	1	0.3	50
Estimated Total Annual Burden .....				685

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained by writing to The Administration for Children and Families, Office of Information Services, Division of Information Resource Management, 370 L'Enfant Promenade, S.W., Washington, DC 20047, Attn.: ACF Reports Clearance Officer. All requests should be identified by title.

*Comments are invited on:* (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the

burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: June 2, 1997.  
**Bob Sargis,**  
*Acting Reports Clearance Officer.*  
 [FR Doc. 97-14778 Filed 6-5-97; 8:45 am]  
 BILLING CODE 4000-01-M

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Children and Families**

**Submission for OMB Review; Comment Request**

*Title:* Voluntary Surveys of Program Partners to Implement Executive Order 12862 in the Administration for Children and Families.  
*OMB No.:* 0980-0266.

*Description:* Under the provisions of the Federal Paperwork Reduction Act of 1995 (Pub. L. 104-13), the Administration for Children and Families (ACF) is requesting clearance for instruments to implement Executive Order 12862 within the ACF. The purpose of the data collection is to obtain customer satisfaction information from those entities who are funded to be our partners in the delivery of services to the American public. ACF partners are those entities that receive funding to deliver services or assistance from ACF programs. Examples of partners are States and local governments, territories, service providers, Indian Tribes and tribal organizations, grantees, researchers, or other intermediaries serving target populations identified by and funded directly or indirectly by ACF. The surveys will obtain information about how well ACF is meeting the needs of our partners in operating the ACF programs.

*Respondents:* State, Local, Tribal Govt. or Not-for-Profit.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Governments .....	51	10	1	510
Head Start grantees & Delegates .....	200	1	.5	100
Other Discretionary Grant Programs .....	200	10	.5	1,000
Indian Tribes & tribal organizations .....	25	10	.5	50

*Estimated Total Annual Burden Hours:* 1,660.

*Additional Information:* Copies of the proposed collection may be obtained by writing to The Administration for Children and Families, Office of Information Services, Division of Information Resource Management Services, 370 L'Enfant Promenade, SW., Washington, D.C. 20447, Attn: ACF Reports Clearance Officer.

*OMB Comment:* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of

having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, N.W., Washington, D.C. 20503, Attn: Ms. Wendy Taylor.

Dated: May 29, 1997.  
**Bob Sargis,**  
*Acting Reports Clearance Officer.*  
 [FR Doc. 97-14777 Filed 6-5-97; 8:45 am]  
 BILLING CODE 4000-01-M

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. 97N-0201]

**Agency Information Collection Activities: Proposed Collection; Comment Request; Reopening of Comment Period**

**AGENCY:** Food and Drug Administration, HHS.  
**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is reopening the

comment period until June 13, 1997, for the proposed collection of certain information by the agency under the Paperwork Reduction Act of 1995 (the PRA).

**DATES:** Submit written comments on the collection of information for studies A and B by June 13, 1997.

**ADDRESSES:** Submit written comments on the collection of information for studies A and B to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Bldg., 725 17th St. NW., rm. 10235, Washington, DC 20503, Attn: Desk Officer for FDA. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Denver Presley, Office of Information Resources Management (HFA-250), Food and Drug Administration, 5600 Fishers Lane, rm. 16B-19, Rockville, MD 20857, 301-827-1472.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of May 23, 1997 (62 FR 28482), FDA published a notice soliciting comments on a data collection effort consisting of four consumer surveys regarding preferences for, and comprehension of information contained in different formats and methods for communication in over-the-counter (OTC) drug labels. For two of these studies (studies A and B), the agency has requested emergency processing of the proposed collection by OMB. To give interested persons additional time to submit comments on the proposed data collection for the two studies the agency is reopening the comment period until June 13, 1997.

Dated: June 2, 1997.

**William K. Hubbard,**  
*Associate Commissioner for Policy  
Coordination.*

[FR Doc. 97-14804 Filed 6-5-97; 8:45 am]

BILLING CODE 4160-01-F

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. 97D-0191]

#### Medical Devices; Guidance for Industry; Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products; Revised; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a revised guidance entitled, "Guidance for Industry; Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products." The revised guidance sets forth the types of tests the Center for Devices and Radiological Health (CDRH), FDA, believes are necessary to provide reasonable assurance of the safety and effectiveness of contact lens care products. The revised guidance accompanies a final rule, which appears elsewhere in this issue of the **Federal Register**, reclassifying rigid gas permeable contact lens solution; soft (hydrophilic) contact lens solution; and contact lens heat disinfecting units from class III (premarket approval) to class II (special controls).

**DATES:** Written comments may be submitted at any time.

**ADDRESSES:** Submit written requests for single copies of the revised guidance entitled, "Guidance for Industry Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products" (shelf number 674) to the Division of Small Manufacturers Assistance (HFZ-220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 301-443-6597 (outside MD 1-800-638-2041). Send two self-addressed adhesive labels to assist that office in processing your requests. Submit written comments on the revised guidance to the Dockets Management Branch (HFA-305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1-23, Rockville, MD 20857. Requests and comments should be identified with the docket number found in brackets in the heading of this document. Comments may be submitted at any time and will be used to determine whether to revise the guidance further.

**FOR FURTHER INFORMATION CONTACT:** James F. Saviola, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301-594-1744.

#### SUPPLEMENTARY INFORMATION:

##### I. The Statutory Requirements

The Safe Medical Devices Act (the SMDA) (Pub. L. 101-629), which amended the medical device provisions of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321 *et seq.*), contains specific provisions on transitional devices (i.e., those devices regulated as new drugs before the Medical Device Amendments of 1976 (Pub. L. 94-295) became law) (see

section 520(l) of the act (21 U.S.C. 360j(l)). In 1976, Congress classified into class III all transitional devices (i.e., those devices previously regulated as drugs). The legislative history of the SMDA reflects congressional concern that many transitional devices were being overregulated in class III (H. Rept. 808, 101st Cong., 2d sess. 26-27 (1990); S. Rept. 513, 101st Cong., 2d sess. 26-27 (1990)). Congress amended section 520(l) of the act to direct FDA to collect certain safety and effectiveness information from the manufacturers of transitional devices that still remain in class III to determine whether the devices should be reclassified into class II (special controls) or class I (general controls).

Under section 520(l)(5)(B) of the act, FDA was to publish regulations by December 1, 1992, either leaving the transitional class III devices in class III or revising their classification down to class I or class II. However, as permitted by section 520(l)(5)(C) of the act, in the **Federal Register** of November 30, 1992 (57 FR 56586), the agency published a notice extending the period for issuing such regulations until December 1, 1993. Due to limited resources, FDA was unable to publish the regulations before the December 1, 1993, deadline. In the **Federal Register** of April 1, 1996 (61 FR 14277), FDA published a proposed rule to reclassify from class III (premarket approval) to class II (special controls) the rigid gas permeable contact lens solution; the soft (hydrophilic) contact lens solution; and the contact lens heat disinfecting unit. FDA also announced the availability of a premarket notification (510(k)) draft guidance document for contact lens care products (61 FR 14330, April 1, 1996). Interested persons were invited to comment on the guidance document by May 31, 1996.

Elsewhere in this issue of the **Federal Register**, FDA is issuing a final rule reclassifying from class III (premarket approval) to class II (special controls) all transitional contact lens care products. In conjunction with the final rule, FDA is announcing the availability of the revised guidance for premarket notification for the reclassified contact lens care products entitled, "Guidance for Industry; Premarket Notification (510(k)) for Contact Lens Care Products."

##### II. The Revised Guidance

The revised guidance sets forth the types of testing that FDA believes will provide reasonable assurance of the continued safety and effectiveness of transitional contact lens care products. It also provides comprehensive

directions for manufacturers of contact lens care products to follow in submitting a 510(k) premarket notification submission demonstrating substantial equivalence of their device to a legally marketed contact lens care product (predicate device). Information on the battery of preclinical testing that may demonstrate substantial equivalence is included in the guidance. If the results of preclinical testing demonstrate that the device will have new characteristics, clinical performance data may be needed to establish substantial equivalence. If clinical performance data are needed, the guidance document suggests methodologies (e.g., size and scope of the study) to be included in the investigational protocol.

Other elements of the guidance include: (1) General information on the regulations and requirements for labeling contact lens care products; (2) information about 510(k) submission requirements relating to modifying a marketed contact lens care product; and (3) guidance for submitting a 510(k) notification for contact lens cases and contact lens accessories (i.e., mechanical cleaning aids and accessory cleaning pads).

In the event that clinical trials are necessary, FDA emphasizes that manufacturers are required to conduct the trials in accordance with the investigational device exemption regulations in 21 CFR part 812. At this time, FDA considers clinical studies of most contact lens care products to be nonsignificant risk investigations. For nonsignificant risk investigations, approval of an institutional review board (IRB) is necessary before initiating a clinical study, and an investigational plan and informed consent document must be presented to an IRB for review and approval. Prior FDA approval is not required.

However, FDA considers some clinical studies of solutions that contain new active ingredients for ophthalmic use and that are intended for use directly in the eye to be significant risk investigations that would require both IRB and FDA review and approvals. Examples of significant risk investigations requiring FDA and IRB review and approval include investigations of solutions intended for repeated use directly in the eye that contain new types of ingredients that have no history of ophthalmic use, that may require different testing than the preclinical tests in the guidance, that may contain ingredients that can perfuse through the cornea, or that may involve overlapping concerns with other FDA Centers, such as products or

studies incorporating a biologic or a pharmaceutical compound. Sponsors proposing to conduct such studies should contact James F. Saviola (address above) concerning the risk status of the proposed investigation prior to implementing their studies.

Comments received from the public on the draft guidance were summarized at the July 26, 1996, meeting of the Ophthalmic Devices Panel of the Medical Devices Advisory Committee.

### III. Summary and Analysis of Comments and FDA's Response

Separate comments were received from four individuals and a single set of comments from industry via the Contact Lens Institute. Comments were generally categorized as editorial, clarification, and substantive. The guidance document has been revised to address most of the editorial, providing clarification and substantive comments.

Comments pertaining to policy and clinical information are summarized as follows:

1. One comment suggested that FDA change the wording in the guidance which states that clinical studies of contact lens care products are nonsignificant risk investigations. The current wording in the guidance states that this is the case unless the device contains new active ingredients for ophthalmic use and is intended to be used directly in the eye.

FDA agrees in part with this comment. However, investigations of some in-eye products are significant risk investigations (e.g., investigations of solutions intended for repeated use directly in the eye that contain new types of ingredients that have no history of ophthalmic use, that may require different testing than the preclinical tests in the guidance, that may contain ingredients that can perfuse through the cornea, or that may involve overlapping concerns with other FDA Centers, such as products or studies incorporating a biologic or a pharmaceutical compound). The guidance has been revised to clarify when a contact lens care product investigation is considered significant risk and to recommend that sponsors contact FDA for guidance concerning risk status of such proposed investigations prior to beginning clinical studies.

2. One comment stated that discard dates alone will not necessarily reduce the risk of eye infections caused by contamination during use and suggested that the statement in the General Manufacturing section stating that, whenever possible, manufacturers should consider the use of discard dates

after opening, be revised to be more consistent with 21 CFR 800.10(b).

FDA agrees that the guidance should reflect the regulation and has revised the guidance accordingly. However, FDA believes that discard dates would help to minimize contamination of lens care products and that responsible manufacturers should work in this direction.

3. A few comments were received pertaining to recommendations for clinical trials (e.g., size and scope, study design, and testing matrix). One comment stated that the studies are too short and may not uncover complications such as different levels of patient hypersensitivity. That comment stated that clinical studies for all new lens care formulations should be, at a minimum, 3 months in length with at least 100 patients. Also, for products that are substantially the same as one already on the market with the same indication, clinical studies would still be necessary.

FDA has designed the guidance to include preclinical testing as the primary evidence for establishing substantial equivalence, with supplemental clinical testing as additional confirmatory information. The clinical recommendations include minimum patient numbers. Sample sizes are similar to those used in the daily wear contact lens guidance. FDA has revised the guidance to clarify that a 30 patient/1-month study is appropriate in certain matrices for products with active ingredients within marketed concentrations, as well as for higher or lower concentrations. Under study design, FDA has clarified the statement that a crossover design with an in vitro analysis is an example of a method that may be used for clearer effectiveness studies, rather than stating that it may be the best method to use. The guidance has been revised to include suggestions for sponsors choosing to include data from a patient population greater than the minimum size recommended.

In Appendix B for protocol considerations, FDA has revised the visit schedule to delete the 2-week visit for trials conducted longer than 1 month, provided for the use of other suitable well-defined grading scales (e.g., International Standards Organization Scale), and revised the investigator-patient ratio section to provide additional guidance for the number of patients per study site.

4. One comment suggested that the title of the "Adverse Reaction Section" be changed to "Serious Adverse Reaction." Another comment suggested that the discontinued eye summary

table be deleted. FDA disagrees with both of these comments. The first comment invites subjectivity of reporting adverse events.

Discontinuation information could provide important safety or efficacy information and should be reported.

Comments pertaining to preclinical information are summarized as follows:

Concerning microbiology, most comments submitted for clarification or minor changes in test methods have been included in the revised guidance. Many of these comments addressed preparation of the microbial challenge used to conduct the test. Substantive comments on the disinfection efficacy tests, which are the stand alone and regimen tests, addressed the panel of test organisms, the methodology, and the performance criteria.

Concerning test organisms, one comment recommended that FDA add to the current panel of microorganisms used for evaluating antimicrobial efficacy.

This comment was rejected. FDA believes the current panel is adequate for determining the substantial equivalence of newly marketed products. Manufacturers may choose to test products against additional microorganisms during product evaluation; however, FDA's current policy is that labeling claims may not highlight product efficacy against individual microorganisms.

Concerning methodology, comments addressed the need to include organic load and biofilm in the test procedures.

FDA's position remains unchanged regarding the inclusion of organic load to establish the substantial equivalence of disinfecting solutions. FDA did not incorporate two separate comments on organic load (i.e., one that suggested inclusion of a mild organic load in the stand alone test procedure and one that recommended elimination of organic load in the regimen test). Stand alone disinfecting products are labeled with cleaning instructions to remove organic load. For lens care regimens with milder disinfecting agents, it is necessary to include removal of simulated lens deposits during cleaning and rinsing steps.

FDA rejected a comment to evaluate biofilm in the lens case. The issue of biofilm formation can be adequately addressed through labeling recommendations for daily cleaning and frequent lens case replacement.

Concerns were raised on the currently recommended performance regimen criteria of less than three colony forming units to determine substantial equivalence of disinfecting regimens.

FDA agrees that manufacturers should have alternative performance criteria due to limited experience with the revised regimen test procedure. Therefore, the guidance has been revised to include an option based on directly comparing regimen test results for the device with those obtained for a predicate device.

FDA revised the guidance to include the experimental error ( $\pm 0.5$  log) in the performance criteria requiring stasis on yeast and mold counts.

Based on the comments received concerning the bacteriostasis test, the following revisions have been made in the guidance:

1. A correction to eliminate a microbial rechallenge in the bacteriostasis test.

2. Including bacteriostasis testing outside of the actual product container.

FDA has incorporated most suggested clarifications for chemistry and manufacturing. Revisions include the following for chemistry:

1. A solution compatibility test has been included in all product test matrices.

2. A wetting angle test is recommended for all conditioning solutions in the test matrix.

3. The following example has been added as a modification not requiring a 510(k): Nonsignificant manufacturing changes made in accordance with 21 CFR 807.81 that meet good manufacturing practice requirements.

Comments on the protocol for establishing shelf-life concerned microbiology and chemistry testing.

1. FDA rejected the suggestion that sponsors should submit and/or reference data from identically packaged contact lens care products to support shelf-life sterility since a product formulation may affect microbial growth during storage.

2. FDA has added the statement that manufacturing changes to smaller bottle sizes from identical materials, using an approved shelf-life protocol, is an example of a change not requiring a 510(k).

3. FDA has deleted the recommendation for disinfection efficacy testing at the end of the recommended shelf life.

4. FDA has included container inversion as one example for maximally testing the container/closure system as clarification, and not as a specific recommendation.

5. FDA has reevaluated the recommendation for accelerated testing for establishing shelf life beyond 2 years and the recommendation for 6 months ambient temperature data prior to marketing. The recommendation that

any shelf-life request beyond 2 years should be based on real time data has been eliminated. The guidance recommends that companies provide their shelf-life protocol in their 510(k) and certify that they will have shelf-life data sufficient to support their labeled expiration date prior to marketing their device.

Toxicology comments received on the product specific test matrices include:

1. Replacing the current 3-day acute ocular irritation test with a 5-day test.

2. Adding an additional battery of toxicology tests for the higher than marketed concentrations.

3. Including cytotoxicology and an ocular irritation toxicology screening test for active ingredients within marketed concentrations and for lower than marketed concentrations.

FDA's response to these comments are as follows:

1. The suggested 3-day acute ocular irritation test currently in the guidance is based on historical evidence that if adverse events occur, they will generally manifest themselves during the 3-day time period. If a sponsor prefers the 5-day test, this is acceptable.

2. While the additional battery of tests for the higher than marketed concentrations may be appropriate in some cases depending on the ingredients, they are not generally appropriate for all product specific matrices.

3. FDA agrees that toxicology screening is appropriate and the guidance has been revised accordingly.

Several comments were received concerning labeling. Many of these suggested editorial changes which have been incorporated in the revised guidance. The following four labeling comments were rejected:

1. FDA has not deleted the warning, "To Avoid Contaminating Your Solution, Do Not Transfer to Other Bottles or Containers." This warning was recommended by the Ophthalmic Devices Panel as one means of helping to minimize contamination. FDA believes that, at a minimum, this warning should be on larger-sized bottles.

2. Company phone numbers to which adverse reactions should be reported is still included as a means of encouraging device reporting back to the manufacturer.

3. Boxed warnings were included in the "Write-it-Right" labeling example to provide an example of labeling developed according to specific principles. These warnings remain in the guidance because they are examples and not specific recommendations.

4. FDA has revised the labeling examples to make product-specific warnings more direct.

FDA will continue to evaluate and amend the guidance in the future if changes are necessary to assure the continued safety and effectiveness of contact lens care products.

#### IV. Significance of a Guidance

In the past, guidances have generally been issued under § 10.90(b) (21 CFR 10.90(b)), which provides for the use of guidances to state procedures or standards of general applicability that are not legal requirements, but that are acceptable to FDA. The agency is now in the process of revising § 10.90(b). Therefore, this guidance is not being issued under the authority of § 10.90(b). This guidance document represents the agency's current thinking on the tests the agency believes necessary to provide reasonable assurance of the safety and effectiveness of transitional contact lens care products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulations, or both.

#### V. Requests for Comments

Interested persons may, at any time, submit to the Dockets Management Branch and to the contact person (addresses above) comments on the revised guidance. Two copies of any comments should be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The revised guidance and received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. Comments received will be considered in future revisions of the guidance.

FDA/CDRH maintains an entry on the World Wide Web (WWW) for easy access to information including text, graphics, and files that may be downloaded to a PC with access to the Web. Updated on a regular basis, the CDRH home page includes the "Guidance for Industry; Premarket Notification (510(k)) for Contact Lens Care Products," device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturers' assistance, information on video conferencing and electronic submissions, mammography matters, and other device-oriented information. The CDRH home page may be accessed

at <http://www.fda.gov/cdrh>. "Guidance for Industry Premarket Notification (510(k)) Guidance Document for Contact Lens Care Products" will be available on the Ophthalmic Guidance Document page at: <http://www.fda.gov/cdrh/ode/ed.op.html>. A text-only version of the CDRH Web site is also available from a computer or VT-100 compatible terminal by dialing 1-800-222-0185 (terminal settings are 8/1/N). Once the modem answers, press Enter several times and then select menu choice 1: FDA Bulletin Board Service. From there follow instructions for logging in, and at BBS Topics Page, arrow down to the FDA home page (do not select the first CDRH entry). Then select Medical Devices and Radiological Health for general information, or arrow down for specific topics.

Dated: May 28, 1997.

**Joseph A. Levitt,**

*Deputy Director for Regulations Policy, Center for Devices and Radiological Health.*

[FR Doc. 97-14750 Filed 6-5-97; 8:45 am]

BILLING CODE 4160-01-F

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Care Financing Administration

[Document Identifier: HCFA-R-183]

#### Agency Information Collection Activities: Submission for OMB Review; Comment Request

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, has submitted to the Office of Management and Budget (OMB) the following proposal for the collection of information. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

*Type of Information Collection Request:* Extension of currently approved collection; *title of Information Collection:* Voluntary Customer Surveys to Implement Executive Order 12862

within HCFA; *Form No.:* HCFA-R-183; *Use:* These voluntary customer surveys will be used to implement E.O 12862 to ascertain customer satisfaction with HCFA programs in terms of service quality. Surveys will involve individuals that are in direct or indirect beneficiaries of HCFA service and/or assistance, not partners. *Frequency:* Annually; *Affected Public:* Individuals or households; *Number of Respondents:* 1; *Total Annual Responses:* 1; *Total Annual Hours:* 1.

To obtain copies of the supporting statement for the proposed paperwork collections referenced above, access HCFA's WEB SITE ADDRESS at <http://www.hcfa.gov/regs/prdact95.htm>, or to obtain the supporting statement and any related forms, E-mail your request, including your address and phone number, to [Paperwork@hcfa.gov](mailto:Paperwork@hcfa.gov), or call the Reports Clearance Office on (410) 786-1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: OMB Human Resources and Housing Branch, Attention: Allison Eydt, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: May 29, 1997.

**Edwin J. Glatzel,**

*Director, Management Analysis and Planning Staff, Office of Financial and Human Resources, Health Care Financing Administration.*

[FR Doc. 97-14759 Filed 6-5-97; 8:45 am]

BILLING CODE 4120-03-M

## HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Cancer Institute; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Cancer Institute Special Emphasis Panel (SEP) meeting:

*Name of SEP:* Prostate, Lung, Colorectal and Ovarian (PLCO) Cancer Screening Trial Expansion for Minority Enrollment.

*Date:* July 9, 1997.

*Time:* 8:30 a.m. to 5:30 p.m.

*Place:* Executive Plaza North, Conference Room E, 6130 Executive Boulevard, Rockville, MD 20852.

*Contact Person:* Wilma Woods, Ph.D., Scientific Review Administrator, National Cancer Institute, NIH, Executive Plaza North, Room 609, 6130

Executive Boulevard, MSC 7410, Bethesda, MD 20892-7410, Bethesda, MD 20892-7410, Telephone: 301/496-7903.

*Purpose/Agenda:* To evaluate and review grant applicants.

The meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. Applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: June 1, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-14843 Filed 6-5-97; 8:45 am]

BILLING CODE 4140-01-M

## HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Cancer Institute; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Cancer Institute Special Emphasis Panel (SEP) meeting:

*Name of SEP:* Minority Adolescent HIV Research Project.

*Date:* June 9, 1997.

*Time:* 1:00 p.m.

*Place:* Teleconference, National Cancer Institute, Executive Plaza North, Conference Room G, 6130 Executive Boulevard, Bethesda, MD 20892.

*Contact Person:* Lalita Palekar, Ph.D., Scientific Review Administrator, National Cancer Institute, NIH, Executive Plaza North, Room 601, 6130 Executive Boulevard, MSC 7410, Bethesda, MD 20892-7410, Telephone: 301/496-7575.

*Purpose/Agenda:* To evaluate and review grant applications.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

The meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. Applications and the discussions could reveal confidential trade secrets or commercial property such as patentable

material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: June 1, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-14844 Filed 6-5-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Human Genome Research Institute; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings:

*Agenda/Purpose:* To review and evaluate grant applications and/or contract proposals.

*Name of Committee:* National Human Genome Research Institute, Special Emphasis Panel 02.

*Date:* June 17, 1997.

*Time:* 8:30-9:30 am.

*Place:* Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

*Name of Committee:* National Human Genome Research Institute Initial Review Group, Ethical, Legal, and Social Implications Subcommittee.

*Date:* June 17, 1997.

*Time:* 9:30 am-5:00 pm.

*Place:* Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

*Name of Committee:* National Human Genome Research Institute, Special Emphasis Panel 03.

*Date:* June 18, 1997.

*Time:* 8:30-12:00 noon.

*Place:* Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

*Name of Committee:* National Human Genome Research Institute Initial Review Group, Genome Research Review Subcommittee.

*Date:* June 18, 1997.

*Time:* 12:00 noon-6:00 pm.

*Place:* Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

This notice is being published less than 15 days prior to the above meetings due to the urgent need to meet timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Human Genome Research Institute, Special Emphasis Panel 01.

*Date:* July 9, 1997.

*Time:* 8:30-5:00 pm.

*Place:* ANA Hotel, 2401 M Street, NW., Washington, D.C. 20037.

*Contact Person:* Rudy Pozzatti, Ph.D., Office of Scientific Review, National Center for Human Genome Research, National Institutes of Health, Building 38A, Room 604, Bethesda, Maryland 20892, (301) 402-0838.

The meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. The applications and/or contract proposals, and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalogue of Federal Domestic Assistance Program No. 93.172, Human Genome Research)

Dated: June 1, 1997.

**LaVerne Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-14846 Filed 6-5-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Mental Health; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting of the National Institute of Mental Health Special Emphasis Panel:

*Agenda/Purpose:* To review and evaluate grant applications.

*Committee Name:* National Institute of Mental Health Special Emphasis Panel.

*Date:* June 23, 1997.

*Time:* 11:15 a.m.

*Place:* Parklawn, Room 9C-26, 5600 Fishers Lane, Rockville, MD 20857.

*Contact Person:* Phyllis D. Artis, Parklawn, Room 9C-26, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 301-443-6470.

The meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This notice is being published less than fifteen days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

(Catalog of Federal Domestic Assistance Program Numbers 93.242, 93.281, 93.282)

Dated: June 1, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-14842 Filed 6-5-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to Section 19(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following advisory committee meeting of the National Institute of General Medical Sciences:

*Committee Name:* Minority Biomedical Research Support Subcommittee (MBRS) Special Emphasis Panel.

*Date:* June 18, 1997.

*Time:* 2:00 p.m.—until conclusion.

*Place:* Telephone Conference, Natcher Building—Room 1 AS-19, 45 Center Drive, Bethesda, Maryland 20892-6200.

*Contact Person:* Michael A. Sesma, Ph.D., Scientific Review Administrator, NIGMS, Office of Scientific Review, 45 Center Drive, Room 1AS-19, Bethesda, MD 20892-6200, 301-594-2048.

*Purpose:* To review institutional research training grant applications.

This notice is being published less than 15 days prior to the above meeting due to the urgent need to meet timing limitations imposed by the grant review and funding cycle.

This meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. The discussions of these applications could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. 93.821, Biophysics and Physiological Sciences; 93.859, Pharmacological Sciences; 93.862, Genetics Research; 93.863, Cellular and Molecular Basis of Disease Research; 93.880, Minority Access Research Careers [MARC]; and 93.375, Minority Biomedical Research Support [MBRS])

Dated: June 1, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-14845 Filed 6-5-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Dental Research; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Dental Research Special Emphasis Panel (SEP) meetings:

*Name of SEP:* National Institute of Dental Research Special Emphasis Panel—Review of R44 application (97-53).

*Dates:* June 17, 1997.

*Time:* 1:00 p.m.

*Place:* Natcher Building, Rm. 4AN-44F, National Institutes of Health, Bethesda, MD 20892, (teleconference).

*Contact Person:* Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN-44F, Bethesda, MD 20892, (301) 594-2372.

*Purpose/Agenda:* To evaluate and review grant applications and/or contract proposals.

*Name of SEP:* National Institute of Dental Research Special Emphasis Panel—Review of R42 Application (97-51).

*Dates:* June 18, 1997.

*Time:* 9:00 a.m.

*Place:* Natcher Building, Rm. 4AN-44F, National Institutes of Health, Bethesda, MD 20892, (teleconference).

*Contact Person:* Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN-44F, Bethesda, MD 20892, (301) 594-2372.

*Name of SEP:* National Institute of Dental Research Special Emphasis Panel—Review of PO1 application (97-52).

*Purpose/Agenda:* To evaluate and review grant applications and/or contract proposals.

*Dates:* June 19-20, 1997.

*Time:* 8:30 a.m.

*Place:* Marriott Pooks Hill, 5151 Pooks Hill Road, Bethesda, MD 20814.

*Contact Person:* Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN-44F, Bethesda, MD 20892, (301) 594-2372.

*Purpose/Agenda:* To evaluate and review grant applications and/or contract proposals.

*Name of SEP:* National Institute of Dental Research Special Emphasis Panel—Review of Contract (97-56).

*Dates:* June 23, 1997.

*Time:* 1:00 p.m.

*Place:* Natcher Building, Rm. 4AN-44F, National Institutes of Health, Bethesda, MD 20892, (teleconference).

*Contact Person:* Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN-44F, Bethesda, MD 20892, (301) 594-2372.

*Purpose/Agenda:* To evaluate and review grant applications and/or contract proposals.

*Name of SEP:* National Institute of Dental Research Special Emphasis Panel—Review of Contract (97-58).

*Dates:* June 24, 1997.

*Time:* 2:30 p.m.

*Place:* Natcher Building, Rm. 4AN-44F, National Institutes of Health, Bethesda, MD 20892, (teleconference).

*Contact Person:* Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN-44F, Bethesda, MD 20892, (301) 594-2372.

*Purpose/Agenda:* To evaluate and review grant applications and/or contract proposals.

This notice is being published less than 15 days prior to the above meetings due to the urgent need to meet timing limitations imposed by the review and funding cycle.

*Name of SEP:* National Institute of Dental Research Special Emphasis Panel—Review of PO1 application (97-44).

*Dates:* July 6-8, 1997.

*Time:* 8:30 a.m.

*Place:* Marriott Pooks Hill, 5151 Pooks Hill Road, Bethesda, MD 20814.

*Contact Person:* Dr. Philip Washko, Scientific Review Administrator, 4500 Center Drive, Natcher Building, Room 4AN-44F, Bethesda, MD 20892, (301) 594-2372.

*Purpose/Agenda:* To evaluate and review grant applications and/or contract proposals.

*Name of SEP:* National Institute of Dental Research Special Emphasis Panel—Review of PO1 application (97-46).

*Dates:* July 14-15, 1997.

*Time:* 8:30 a.m.

*Place:* Marriott Pooks Hill, 5151 Pooks Hill Road, Bethesda, MD 20814.

*Contact Person:* Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN-44F, Bethesda, MD 20892, (301) 594-2372.

*Purpose/Agenda:* To evaluate and review grant applications and/or contract proposals.

The meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the application and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research)

Dated: June 1, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-14847 Filed 6-5-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4235-N-06]

### Federal Property Suitable as Facilities to Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:**

Mark Johnston, room, 7256, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708-1226; TDD number for the hearing- and speech-impaired (202) 708-2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1-800-927-7588.

**SUPPLEMENTARY INFORMATION:** In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless v. Veterans Administration*, No. 88-2503-OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Brian Rooney, Division of Property Management, Program Support Center, HHS, room 5B-41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443-2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the

opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1-800-927-7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Air Force:* Ms. Barbara Jenkins, Air Force Real Estate Agency (Area—MI), Bolling Air Force Base, 112 Luke Avenue, Suite 104, Building 5683, Washington DC 20332-8020; (202) 767-4184; *Energy:* Ms. Marsha Penhaker, Department of Energy, Facilities Planning and Acquisition Branch, FM-20, Room 6H-058, Washington, DC 20585; (202) 586-0426; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW, Washington, DC 20405; (202) 501-2059; *Navy:* Mr. Charles C. Cocks, Department of the Navy, Director, Real Estate Policy Division, Naval Facilities Engineering Command, Code 241A, 200 Stovall Street, Alexandria, VA 22332-2300; (703) 325-7342; (These are not toll-free numbers).

Dated: May 29, 1997.

**Fred Karnas, Jr.**,  
*Acting Deputy Assistant Secretary, for Economic Development.*

**Title V, Federal Surplus Property Program  
Federal Register Report for 06/06/97**

**Suitable/Available Properties**

*Buildings (by State)*

North Carolina

Bldg. 117, Camp Lejeune  
Greater Sandy Run Training Area  
Camp Lejeune Co: Onslow NC 28542-  
Landholding Agency: Navy  
Property Number: 779720042  
Status: Unutilized  
Comment: 1456 sq. ft., frame, off-site use only

Bldg. 118, Camp Lejeune  
Greater Sandy Run Training Area  
Camp Lejeune Co: Onslow NC 28542-  
Landholding Agency: Navy  
Property Number: 779720043  
Status: Unutilized  
Comment: 1456 sq. ft., frame, off-site use only

**Suitable/Unavailable Properties**

*Buildings (by State)*

Kansas

Bldg. 2703, Forbes Field  
Co: Topeka KS  
Landholding Agency: Air Force  
Property Number: 189720042  
Status: Unutilized  
Comment: 192,000 sq. ft. warehouse, needs major repairs

Nebraska

Bldg. 64  
Offutt AFB  
Silver Creek Co: Nance NE 68113-  
Landholding Agency: Air Force  
Property Number: 189720040  
Status: Unutilized  
Comment: 4000 sq. ft., most recent use—  
admin., needs major rehab, possible  
asbestos/lead base paint

*Land (by State)*

Nebraska

Land/Offutt Comm. Annex No. 4  
Silver Creek Co: Nance NE 68663-  
Landholding Agency: Air Force  
Property Number: 189720041  
Status: Unutilized  
Comment: 354 acres, most recent use—radio  
transmitter site, wetlands, isolated area

**Unsuitable Properties**

*Buildings (by State)*

California

Marine Pollution Laboratory  
Granite Canyon  
Monterey Co: Monterey CA 93940-  
Landholding Agency: GSA  
Property Number: 549720005  
Status: Surplus  
Reason: Secured Area, GSA Number: 9-C-  
CA-1499

North Carolina

Bldg. M178, Camp Lejeune

Camp Johnson Area  
Camp Lejeune Co: Onslow NC 28542-0004  
Landholding Agency: Navy  
Property Number: 779720044  
Status: Unutilized  
Reason: Extensive deterioration, Secured Area

Bldg. TC1059, Camp Lejeune  
French Creek Area  
Camp Lejeune Co: Onslow NC 28542-0004  
Landholding Agency: Navy  
Property Number: 779720045  
Status: Unutilized  
Reason: Extensive deterioration, Secured Area

Oklahoma  
Bldgs. 4a, 4b, 6, 8, 9, 11, 12  
NIPER  
Bartlesville, Co: Washington, OK 74003-  
Landholding Agency: Energy  
Property Number: 419720003  
Status: Unutilized  
Reason: Extensive deterioration

Wisconsin  
North Point Light Station  
North Point Co: Milwaukee WI 53211-5860  
Landholding Agency: GSA  
Property Number: 549720004  
Status: Excess  
Reason: Other  
Comment: No legal access, GSA Number: 1-U-WI-577

Port Washington Light Station  
Port Washington Co: Ozaukee WI 53074-  
Landholding Agency: GSA  
Property Number: 549720006  
Status: Excess  
Reason: Within 2000 ft. of flammable or explosive material, GSA Number: 1-U-WI-577

#### Land (by State)

Louisiana  
Harrison Lock & Dam No. 2  
Harrisonburg Co: Catahoula LA 71340-  
Landholding Agency: GSA  
Property Number: 549720003  
Status: Excess  
Reason: Floodway, GSA Number: 7-D-LA-0552

[FR Doc. 97-14522 Filed 6-5-97; 8:45 am]

BILLING CODE 4210-29-M

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Availability of Draft Recovery Plan for the Santa Cruz Cypress (*Cupressus Abramsiana*) for Review and Comment

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of document availability.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) announces the availability for public review of a draft Recovery Plan for the Santa Cruz cypress (*Cupressus abramsiana*). The Santa Cruz cypress is a tree restricted to

5 populations totalling approximately 5,100 individuals in Santa Cruz and San Mateo counties, California.

**DATES:** Comments on the draft recovery plan must be received on or before August 5, 1997 to receive consideration by the Service.

**ADDRESSES:** Copies of the draft recovery plan are available for inspection, by appointment, during normal business hours at the following location: U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, California 93003; and the Santa Cruz Public Library, 224 Church St., Santa Cruz, CA 95060. Requests for copies of the draft recovery plan and written comments and materials regarding this plan should be addressed to Judy Hohman, Acting Field Supervisor, at the above Ventura address.

**FOR FURTHER INFORMATION CONTACT:** Constance Rutherford, Botanist, at the above Ventura address, (805) 644-1766.

#### 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 the conservation of the species, establish criteria for the recovery levels for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act, 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 public notice and an opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during the public comment period prior to approval of each new or revised Recovery Plan. Substantive technical comments will result in changes to the plans. Substantive comments regarding recovery plan implementation may not necessarily result in changes to the recovery plans, but will be forwarded to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions.

Individualized responses to comments will not be provided.

The Santa Cruz cypress is a tree in the Cypress family (Cupressaceae) currently and historically located in patches within coastal chaparral and mixed evergreen forests on sandy or gravelly, well drained soils in Santa Cruz and San Mateo counties, California. This species has been threatened by conversion of habitat to agriculture, logging, residential development, genetic introgression, interruption of natural fire patterns, disease and insect infestations, and invasion of alien plant species.

This plan provides a framework for the recovery of the Santa Cruz cypress so that protection by the Act is no longer necessary. To accomplish this objective, needed tasks include: protection from incompatible land uses (i.e., timber harvest, agriculture, developments, recreation), implementation of resource management plans that would manage for long-term viability of the populations (i.e., mimic natural fire regime, address genetic introgression, and control insect infestations), and further research into the biology of the species and the threats facing it.

#### 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 this plan.

#### Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

#### Don Weathers,

*Acting Regional Director, U.S. Fish and Wildlife Service, Region 1.*

[FR Doc. 97-14669 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-55-P

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Incidental Take Permit for Red-cockaded Woodpeckers in Association With Timber Management Activities on Two Properties in Alachua and Citrus Counties, Florida; Availability of an Environmental Assessment and Receipt of a Joint Application

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Holnam, Inc., Crystal River Limestone Mine and Carl L. Johnson, Trustee, Eric Parker Realtor Kallman

tract (Applicants) have jointly applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit (ITP) pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The proposed permit would authorize the incidental take of a federally endangered species, the red-cockaded woodpecker, *Picoides borealis* (RCW), known to occur on the two tracts of lands owned by the Applicants. The Holnam, Inc., Crystal River Limestone Mine ownership (HCR Tract) is located in Citrus County, Florida. The Eric Parker Realtor Kallman ownership (Kallman Tract) is located in Alachua County, Florida. The Applicants are requesting an ITP in order to harvest the timber on their respective properties for economic reasons. The proposed ITP would authorize incidental take of a single RCW on the Kallman Tract and up to two groups of RCWs on the HCR Tract, in exchange for mitigation elsewhere as described further in the **SUPPLEMENTARY INFORMATION** section below.

The Service also announces the availability of an environmental assessment (EA) and habitat conservation plan (HCP) for the incidental take application. Copies of the EA and/or HCP may be obtained by making a request to the Regional Office (see **ADDRESSES**). Requests must be in writing to be processed. This notice also advises the public that the Service has made a preliminary determination that issuing the ITP is not a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended. The Finding of No Significant Impact (FONSI) is based on information contained in the EA and HCP. The final determination will be made no sooner than 30 days from the date of this notice. This notice is provided pursuant to Section 10 of the Act and NEPA regulations (40 CFR 1506.6). The Service specifically requests comment on the appropriateness of the "No Surprises" assurances should the Service determine that an ITP will be granted and based upon the submitted HCP. Although not explicitly stated in the HCP, the Service has, since August 1994, announced its intention to honor a "No Surprises" Policy for applicants seeking ITPs. Copies of the Service's "No Surprises" Policy may be obtained by making a written request to the Regional Office (see **ADDRESSES**). The Service is soliciting public comments and review the applicability of the "No

Surprises" Policy to this application and HCP.

**DATES:** Written comments on the permit application, EA, and HCP should be sent to the Service's Regional Office (see **ADDRESSES**) and should be received on or before July 7, 1997.

**ADDRESSES:** Persons wishing to review the application, HCP, and EA may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or Field Supervisor, U.S. Fish and Wildlife Service, 6620 Southpoint Drive, South, Suite 310, Jacksonville, Florida 32216-0912. Written data or comments concerning the application, EA, or HCP should be submitted to the Regional Office. Requests for the documentation must be in writing to be processed. Comments must be submitted in writing to be processed. Please reference permit number PRT-829937 in such comments, or in requests of the documents discussed herein.

**FOR FURTHER INFORMATION CONTACT:** Mr. Rick G. Gooch, Regional Permit Coordinator, (see **ADDRESSES** above), telephone: 404/679-7110; or Ms. Dawn Zattau, Fish and Wildlife Biologist, Jacksonville Field Office, (see **ADDRESSES** above), telephone: 904/232-2580, extension 120.

**SUPPLEMENTARY INFORMATION:** The RCW is a territorial, non-migratory cooperative breeding bird species. RCWs live in social units called groups which generally consist of a breeding pair, the current year's offspring, and one or more helpers (normally adult male offspring of the breeding pair from previous years). Groups maintain year-round territories near their roost and nest trees. The RCW is unique among the North American woodpeckers in that it is the only woodpecker that excavates its roost and nest cavities in living pine trees. Each group member has its own cavity, although there may be multiple cavities in a single pine tree. The aggregate of cavity trees is called a cluster. RCWs forage almost exclusively on pine trees and they generally prefer pines greater than 10 inches diameter at breast height. Foraging habitat is contiguous with the cluster. The number of acres required to supply adequate foraging habitat depends on the quantity and quality of the pine stems available.

The RCW is endemic to the pine forests of the Southeastern United States

and was once widely distributed across 16 States. The species evolved in a mature fire-maintained ecosystem. The RCW has declined primarily due to the conversion of mature pine forests to young pine plantations, agricultural fields, and residential and commercial developments, and to hardwood encroachment in existing pine forests due to fire suppression. The species is still widely distributed (presently occurs in 13 Southeastern States), but remaining populations are highly fragmented and isolated. Presently, the largest known populations occur on federally owned lands such as military installations and national forests.

The most recent estimate of the status of the State of Florida's RCW population is 1995. Data indicates that 1,285 active RCW clusters occur, of which 1,063 (82.7 percent) exist on Federal lands, 128 (10 percent) exist on State-owned lands, and 94 (7.3 percent) exist on private lands.

Both the RCWs on both the Kallman and HCR Tracts exist in a highly fragmented landscape. As indicated in the accompanying HCP, data suggests that the RCW population on both tracts are experiencing a long-term decline that will result in local extirpation at some point in the near future. The nearest known RCWs to the Kallman property occur at Camp Blanding (15 miles away) and some isolated scattered groups in western Putnam County (15 miles away). Few suitable RCW habitats and groups located in region of the HCR Tract are scattered among predominately agricultural lands. Thirty RCW groups occur within 13 miles of the HCR Tract at the Goethe State Forest and vicinity, 1 group on private lands 10 miles to the southeast, and 58 groups approximately 17 miles away at Withlacoochee State Forest.

One family of the threatened Florida scrub jay (*Aphelocoma coerulescens*) occur on the HCR Tract but will not be affected by the proposed timber harvesting activities and are not subject to the ITP request from the Applicants.

The HCP provides mitigation measures for the proposed incidental taking including habitat enhancement and translocation of the remaining RCWs during a 3-year mitigation period, or until success is achieved, whichever is shorter. The HCP provides a funding mechanism for these mitigation measures.

#### **HCR Tract**

The conservation measures proposed to offset impacts are:

- The Applicant will construct and install a minimum of four (4) completed

artificial cavity inserts within three (3) selected recruitment clusters within the Osceola National Forest (OSNF). The recruitment cluster locations will be determined in cooperation with the Applicant, the U.S. Forest Service (USFS) and the Service.

- Artificial cavity inserts will be screened for two (2) weeks and checked twice for leakage and cracks.

- Once the artificial cavities are in place, the single male RCW will be translocated to one of the newly-created recruitment sites. Work within the occupied RCW habitat onsite will be restricted until the single male RCW is translocated. Temporary foraging and roosting habitat will be provided, at a quantity consistent with Service guidelines.

- Monitoring will be conducted for three (3) years or until success is achieved, whichever is less. Success is defined as establishment of new breeding group in any of the newly-created recruitment sites. Two (2) visits to the receiving site will be made weekly for the first two (2) months following translocation of the single male RCW. Surveys of the remaining newly-created recruitment sites will take place four (4) times during the following nesting season to monitor reproductive status and success.

#### **Kallman Tract**

The conservation measures proposed to offset impacts are:

- The Applicant will construct and install a minimum of four (4) completed artificial cavity inserts within one (1) selected recruitment clusters within the OSNF. The recruitment cluster location will be determined in cooperation with the Applicant, the USFS, and the Service.

- Artificial cavity inserts will be screened for two (2) weeks and checked twice for leakage and cracks.

- Once the artificial cavities are in place, the single male RCW will be translocated to an existing cluster site at the Ocala National Forest (ONF). Work within the occupied RCW onsite will be restricted until the single male RCW is translocated. Temporary foraging and roosting habitat will be provided, at a quantity consistent with Service guidelines.

- Monitoring of the translocated male RCW will take place the morning following release. Subsequent monitoring will take place one (1) week later. Four (4) visits will be made during the following nesting season, coordinated with ONF staff. Any other monitoring data collected by ONF staff will be reported to the Applicant.

More details on the mitigation and minimization measures are outlined in the Applicants' HCP.

The EA considers the environmental consequences of two alternatives, including the proposed action. The proposed action alternative is issuance of the incidental take permit and implementation of the HCP as submitted by the Applicants.

As stated above, the Service has made a preliminary determination that the issuance of the ITP is not a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of NEPA. This preliminary information may be revised due to public comment received in response to this notice and is based on information contained in the EA and HCP. An appropriate excerpt from the FONSI reflecting the Service's finding on the application is provided below:

Based on the analysis conducted by the Service, it has been determined that:

1. Issuance of an ITP would not have significant effects on the human environment in the project area.

2. The proposed take is incidental to an otherwise lawful activity.

3. The Applicant has ensured that adequate funding will be provided to implement the measures proposed in the submitted HCP.

4. Other than impacts to endangered and threatened species as outlined in the documentation of this decision, the indirect impacts which may result from issuance of the ITP are addressed by other regulations and statutes under the jurisdiction of other government entities. The validity of the Service's ITP is contingent upon the Applicant's compliance with the terms of the permit and all other laws and regulations under the control of State, local, and other Federal governmental entities.

The Service will also evaluate whether the issuance of a Section 10(a)(1)(B) ITP complies with Section 7 of the Act by conducting an intra-Service Section 7 consultation. The results of the biological opinion, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP.

On Thursday, January 16, 1997, the Service published a notice in the **Federal Register** announcing the Final Revised Procedures for implementation of NEPA (NEPA Revisions), (62 FR 2375-2382). The NEPA revisions update the Service's procedures, originally published in 1984, based on changing trends, laws, and consideration of public comments. Most importantly, the NEPA revisions reflect new initiatives

and Congressional mandates for the Service, particularly involving new authorities for land acquisition activities, expansion of grant programs and other private land activities, and increased Endangered Species Act permit and recovery activities. The revisions promote cooperating agency arrangements with other Federal agencies; early coordination techniques for streamlining the NEPA process with other Federal agencies, Tribes, the States, and the private sector; and integrating the NEPA process with other environmental laws and executive orders. Section 1.4 of the NEPA Revisions identify actions that may qualify for Categorical Exclusion. Categorical exclusions are classes of actions which do not individually or cumulatively have a significant effect on the human environment. Categorical exclusions are not the equivalent of statutory exemptions. If exceptions to categorical exclusions apply, under 516 DM 2, Appendix 2 of the Departmental Manual, the departmental categorical exclusions cannot be used. Among the types of actions available for a Categorical Exclusion is for a "low effect" HCP/incidental take permit application. A "low effect" HCP is defined as an application that, individually or cumulatively, has a minor or negligible effect on the species covered in the HCP [Section 1.4(C)(2)].

The Service may consider the Applicants' ITP request and HCP such a Categorical Exclusion. The Service is soliciting for public comments on this determination. The Service is announcing the availability of the EA since the project's environmental documents were finalized shortly after the NEPA Revisions were released. However, the Service may make a final determination that this action is categorically excluded.

Dated: May 28, 1997.

**Noreen K. Clough,**

*Regional Director.*

[FR Doc. 97-14785 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-55-P

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## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service, Interior**

#### **Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Tenth Regular Meeting**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

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**SUMMARY:** This notice sets forth summaries of the United States negotiating positions on agenda items and resolutions submitted by other countries for the tenth regular meeting of the Conference of the Parties (COP10) to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Comments have been solicited and a public meeting has been held to discuss these negotiating positions.

**DATES:** This notice shall go into effect on June 6, 1997.

**ADDRESSES:** Please send correspondence concerning this notice to Chief, Office of Management Authority; 4401 North Fairfax Drive, Room 430, Arlington, Virginia 22203. Fax number 703-358-2280.

**FOR FURTHER INFORMATION CONTACT:** Kenneth B. Stansell or Dr. Susan S. Lieberman, Office of Management Authority, U.S. Fish and Wildlife Service; telephone 703/358-2093; fax: 703/358-2280; E-mail: r9oma\_cites@mail.fws.gov.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, hereinafter referred to as CITES or the Convention, is an international treaty designed to monitor and regulate international trade in certain animal and plant species which are or may become threatened with extinction, and are listed in Appendices to the treaty. Currently 136 countries, including the United States, are CITES Parties. CITES calls for biennial meetings of the Conference of the Parties (COP) which review its implementation, make provisions enabling the CITES Secretariat (in Switzerland) to carry out its functions, consider amending the lists of species in Appendices I and II, consider reports presented by the Secretariat, and make recommendations for the improved effectiveness of the Convention. The tenth regular meeting of the Conference of the Parties to CITES (COP10) will be held in Harare, Zimbabwe, June 9-20, 1997.

A series of **Federal Register** notices and two public meetings already held, have provided the public with an opportunity to participate in the development of U.S. positions for COP10. A **Federal Register** notice concerning possible U.S. submissions of species amendments and resolutions for consideration at COP10 (with a request for public comments) was published on March 1, 1996 (61 FR 8019). A **Federal Register** notice announcing a public

meeting to discuss an international study of the effectiveness of CITES was published on June 14, 1996 (61 FR 30255). A **Federal Register** notice requesting information on the Service's consideration of amendments to the Appendices was published on August 28, 1996 (61 FR 44324). A **Federal Register** notice concerning the provisional agenda of COP10 as well as proposed resolutions and agenda items being considered was also published on August 28, 1996 (61 FR 44332). A **Federal Register** notice concerning proposed U.S. negotiating positions for agenda items and resolutions submitted by other countries was published on April 17, 1997 (62 FR 18777). A public meeting held October 3, 1996 solicited comments on proposed U.S. submissions of species amendments, resolutions, and agenda items for consideration at COP10, and a public meeting held on April 25, 1997 allowed for discussion of U.S. positions on species amendments and resolutions submitted by other CITES Parties, and agenda items leading up to COP10.

**Negotiating Positions**

In this notice, the Service summarizes the United States positions on agenda items and resolutions for COP10 (other than proposals to amend the Appendices, which will be published in a separate notice), which have been submitted by other countries and the CITES Secretariat. A **Federal Register** notice was published on March 27, 1997 (62 FR 14689) outlining rationales for resolutions and discussion documents submitted by the United States; those issues will not be discussed in detail here. Interested members of the public should refer to those notices for discussion of relevant issues. Numerals next to each agenda item or resolution correspond to the numbers used in the provisional agenda [COP10 Doc. 10.1 (Rev.)] received from the CITES Secretariat.

Some documents have not yet been received from the CITES Secretariat and may not be received until the meeting of the COP itself. Other documents were received only days before this notice was finalized, and therefore insufficient time was available to develop a U.S. negotiating position. A list of documents received by the Service to date is available on request (see **ADDRESSES**, above).

In the discussion that follows, the description of each proposed resolution is followed by a brief rationale explaining the basis of the United States position. The Service outlines these final negotiating positions on agenda items and resolutions submitted by

foreign countries for COP10 with the understanding that new information that becomes available during discussions prior to and at COP10 can often lead to modifications of these positions. The U.S. delegation will fully disclose any and all position changes and the rationale(s) explaining them through daily public briefings at COP10.

**Negotiating Positions: Summaries**

*I. Opening Ceremony by the Authorities of Zimbabwe*

*Comments:* No comments received on this issue.

U.S. Negotiating Position: No document will be prepared by the Secretariat on this item. It is traditional that the host country conduct an opening ceremony at a CITES COP.

*II. Welcoming Addresses*

*Comments:* No comments received on this issue.

U.S. Negotiating Position: No document will be prepared by the Secretariat on this item. It is traditional that the host country make welcoming remarks at the opening of a CITES COP.

*III. Adoption of the Rules of Procedure (This Item Consists of two Subitems)*

1. Voting Before Credentials Have Been Accepted [Doc. 10.4]

*Comments:* No comments received on this subitem issue.

U.S. Negotiating Position: No document has yet been received from the Secretariat on this issue. The United States believes that delegations to international treaty conferences should be able to obtain credentials from their government prior to attending the meeting, and as such should not be entitled to vote until their credentials are approved. However, some flexibility is acceptable in certain circumstances. The United States does not believe that delegates whose credentials are pending should be denied access to meetings or the ability to speak, but decisions on such issues should go through the Credentials Committee at the COP.

2. Adoption of the Rules of Procedure [Doc. 10.3]

*Comments:* One comment received on this issue. The commenter expressed support for the U.S. government's proposed negotiating position.

U.S. Negotiating Position: A provisional version of the Rules of Procedure, which describe the manner in which a COP is conducted, are distributed prior to all CITES COPs by the Secretariat. The United States supports the provisional version of the Rules of Procedure as received. The

United States is not aware of any changes from previously adopted Rules of Procedure that will be proposed. The United States notes that the Rules of Procedure were modified at COP9 to allow for a simplified procedure for approving secret ballots. Those changes were handled smoothly, and the United States does not believe that this provision should be altered. However, at COP9 many country delegates had problems with the procedure by which the Secretariat issued secret ballots. The United States will work through the Bureau at the COP to simplify this process (which would not involve any modification of the Rules of Procedure), in order to be prepared for any secret ballot vote(s).

*IV. Election of Chairman and Vice-Chairman of the Meeting and of Chairman of Committees I and II and of the Budget Committee*

*Comments:* No comments received on this issue.

U.S. Negotiating Position: No document will be prepared for this item by the Secretariat. The United States will support the election of a Conference Chair from Zimbabwe, and a highly qualified Vice-Chair of the Conference and Committee Chairs representing the geographic diversity of CITES.

The Chair of the CITES Standing Committee (Japan) will serve as temporary Chair of the COP until a permanent Conference Chair is elected. It is traditional for the host country to provide the Conference Chair. The Conference Chair will serve as Presiding Officer of the Conference and also of the Conference Bureau, the executive body which manages the business of the Conference: other members of the Conference Bureau include the Committee Chairs (discussed below), the members of the Standing Committee, and the Secretary General.

The major technical work of the CITES is done in the two contemporaneous Committees, and thus Committee Chairs must have great technical knowledge and skill. In addition, CITES benefits from active participation and leadership of representatives of every region of the world. The United States will support the election of Committee Chairs and a Vice-Chair of the Conference having requisite technical knowledge and skills and also reflecting the geographic and cultural diversity of CITES Parties.

*V. Adoption of the Agenda and Working Programme [Doc. 10.1 (Rev.); Doc. 10.2; Doc. 10.2.1; Doc. 10.2.2]*

*Comments:* No comments received on this issue.

U.S. Negotiating Position: Provisional versions of the Agenda and the Working Programme for COP10 have been received from the Secretariat. The United States supports those documents, but continues to review whether some issues currently allocated to Committee I (scientific issues) should be moved to Committee II (management and other technical issues), due to subject matter, workload and time. The U.S. believes that similar agenda items dealing with similar issues should be discussed one after the other on the agenda. For example, the issues of illegal trade in whale meat and the relationship between CITES and the International Whaling Commission should be moved on the agenda to be sequential.

*VI. Establishment of the Credentials Committee*

*Comments:* No comments received on this issue.

U.S. Negotiating Committee: No document will be prepared by the CITES Secretariat on this agenda item. The United States supports the establishment of the Credentials Committee.

The establishment of the Credentials Committee is a pro forma matter. The Credentials Committee approves the credentials of delegates to the COP by confirming that they are official representatives of their governments, thereby affording them the right to vote in Committee and Plenary sessions. The United States was a member of the Credentials Committee at COP9.

*VII. Report of the Credentials Committee*

*Comments:* No comments received on this issue.

U.S. Negotiating Position: No document will be prepared by the Secretariat on this agenda item. The United States supports adoption of the report of the Credentials Committee if it does not recommend the exclusion of legitimate representatives of countries that are Parties to CITES. The United States will encourage timely production of Credentials Committee reports at the COP.

Adoption of the report is generally a pro forma exercise. Representatives whose credentials are not in order should be afforded observer status as provided for under Article XI of the Convention. If there is evidence that credentials are forthcoming but have

been delayed, representatives can be allowed to vote on a provisional basis. A liberal interpretation of the Rules of Procedure on credentials should be adhered to in order to permit clearly legitimate representatives to participate. Exclusion of Party representatives whose credentials are not in order could undermine essential cooperation among Parties. Greater vigilance is necessary however in cases of close votes, or decisions to be made by secret ballot.

*VIII. Admission of Observers [Doc. 10.5]*

*Comments:* No comments received on this issue.

U.S. Negotiating Position: Support admission to the meeting of all technically qualified non-governmental organizations and oppose unreasonable limitations on their full participation at COP10.

Non-governmental organizations representing a broad range of viewpoints and perspectives play a vital and important role in CITES activities and have much to offer to the debates and negotiations at a COP. Their participation is specifically provided by Article XI of the Convention. The United States supports the opportunity for all technically qualified observers to fully participate at COPs, as is standard CITES practice. The United States has approved 49 organizations as observers to COP10, and will fully support their accreditation and active participation in the meeting. The United States also supports flexibility and openness in approval of documents produced by non-governmental organizations, and the dissemination of these documents to delegates; such information sharing is vital to decision-making and scientific and technical understanding at a CITES meeting.

*IX. Matters Related to the Standing Committee (This Item Consists of Three Subitems)*

*Comments:* No comments received on this issue.

U.S. Negotiating Positions:

1. Report of the Chairman [Doc. 10.6]

No document has yet been received. The United States will fully support the presentation of a report by the Chairman of the Standing Committee (Japan) regarding the execution of the Committee's responsibilities and its activities that accurately reflects the discussions and decisions of the Committee. A U.S. negotiating position on the Chair's report is pending receipt of the document.

## 2. Regional Representation [Doc. 10.7]

At COP9 membership in the Standing Committee was increased for those CITES regions with a large number of Parties. Current membership on the Standing Committee is as follows: Chair (Japan), two representatives for Asia (Japan and Thailand), three representatives for Africa (Namibia, Senegal, and Sudan), two representatives for Europe (Russian Federation and United Kingdom), one representative for North America (Mexico), one representative for Oceania (Papua New Guinea), two representatives for Central, South America, and the Caribbean (Argentina and Trinidad and Tobago), Depositary Government (Switzerland), Previous Host Country (United States), and Next Host Country (Zimbabwe). Doc. 10.7 was not received in time from the Secretariat to be considered in this notice.

There have been further discussions in the Standing Committee since COP9 on the division of responsibilities among regional representatives. Discussions focused on the question of which subregions and topical areas each Regional representative would speak on and officially represent. The issue of clarifying the responsibilities of the Regional representatives has also been discussed at meetings of the Animals and Plants Committees. The United States will support a division of responsibilities as decided independently by each Region.

## 3. Election of New Regional and Alternate Regional Members

The United States encourages membership which will continue the active role of the Standing Committee. The Regional Representative for North America from COP9 until the present has been Mexico. Discussions will take place at the beginning of COP10 among the three North American CITES Parties (United States, Mexico, and Canada) on which country should be the regional representative between COP10 and COP11.

*X. Reports of the Secretariat (This Item Consists of Three Subitems)*

*Comments:* No comments received on this issue.

U.S. Negotiating Positions: The United States considers the issues which the documents cover essential and important matters. However, either documents have not yet been received for any of the three subitems or were not received in time from the Secretariat to be considered in this notice.

## 1. Secretariat Report [Doc. 10.8]

## 2. Strategic Plan [Doc. 10.9]

The United States notes that the strategic plan of the Secretariat adopted at COP9 was a beginning, but was in need of much improvement. In order to improve the effectiveness of strategic planning for CITES, the United States supports the recommendation of the "Study of the Effectiveness of the Convention" (see item, XIII.1., below) that the Secretariat should develop a strategic plan to guide its work. As stated in the Study of the Effectiveness of the Convention, produced by Environmental Resources Management (ERM), the ". . . plan should include programme and policy requirements with a priority set of actions to be undertaken by the Parties, Standing Committee and Secretariat." The United States believes that a strategic plan must be developed in consultation with the Standing Committee and the Parties, and as such anything submitted by the Secretariat for consideration at COP10 will need close scrutiny by the Parties. The United States has no objection in principle to the Secretariat seeking or contracting with outside organizations or persons for assistance in drafting this plan, but any action by the Secretariat, including candidates and the final selection should be openly and completely discussed in the Standing Committee, and final approval of any outside entities to perform work in this regard should rest with the Standing Committee.

## 3. Working Plan [Doc. 10.10]

The United States looks forward to a detailed analysis of the working plan of the Secretariat. The Secretariat must be guided by the COP in its work plan for the period between COP10 and COP11, and as such it is up to the COP to review the draft working plan and decide on the work and structure of the Secretariat that it deems most appropriate, in line with the priorities of the Parties. The United States believes that discussion of the working plan and strategic plan must be in concert with discussions in the Budget Committee, and in full recognition of any budgetary implications. The U.S. has received this document, but has not yet completed its review. There are serious concerns about some of the budgetary implications in the document, however.

*XI. Financing and Budgeting of the Secretariat and of Meetings of the Conference of the Parties (This Item Consists of Four Subitems)*

*Comments:* Two comments were received on this issue. One commenter

referred to this issue in general terms, noting that the U.S. should closely scrutinize the Secretariat's rationale for increasing COP attendance fees, and questioned whether the Secretariat was commingling funds remaining from COP9 (and any future excess funds from COP10) with "general operating funds" between the COPs. Another commenter stated that the United States "should not shirk its obligation to provide promised funds so that CITES may continue to ensure that this [wildlife] trade does not cause a detriment to wildlife populations everywhere." This organization urged the Service to impress upon the Department of State the importance of CITES and suggested that CITES' core budget "be reduced if some items in the budget could become "projects" subject to external funding." U.S. Negotiating Position: The United States advocates fiscal responsibility and accountability on the part of the Secretariat and the COP. The United States plans to be an active participant in discussions in the Budget Committee at COP10. The United States will endeavor to explore whether any funds are being commingled. The United States has fulfilled its 1997 pledge to the CITES Trust Fund. Relevant documents were not received in time from the Secretariat to be considered in this notice.

## 1. Financial Report for 1994, 1995 and 1996 [Doc. 10.11]

U.S. Negotiating Position: Issues associated with the financial report of the Secretariat will be fully discussed at COP10 and the United States will closely scrutinize and analyze the relevant documents.

## 2. Anticipated Expenditures for 1997 [Doc. 10.12]

U.S. Negotiating Position: Issues associated with anticipated 1997 expenditures of the Secretariat will be fully discussed at COP10 and the United States will closely scrutinize and analyze the relevant documents.

## 3. Budget for 1998–2000 and Medium-term Plan for 1998–2002 [Doc. 10.13]

U.S. Negotiating Position: The United States will closely scrutinize and analyze the document(s) when received. The United States believes that it is important to coordinate Budget Committee discussions with discussions in Committees I and II that may have budgetary implications. For example, when a resolution with budgetary implications is approved by Committee I or II (and then sent to Plenary for adoption), it should be conveyed to the Budget Committee in time for it to be

factored into the budget. There have been cases at previous meetings of the COP where the Budget is already approved, and the Committees are taking decisions that may have financial implications. The United States will work through the Bureau at the COP to deal with this issue.

#### 4. External Funding [Doc. 10.14]

U.S. Negotiating Position: External funding refers to the financial support by Party governments and non-governmental organizations for projects that have been approved as priorities for CITES by the Standing Committee under a previously established procedure. This procedure is designed to avoid any conflicts of interest or even the appearance of a conflict when approving projects and channeling funds between the provider and recipient. These externally funded projects are outside of the CITES Trust Fund. It has been decided by the Standing Committee that under no circumstances are any UNEP overhead costs to be assessed on these projects.

The United States continues to contribute external funding to Standing Committee-approved projects including delegate travel to the COP, support for committee meetings, CITES enforcement and implementation training, and biological studies of significantly traded species, when funds are available.

#### *XII. Committee Reports and Recommendations (This Item Consists of Four Subitems)*

*Comments:* One comment was received on sub-item No. 3; see below.

#### 1. Animals Committee

##### (a) Report of the Chairman [Doc. 10.15]

U.S. Negotiating Position: The United States fully supports the presentation of a report by the Chairman of the Animals Committee regarding the execution of the Committee's responsibilities and its activities that accurately reflect the discussions and decisions of the Committee. A position on that report is pending receipt of the document.

##### (b) Regional representation [Doc. 10.17]

U.S. Negotiating Position: The United States supports the active role of the Animals Committee in scientific and management issues pertaining to animal species listed in the CITES Appendices. We encourage membership which will continue the active role of the Animals Committee, and selection of a Chair with a strong commitment to a proactive Animals Committee committed to conservation. The United States has always participated actively in the work of the Animals Committee, and will

continue to be an active participant in all Committee functions.

At COP9 membership on the Animals Committee was increased for those regions with a larger number of Parties. Current membership includes: Africa (two representatives), Asia (two representatives), Europe (one representative), North America (one representative), Oceania (one representative), Central, South America, and the Caribbean (two representatives). The Regional representatives are selected by their respective regional caucuses at the COP. The Chair and Vice-Chair will be selected by the new Animals Committee, during a meeting to be held at the close of COP10.

During recent discussions in the Animals Committee the issue of increased representation for the European Region was discussed, since the Region now has 31 countries and was not given additional representation at COP9. Consequently, at COP10, there may be a recommendation to increase the number of representatives for the European Region to two. The United States supports an increase of one additional representative for the European Region.

The United States has submitted a resolution "Establishment of Committees" (Doc. 10.27) for the purpose of amending Res. Conf. 9.1, Annexes 2 and 3. This resolution discusses the designation of members of the Animals and Plants Committees. It recommends that the official members should be Party governments, not individuals. The United States strongly believes that Party countries, not individuals, are members of CITES, and therefore proposed this change to be consistent with standard international practices, and to avoid potential, perceived, or real conflicts of interest. Individual countries would be asked to name qualified individuals as contact points for committee matters, but the members themselves would be the governments.

##### (c) Election of New Regional and Alternate Regional Members

U.S. Negotiating Position: No document will be prepared by the Secretariat on this issue. Currently, Dr. Charles Dauphine of Canada is the North American regional representative on the Animals Committee. The United States anticipates adoption of our proposed resolution that will change the regional representative to a country rather than an individual (as discussed above). At COP10, the United States, Canada, and Mexico will meet to decide which country should be the regional Animals Committee representative

between COP10 and COP11. At that time, the country will nominate an individual to serve as contact point. If that individual cannot continue serving for any reason, the country selected will nominate another individual.

The other CITES geographic regions will also meet and decide on their Animals Committee representatives. Those decisions are made by the individual regions. The United States position will be to encourage regions to nominate countries that are committed to full participation in the work of the committees. Doc. 10.15 was not received in time to be considered for this notice.

#### 2. Plants Committee

##### (a) Report of the Chair [Doc. 10.16]

U.S. Negotiating Position: The United States welcomes the presentation of a report by the Chair of the Plants Committee regarding the execution of the Committee's responsibilities and its activities, that accurately reflects the discussions and decisions of the Committee. A position on that report is pending evaluation of the document. Doc. 10.16 was not received in time to be considered for this notice.

##### (b) Regional Representation [Doc. 10.7]

U.S. Negotiating Position: At COP9, as with the Animals Committee, membership on the Plants Committee was increased for those regions with a larger number of Parties. Current membership includes: Africa (two representatives), Asia (two representatives), Europe (one representative), North America (one representative), Oceania (one representative), and Central, South America, and the Caribbean (two representatives). The Regional representatives are selected by their respective Regional caucuses at COP10, and a Chair and Vice-Chair will be selected by the new Plants Committee, during a meeting to be held at the close of COP10. Doc. 10.7 was not received in time from the Secretariat to be considered in this notice.

##### (c) Election of New Regional and Alternate Members

U.S. Negotiating Position: No document will be prepared by the Secretariat on this issue. Currently, Dr. Bruce MacBryde of the Service's Office of Scientific Authority is the North American Regional representative to the Plants Committee. The United States anticipates adoption of our proposed resolution that will change the regional representative to a country rather than an individual (as discussed above under Animals Committee). At COP10, the United States, Canada, and Mexico will

meet to decide which country should be the regional Plants Committee representative between COP10 and COP11. At that time, the selected country will nominate an individual to serve as its contact point. If that individual cannot continue serving for any reason, the country selected will nominate another individual.

The other CITES geographic regions will also meet and decide on their Plants Committee representatives. Those decisions are made by the individual regions. The United States position will be to encourage regions to nominate countries that are committed to full participation in the work of the committees.

### 3. Identification Manual Committee [Doc. 10.17]

*Comments:* One comment received on this issue expressed strong support for the "continuing development of animal and plant identification manuals for use by port and border enforcement authorities." This commenter encouraged the Service "to sponsor, or seek private funding for, the production of identification manuals for CITES-listed herptiles in trade..."

U.S. Negotiating Position: No document has yet been received. The United States will continue to support the continuing development of animal and plant identification manuals for use by port and border enforcement authorities, in providing a standard of reference for the identification of CITES species, within available resources and priorities. The United States particularly applauds the United Kingdom's efforts in developing the general CITES guide to plants in trade. The United States plans to assess alternatives presented by the Secretariat for updating animal sections of the Identification Manual, and encourages and will consider all comments from other Parties as to the value of the Identification Manual. The United States also believes that the posting of the Identification Manual on the Internet to facilitate access by all CITES Parties should be explored and discussed, considering all the costs and benefits of so doing.

The United States believes that enforcement officers of the Parties must be equipped with guides which are accurate, realistic, and helpful in the identification of the many CITES species and products found in trade throughout the world. Toward this end, the United States supported the efforts of the Canadian government in producing a series of extremely useful and highly professional identification manuals for certain CITES species in international trade.

### 4. Nomenclature Committee

U.S. Negotiating Position: Doc. 10.18 and Doc. 10.19 was not received in time from the Secretariat to be considered in this notice.

(a) Report of the Chairman [Doc. 10.18]

(b) Recommendations of the Committee [Doc. 10.19]

### XIII. Evolution of the Convention (This Item Consists of Two Subitems)

#### 1. How to Improve the Effectiveness of the Convention

*Comments:* Comments were received from four organizations on this general issue, some of which were directly related to the points raised in the ERM Study, while others were not. One commenter agreed with the draft U.S. position that the ERM study demonstrated that the majority of CITES Parties believe that the actual text of the Convention should not be changed. This commenter also called for greater cooperation between CITES and the Convention on Biological Diversity, as discussed in the ERM findings, and stated that such cooperation or "consultation" include other "relevant organizations such as the SSN [Species Survival Network]." This commenter also urged the U.S. to approach ERM recommendation 5C on stricter domestic measures "with trepidation," and urged the U.S. to "promote steadfastly the primacy of CITES over other international trade regimes." Another commenter, in discussing findings in the ERM study, stated that the U.S. should promote "meaningful discussion" of CITES' "failure to accommodate sustainable use, and the abuse of stricter domestic measures to prevent trade," and called on the U.S. to advocate that stricter domestic measures only be applied by Parties in consultation with range states when such measures affect "a species beyond the borders of the country imposing the measures." This commenter also stated that the U.S. "should support a continued self-evaluation of the functions and effectiveness of CITES." Another commenter stated that the ERM Study should "continue in the appropriate form," but added that the Parties should defer development of a resolution on sustainable use. One commenter supported the "continuation and expansion of the review process" subject "to the condition that the contractor be afforded adequate time and funds to complete the process in a systematic and orderly fashion."

(a) Comments From the Parties and Organizations on the Study [Doc. 10.20]

U.S. Negotiating Position: At the Ninth Meeting of the COP to CITES in Fort Lauderdale, Florida, November 1994 (COP9), the COP decided to assign the CITES Standing Committee the task of conducting a review of the effectiveness of the provisions and implementation of the Convention, and to report its findings to the next meeting of the COP.

The CITES Standing Committee appointed a team to undertake the review including an independent consultant and two individuals chosen by the Committee for the information gathering portion of the project. On December 21, 1994, the CITES Secretariat published Notification to the Parties No. 831, which contained a call for proposals from prospective consultants to conduct the study on the effectiveness and implementation of the Convention. The firm of Environmental Resources Management (ERM), based in London, United Kingdom, was ultimately selected for the task. That selection was made by a Monitoring Committee of CITES Parties, including several representatives to the CITES Standing Committee. The Monitoring Committee, which was selected by the Standing Committee, was made up of representatives of the following governments: Argentina, Canada, Japan, Namibia, New Zealand, and the United Kingdom. The study itself and the report that was produced were reviewed by the same Monitoring Committee, and the report was presented to the December 1996 meeting of the CITES Standing Committee. The CITES Standing Committee selected Jaques Berney (retired Deputy Secretary General of CITES) and Marshall Jones (Assistant Director for International Affairs, U.S. Fish and Wildlife Service) or Dr. Susan Lieberman (Chief, CITES Operations Branch, Office of Management Authority, U.S. Fish and Wildlife Service), as the technical advisors on the project.

The initial phase of this review was designed to collate information including but not necessarily limited to the following: the stated and implied objectives of the Convention and their continued relevance to the conservation of wild fauna and flora; the degree of effectiveness of conservation for representative species listed in the three Appendices of CITES and the extent of this degree of conservation that can be attributed to the implementation of the Convention; the relationship of the Convention to other global or regional conservation treaties or agreements and

how the objectives of the Convention may be enhanced or hindered by the existence and implementation of these treaties or agreements; the ease and effectiveness of implementation, including enforcement, of the Convention in Party states; and the anticipated and actual roles of various participants in the implementation of the Convention, including Party states, non-Party states, national and international conservation organizations, and national and international trade and development organizations.

ERM, the contractor on the study, transmitted a questionnaire to all CITES Parties (132 countries at the time), as well as international non-governmental organizations. In addition, representatives of ERM met in person with several governments, in order to obtain more detailed responses to the questionnaire and in order to assist ERM in preparing its report on the effectiveness of the Convention. ERM was not able to meet with all Parties to the Convention while preparing their report, due primarily to time constraints inherent in the project. Therefore, ERM invited other countries in the region of the Party it was visiting to attend the meetings in question for group as well as private consultations (discussed in greater detail, below).

Each country that was visited was asked by ERM to independently decide how to consult with neighboring countries, as well as with non-governmental organizations; the questionnaire sent to the Parties recommends broad consultation. The United States supported an exceedingly broad, transparent, and consultative process, with active input from all non-governmental organizations interested in the effectiveness of CITES and the conservation of species subject to international trade. ERM stated that it was limited in the countries it planned to visit, based on time and funding constraints.

The Monitoring Committee mentioned above worked with ERM to plan the country visits. As outlined in the ERM Study, national consultations, headed by either "core team members" of the ERM Study or ERM regional office staff, were held in the following regions and countries (the consultations in question were variable in levels of contact and depth as indicated in the ERM Study): Africa (Egypt, Kenya, Namibia, Senegal, South Africa and Zimbabwe); Asia (India, Japan and Thailand); Europe (separate consultations with members of the European CITES Committee and the Russian Federation); North America

(Canada, Mexico and the United States); Oceania (Australia); and South America, Central America and the Caribbean (Argentina, Brazil, Chile, Colombia, Costa Rica and Trinidad and Tobago).

In addition to these consultations, ERM held meetings with CITES Secretariat staff and international non-governmental organizations (the World Conservation Union-IUCN, the World Wide Fund For Nature/World Wildlife Fund-WWF, Trade Records Analysis of Fauna and Flora In Commerce-TRAFFIC, and the World Conservation Monitoring Centre-WCMC). ERM also indicated that they consulted with the Secretariats of the International Tropical Timber Organization, Convention on Biological Diversity (CBD), Ramsar Convention on Wetlands of International Importance, Convention on the Law of the Sea, International Convention on the Regulation of Whaling (IWC), and the Convention on Migratory Species of Wild Animals.

The United States appreciates that ERM produced a final report within the allotted time constraints, and met and consulted with many governments, non-governmental organizations, and other bodies during preparation of the study. Although the views of countries were obtained from questionnaire responses and the in-country meetings arranged by ERM, the United States regrets that the time constraints placed on ERM in conducting this study precluded substantive, detailed discussions with the majority of the Parties. In addition, the United States is concerned that the ERM questionnaire did not specifically pose questions which directly addressed issues related to enforcement of the Convention. Nevertheless, ERM has produced a highly professional report despite these problems.

(b) Consideration of the Recommendations Arising From the Study [Doc. 10.21]

U.S. Negotiating Position: The United States believes that the ERM study has produced a great quantity of meaningful recommendations and findings, but concurrently believes that some of these could prove controversial. Nevertheless, some of the recommendations of the ERM study could be implemented either directly by the Secretariat or Standing Committee, or adopted by the COP with little controversy. Therefore, we believe that the Parties must take direct but cautious steps to properly review the recommendations and findings of the report, and act deliberately to advance the interests of the Convention.

The United States recommends that the Parties adopt the report and use it as a valuable reference in future

decision-making. The ERM report provides a useful perspective on the views of the Parties on a number of issues. The report is to be commended for focusing on majority versus minority viewpoints, which should be used by the Parties in assessing priorities for action that could result from the study.

The United States notes that the findings of the ERM report demonstrated quite conclusively that the majority of the Parties of the Convention believe that the text of the Convention should not be amended. This perspective is complemented by ERM highlighting the high monetary costs and logistical requirements which would be incurred in attempting to conduct any such textual amendments. The United States strongly concurs with this view, and hopes that this will discourage efforts to amend the treaty or alter its fundamental objectives.

The United States notes that according to the report, the majority of the Parties (including the United States) and international organizations believe there is no reason why the application of CITES should exclude any taxonomic group. The study goes on to say that a minority of the Parties oppose inclusion of commercial fish in the CITES Appendices on the grounds that it is premature to consider such listing until consultations have been held with the relevant inter-governmental bodies charged with managing these species and that there is often insufficient information available to allow adequate listing proposals to be developed.

While the United States supports many of the ERM recommendations, we disagree with others and find some unclear for a variety of reasons. For example, the United States supports the consolidation of resolutions, provided their original text and preamble are maintained to preserve their original intent. The Secretariat has submitted a document evaluating some of the recommendations. The U.S. supports most of the Secretariat's suggestions, including the development of a financial and strategic plan. The U.S. opposes the Secretariat's suggestion to simplify resolutions; the U.S. strongly opposes the suggestion that the Secretariat should play a role in determining resolution language. This is a responsibility given to the Parties by the Convention. The Secretariat's role should be advisory only, and not unilateral for action. The U.S. supports the drafting of explanatory memorandums by the Parties and a simple guide to implementation of the Convention however. The U.S. does not support the linkage of the simplification of CITES resolutions with the

consolidation of resolutions. In its document, the Secretariat suggests a role for it in editing documents submitted by Parties; while recognizing the need for minor editing by the Secretariat for uniformity, the U.S. is concerned that political pressures could impact the editing of working documents.

Other recommendations could be acted on by the Secretariat, Standing Committee, or the meeting of the COP. Many of the recommendations in the ERM report could be acted on without the introduction of resolutions. In response to a request from the CITES Standing Committee and a Notification to the Parties, the United States submitted detailed comments on the ERM report on March 14, 1997, including comments on all recommendations in the report; those comments are available by contacting the Service's Office of Management Authority (see ADDRESSES, above).

(c) Co-Operation/Synergy With Other Conservation Conventions and Agencies

U.S. Negotiating Position: The United States supports the concept and practice of cooperation between CITES and other conservation entities, and supports cooperation with the Convention on Biological Diversity (CBD) as being potentially useful and relevant to CITES. Representatives of other conservation conventions and agencies should be invited to attend CITES COPs as observers, including: the CBD, Convention on Migratory Species, Ramsar, World Heritage Convention, Convention on Desertification and Drought, Convention on the Law of the Sea and regional agreements as appropriate.

The United States agrees that cooperation with the CBD is potentially useful and relevant to the purposes of CITES. It is not clear however that it is necessary to negotiate a comprehensive agreement between the Secretariats. Cooperation between Conventions will be most effective if it evolves out of recognition of the contribution each can make to the other. It may be best to let the relationship between the two conventions evolve as the CBD matures, rather than to mandate cooperation. Mandated cooperation without a clear sense of how each Convention will benefit may result in more work for each Secretariat and less focus on the goals central to the interests of the Parties to each Convention. It is up to governments to consider the integration of their obligations under respective Conventions.

2. Relationship between CITES and UNEP [Doc. 10.23]

*Comments:* No comments were received on this issue.

U.S. Negotiating Position: No document has yet been received. The United States believes that the current state of the relationship between the United Nations Environment Programme (UNEP) and CITES is not only unclear, but potentially quite damaging to the Convention. The United States strongly supports the examination of this relationship, and the renegotiation of the 1992 Agreement between the CITES Standing Committee and UNEP. The thirty-sixth meeting of the CITES Standing Committee established a Working Group to evaluate the relationship between CITES and UNEP. The United States is actively involved as a member of that Working Group. The thirty-seventh meeting of the Standing Committee charged the same Working Group with producing a revision of the Agreement between CITES and the United Nations Environment Programme (UNEP). The existing Agreement was signed on 26 June 1992 by the Chairman of the Standing Committee (Murray Hosking, New Zealand), and on 28 June 1992 by the Executive Director of UNEP (Dr. Mostafa Tolba). The decision to revise that existing Agreement between the CITES Standing Committee (on behalf of the CITES Parties) and UNEP was made by the Standing Committee, in response to the report submitted to it by the Working Group. That report, adopted by the Standing Committee, has been circulated to the CITES Parties in Notification to the Parties Number 961. Reports of the Working Group will be presented to the Parties at COP10. The Working Group negotiated a revised Agreement between CITES and UNEP, at a meeting held in Washington, DC in March, 1997. That meeting was attended by members of the Working Group and UNEP. UNEP has since provided additional changes to the negotiated revised Agreement, some of which are acceptable and some are not. The United States looks forward to a productive dialogue on these issues, and to reaching consensus on a revised Agreement at COP10.

*XIV. Interpretation and Implementation of the Convention (This Item Consists of Forty-Eight Subitems)*

1. Review of the Resolutions of the Conference of the Parties

(a) Consolidation of Valid Resolutions [Doc. 10.24]

*Comments:* Comments were received from two organizations on this issue. One commenter supported the resolution consolidation process, provided that "the content of individual measures is not lost or weakened" by such action. Another commenter, whose comments were jointly endorsed by two organizations, urged the Service to "ensure that this [consolidation] process is carried out with extreme caution, so as not to delete relevant measures  
\* \* \*"

U.S. Negotiating Position: The United States has been supportive of the process of consolidation of valid resolutions, since its inception after COP8 as a Standing Committee project. At the 36th meeting of the Standing Committee the United States provided comments on proposed consolidations of resolutions regarding cetaceans. At the 37th meeting of the Standing Committee the United States supported the Secretariat's efforts to consolidate the resolutions pertaining to cetaceans. The United States recognizes all of these extant resolutions as current and valid. The Standing Committee agreed to this consolidation. The Committee was presented a draft consolidation on ranching resolutions by the Secretariat. The United States supported the consolidation, with the exception of the Secretariat's proposal to include marine turtle ranching (Resolution Conf. 9.20) in the consolidation. The Standing Committee agreed with the United States, and it is the U.S. position for COP10 that the consolidated ranching resolution should not include the marine turtle ranching resolution from COP9 (Conf. 9.20).

At the 37th meeting of the Standing Committee the Secretariat noted that it would produce additional draft resolutions consolidating previous resolutions for COP10. These drafts have not yet been received from the Secretariat. The United States expressed support for the consolidation process, and continues to do so. These consolidations are procedural, and do not involve renegotiation of any previously adopted text. The United States would not support any renegotiation of previously-adopted text under the guise of a consolidation; that would require a new draft resolution to be submitted by a Party.

The position of the United States is to fully support the continuing effort to consolidate existing resolutions of the COP provided that the consolidation process provides a more "user-friendly" product and does not create consolidated resolutions which impinge on the validity of resolutions which are still sound. Doc. 10.24 was not received in time to be included in this notice.

(b) Index of Resolutions of the Conference of the Parties [Doc. 10.25]

*Comments:* One comment was received on this issue, of which the text was jointly endorsed by the commenter and one additional organization. These commenters supported the creation of an index of resolutions without any further detail.

U.S. Negotiating Position: This resolution, submitted by Australia, recommends and proposes an alphabetical index of resolutions of the COP from Res. Conf. 1.1 to Res. Conf. 9.26 (all resolutions adopted from the first CITES COP, through COP9 held in Ft. Lauderdale, Florida).

The United States considers the Index of Resolutions to be a very good idea that could be an effective tool to assist Parties in executing their responsibilities under the Convention. The index could serve as a guide to all resolutions and a historical record of resolutions in force, repealed, and amended. However, the United States does not support the document as drafted. Considerable work needs to be done on the index and input from the Parties gained during its development. The index needs to be revised to reference all resolutions that pertain to a subject and reviewed to ensure that the information is accurate. In addition, the index would be more useful with some format changes, such as alphabetizing categories under each major heading and converting lengthy phrases to key words. The United States is contacting Australia to discuss this document and suggest we would work with them and other interested Parties between this COP and the next to complete the document. If the Parties agree to this approach at COP10, the document once completed could be forwarded to the Standing Committee for review and, if accepted, to the Secretariat for distribution to the Parties and interested non-governmental organizations (prior to COP11).

2. Report on National Reports Under Article VIII, Paragraph 7, of the Convention [Doc. 10.26]

*Comments:* One commenter suggested that the "Service propose measure for

improving the timeliness of the submission of annual reports."

U.S. Negotiating Position: The United States supports efforts to encourage all Parties to submit annual reports, for all species of fauna and flora, consistent with their domestic legislation. Each Party is required by the Convention to submit an annual report containing a summary of the permits it has granted, and the types and numbers of specimens of species in the CITES Appendices that it has imported and exported. Accurate report data are essential to measure the impact of international trade on species, and can be a useful enforcement tool, particularly when comparing imports into a given country, contrasted with exports from other countries. The United States is current in its Annual Report obligations. Doc. 10.26 was not received in time to be included in this notice. One aspect of that document has been reviewed however, and the U.S. supports the Secretariat's recommendation that the Parties should take measures to develop a standard format for permit numbers. The U.S. will propose modifications to the Secretariat's recommended format for permit numbers, however.

3. Amendment to Resolution Conf. 9.1 on Establishment of Committees [Doc. 10.27]

*Comments:* Six organizations commented on this resolution, two of which jointly endorsed one submission. One commenter stated that regions should "be afforded the flexibility to appoint anyone of their choice" to CITES committees, calling the proposal an infringement on national sovereignty and that the U.S. should withdraw this resolution, instead substituting a resolution that "representatives should be selected upon their credentials and their ability to contribute to the process." One set of comments, which was jointly endorsed by two organizations, supported this resolution noting that the appointment of countries, rather than persons to all CITES committees is the standard practice of the CITES Standing Committee. Another commenter called on the U.S. to withdraw the resolution and stated that Regions and countries should "be able to put anyone of their choice in the seat, whether or not that person works for a government." One commenter, in opposing this resolution, stated that restricting committee representatives only to CITES Parties would "stymie the open exchange or information and expertise and could have the similarly detrimental effect of creating a parallel conference comprised

solely of NGOs." This commenter called for continued NGO participation and increased participation by CITES Parties. Another commenter opposed this resolution stating that the "status quo is preferable" and stated that the "designation of Parties [as representatives to committees] will introduce a politic element in the Committees \* \* \*" This commenter called for greater NGO participation in the work of the Animals and Plants Committees.

U.S. Negotiating Position: This is a U.S.-sponsored resolution. See **Federal Register** notice of March 27, 1997 [FR 14689], for a rationale explaining the U.S. submission of this resolution. In response to the comments, the United States regrets any misunderstandings, in that some commenters appear to have misunderstood that the U.S. proposed resolution calls for countries to be members of the Committee (as with the Standing Committee), but of course individual countries should appoint a qualified individual as their contact point for the work of the committees. The United States believes that this proposed resolution does not infringe on national sovereignty, as claimed, and allows the Party selected by the Region to appoint whomever it chooses as the Committee member. The United States is aware that the work of the committees involves policies and views of governments (such as what draft resolutions would be supported), and as such there must be accountability to Party governments in the work of the committees. The United States emphatically endorses the vigorous, active participation of non-governmental organizations in the work of the committees (and the COP).

#### 4. Enforcement

(a) Review of Alleged Infractions and Other Problems of Implementation of the Convention [Doc. 10.28]

*Comments:* One comment was received on this issue, expressing the opinion that a comprehensive Infractions Report "would help facilitate meaningful and constructive discussion by the Parties on alleged infractions, and result in the identification of mechanisms to reduce or eliminate the problems included in the report." The United States agrees.

U.S. Negotiating Position: Article XIII of the Convention provides for COP review of alleged infractions. The Secretariat prepares an Infractions Report for each COP, which details instances that the Convention is not being effectively implemented, or where trade is adversely affecting a species.

The United States supports this biennial review of alleged infractions by the Parties, and necessary and appropriate recommendations to obtain wider compliance with the Convention. The United States supports an open discussion at COP10 of major infractions, and the enforcement of the laws and regulations implementing the Convention.

The United States received a draft copy of the Infractions Report to be presented at COP10 from the Secretariat and made comments on all matters concerning the United States. A final version of the report has not been received, nor has the anticipated second section of the report which contains explanatory and other substantive sections. When final versions of both sections are received they will be closely scrutinized by the United States.

The United States supports the hard work of the Secretariat in assembling the Infractions Report. However, the United States is concerned that the draft report did not demonstrate a special focus on high priority infractions and violations of the Convention. For example, some cases of technical errors or document irregularities received more attention than major criminal cases involving smuggling of Appendix I species and cooperation among the enforcement agencies of several governments. For example, one case in the draft report [with limited discussion] refers to the sentencing of a major parrot smuggler in the United States to almost 7 years in prison and a significant fine; this case involved excellent cooperation with several other governments, and the crimes involved caused serious potential harm to macaw populations in South America. Many other countries have also prosecuted significant violators since COP9, and the United States has urged the Secretariat to highlight such cases in the final Infractions Report.

The first draft of the Infractions Report contained numerous such alleged infractions. As with previous Infraction Reports, there is a great difference in the depth of reporting of different alleged infractions, due to what appear to be a variety of reasons, but primarily because Parties to the Convention have not communicated sufficient information to the Secretariat regarding these matters. It appears that, as with previous infraction reports, a large number of alleged infractions may be caused by a lack of training, personnel or knowledge on the workings of CITES. These are matters that can be addressed and significantly improved. The majority of the alleged infractions highlighted in the draft

Infractions Report for COP10 should be issues of major concern to the Parties as they have serious consequences for the effectiveness of the Convention, and thereby for conservation.

(b) Working Group on Illegal Trade in CITES Specimens [Doc. 10.29]

*Comments:* Seven organizations commented on this issue, two of which jointly endorsed one submission. One commenter supported this resolution, noting that the creation of an Illegal Trade Working Group "offers a double benefit because in addition to helping curtail illegal trade in endangered species, providing advice and training on enforcement techniques, smuggling, identification, document fraud and marking techniques will also benefit those of us who engage in legal trade of such specimens." The United States agrees. Another commenter called on the U.S. to withdraw this proposal and stated that "existing [enforcement] mechanisms" are preferable. One set of comments, which was jointly endorsed by two organizations, supported the resolution submitted by the U.S. in creating an Illegal Trade Working Group, and noted that the proposal would implement the recommendations in Resolution Conf. 9.8. The United States agrees. Another commenter stated that instead of an Illegal Trade Working Group, the coordination of enforcement activities through the Secretariat, or bilateral international coordination is preferable. This commenter believed the Working Group proposed would operate "outside the law, review data in camera, and be responsible to no sovereign power." One commenter opposed the resolution, mistakenly noting that it was submitted under a different name by the U.S. at COP9. This commenter stated that enforcement of the Convention is the responsibility of the Secretariat and Parties, and called for greater enforcement capabilities for the Secretariat, independent of other entities. Another commenter stated that "law enforcement should be supported by existing national law enforcement mechanisms . . . rather than the development of independent entities to detract from sovereign responsibilities."

U.S. Negotiating Position: This is a U.S.-sponsored resolution. See **Federal Register** notice of March 27, 1997 for a rationale explaining the U.S. submission of this resolution. In response to comments, above, the United States notes that it did not submit a resolution to COP9 on establishment of an enforcement working group; rather, the United States supported such an initiative by the United Kingdom. The proposed Illegal Trade Working Group

would be an adjunct to the efforts of the Secretariat and Parties; it would be responsible to the countries that are sovereign Parties to the Convention. The United States urges interested organizations to read the draft resolution that was submitted by the United States, which elaborates the work of the Working Group; it would not enforce laws, but provide enforcement technical support to Parties and the Secretariat.

(c) Inspection of Wildlife Shipments [Doc. 10.30]

*Comments:* Comments were received from five organizations, two of which jointly endorsed one submission. One commenter, without either endorsing or stating opposition to the proposed resolution, wrote about inspections that they "must be rational and not unduly burden legitimate trade or cause harm to live specimens." One set of comments, which was jointly endorsed by two organizations, stated support for the resolution without giving specifics as to the reasons for their support. Another commenter, without either endorsing or stating opposition to the proposed resolution, called for the U.S. to "seek a reasonable balance on inspection of shipments . . . and not to use stiffer enforcement as an indirect tool to deny markets for the sustainable use of wildlife." One commenter expressed support for the resolution "in so far as it reflects the current practice of the U.S. Fish & Wildlife Service and other responsible parties to the Convention \* \* \* we support the government's interest in encouraging other parties to be diligent in inspecting wildlife shipments."

U.S. Negotiating Position: This is a U.S.-sponsored resolution. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution. In response to comments, the United States notes that this draft resolution transmits a resolution adopted by the last IUCN General Assembly.

5. National Laws for Implementation of the Convention [Doc. 10.31]

(a) Analysis of the national legislation of Parties

(b) Measures taken by Parties to improve their legislation

(c) Measures to be taken with regard to Parties without national legislation

(d) Technical assistance provided to Parties

*Comments:* No comments were received.

U.S. Negotiating Position: No documentation has been received on any of the topics under this sub-item.

The United States is strongly supportive of the COP8-initiated review of national laws for the implementation of the Convention; such laws are required of Parties under Article VIII of CITES. The Service has in the past provided funding for this Secretariat-sponsored activity, and has received reviews of national legislation for several countries. The U.S. strongly believes that the Convention's effectiveness is undermined when Parties do not have national laws and regulations in place for implementing CITES, particularly those which authorize the seizure and/or forfeiture of specimens imported or exported in contravention of the Convention, as well as penalties for such violations (as required by Article VIII of the Convention).

The project, adopted by the Parties at COP8, will identify deficiencies and highlight those Parties in need of improvements in their national CITES implementing legislation. Parties which are identified as not having adequate legislation are required under a decision reached at COP9 to have initiated efforts to enact such laws. At the 37th meeting of the Standing Committee Doc. SC.37.10 on this topic was discussed, and the U.S. noted that action is needed at COP10 to address those countries that have made no progress enacting relevant laws, and have not even communicated with the Secretariat or initiated any efforts towards that end.

#### 6. Training [Doc. 10.32]

*Comments:* Two comments were received, one of which was jointly endorsed by two organizations. One commenter wrote that it "strongly supports the initiative and ongoing participation by the United States in training CITES enforcement officials in various Parties, otherwise lacking appropriate technical expertise." Two organizations expressed support for the Secretariat's and Parties' efforts to provide training to other Parties in need of assistance.

U.S. Negotiating Position: The United States has provided training on CITES enforcement and/or implementation since COP9 in: Bangladesh, China, Honduras, India, Indonesia, Mexico, Nepal, the Philippines, Russia, and Taiwan. The United States is currently planning several more training programs for the coming years, and considers this a very high priority activity. Doc. 10.32 was not received in time to be considered in this notice.

The United States supports all efforts by the Secretariat and other Parties to the Convention to provide training in CITES implementation and enforcement

to Parties that request it. The Parties concur that training is of the highest priority, as evidenced in the ERM Report on the Effectiveness of the Convention. The United States will endeavor to ensure that this high priority on training will be reflected in the CITES budget adopted at COP10.

#### 7. Implementation of the Convention in Small Island Developing Nations [Doc. 10.33]

*Comments:* No comments were received.

U.S. Negotiating Position: No document has yet been received. Some small island developing nations, particularly those in Oceania, have been unable to accede to CITES because of the substantial resources which they feel are needed to fully implement and enforce the Convention. Of particular concern is the need to name Management and Scientific Authorities. Therefore, under a plan supported by the government of New Zealand, those countries would be permitted to share the services of a multi-national Management and/or Scientific Authority. The United States supports full international membership in CITES and continues to support the plan advanced by New Zealand, and believes it is an excellent avenue towards helping small island developing nations accede to the Convention.

#### 8. Relationship With the International Whaling Commission [Doc. 10.34]

*Comments:* Comments were received from seven organizations, two of which jointly endorsed one submission. One commenter supported the proposed U.S. position with regard to "Japan's misguided resolution calling for the repeal of Res. Conf. 2.9 \* \* \* The IWC must remain the competent authority for international whale management." Another commenter called for the U.S. to oppose this resolution, writing that repeal of Conf. 2.9 "could bring CITES and the IWC into direct conflict, which would not be in the best conservation interests of whale species" and further stated that repeal of Conf. 2.9 would "contradict Res. Conf. 9.12, in which the CITES Parties pledged to coordinate measures with the IWC to reduce illegal whaling." Another commenter called for the U.S. to support the resolution and stated that CITES' "relationship with the IWC should be one of consultation and exchange of information." One set of comments, which was jointly endorsed by two organizations, expressed opposition to the proposed resolution, stating that it "would require CITES to interfere with operations of another treaty [and] violates the spirit of

[the Convention's] Article XV [and] contradicts the will of Parties as expressed in Resolution 9.12." These organizations also stated in their comments that changing "the present relationship [between CITES and the IWC] would set the two Conventions on independent and potentially conflicting paths." The U.S. agrees. Another commenter implied that it did not support the proposed U.S. negotiating position on this resolution, but restricted its comments more to the subject of the proposed down listings of various whale species. One commenter stated strong support for the repeal of Conf. 2.9, noting that the linkage of CITES to the IWC through that resolution, "could hamper its credibility, effectiveness and independence."

U.S. Negotiating Position: This resolution, submitted by Japan, calls for the repeal of Conf. 2.9, which recommends that "the Parties agree not to issue any import or export permit or certificate" for introduction from the sea under CITES for primarily commercial purposes "for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling." In 1978 the International Whaling Commission (IWC) passed a resolution requesting that CITES "take all possible measures to support the International Whaling Commission ban on commercial whaling for certain species and stocks of whales as provided in the Schedule to the International Convention on the Regulation of Whaling."

At the time the 1978 IWC Resolution was passed, some populations of whales were listed in Appendix I and some in Appendix II. From 1979 to 1983, as zero catch limits were set in the ICRW Schedule for additional populations of whales, the CITES Conference of Parties added those populations of whales to Appendix I. Most importantly, at the Fourth meeting of the COP in 1983, CITES decided that "All cetaceans for which the catches are regulated by the IWC and for which the Commission has set catch limits for commercial whaling (except for the West Greenland population of minke whales) and not already on Appendix I would be transferred to that Appendix in 1986, when the IWC decision to implement a pause in commercial whaling comes into effect." This action by CITES COP4 established a strong relationship between the two organizations whereby CITES has agreed to reflect IWC decisions in its Appendices.

The IWC has not lifted the moratorium, although some nations, such as Japan and Norway, have called

for the lifting of the IWC moratorium. The IWC continues to work on activities that the United States believes must be completed before any consideration can be given to a resumption of commercial whaling. These elements include development of a scientific scheme for setting quotas and development of an observation and monitoring program to ensure that quotas are not exceeded. Japan continues to circumvent the letter of the ICRW by allowing increasingly high catches of whales for "research" purposes in the Antarctic, and more recently, in the North Pacific. Norway, has since 1993, openly defied the moratorium, by setting its own quota for the take of whales in the North Atlantic. At the most recent meeting (37th) of the CITES Standing Committee, Conf. 2.9 was incorporated into a proposed consolidated resolution for consideration by COP10, although Japan objected.

In consideration of the process related to this issue to date, the United States strongly opposes this resolution.

9. Revision of Resolution Conf. 9.3 on Permits and Certificates [Doc. 10.35]

*Comments:* Three organizations commented, two of which jointly endorsed one submission. One commenter supported the proposed U.S. negotiating position, citing a "need for a clear and consistent permit process." Another set of comments, which was jointly endorsed by two organizations, also supported passage of this resolution without stating a specific rationale.

U.S. Negotiating Position: This is a U.S. sponsored resolution. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution.

10. Interpretation of Article II, Paragraph 2(b), and Article IV, Paragraph 3 [Doc. 10.36]

*Comments:* Comments were received from five organizations, two of which jointly endorsed one submission. One commenter disagreed with the proposed U.S. support of this resolution, and wrote that "listing lots of look-alikes creates significant enforcement and reporting burdens." Another commenter supported the proposed U.S. opposition to this resolution writing that it "joins the United States in opposing this subversive French resolution to reduce protection for Appendix II species listed \* \* \* for reasons of similarity of appearance." One set of comments, jointly endorsed by two organizations, stated opposition to the resolution without stating a specific rationale(s). One organization supported the proposed resolution stating that the

"issue of look-alikes has been a major issue when it comes to bobcat and other species."

U.S. Negotiating Position: This resolution, submitted by France, recommends that Parties be exempt from the requirements in Article IV, paragraph 3 of the Convention, a) to monitor exports of species listed in Appendix II for reasons of similarity of appearance, in order to control the trade in other listed species, and b) to mark such specimens in trade with a special identification tag.

The United States opposes this resolution for several reasons. Listing under Article II.2.b. of the CITES treaty is a very important tool to provide the necessary protection to other species listed in Appendices I and II. The listing in Appendix II for similarity-of-appearance purposes allows for the detection of shifts in the market toward species listed for reasons of similarity of appearance (which could put those species at risk as well). In the case of species listed for reasons of similarity of appearance, it is important to sufficiently monitor their international trade to obtain data which could indicate increased levels of trade or conservation concerns.

11. Interpretation of Article XIV, Paragraph 1 [Doc. 10.37]

*Comments:* Comments were received from seven organizations, two of which jointly endorsed one submission. One commenter supported the U.S. proposed opposition to this resolution by writing that this resolution would impose "additional restrictions upon rights specifically protected in the body of the Convention [and thus] this resolution represents and infringement upon state sovereignty." Another commenter, which called on the U.S. to support the French proposed resolution, stated that "stricter domestic measures should be reserved for extreme circumstances" and that the adoption of such "negates the effectiveness of the Treaty, tests its credibility as an internationally accepted regulatory mechanism, and hinders range states conservation programs." One commenter called on the U.S. to support this proposal, and stated because "some countries \* \* \* do not allow transactions with non-indigenous species that are legal under CITES \* \* \* conservation programs are often hindered when the "use of the species is an important part of the conservation of the species." Another commenter stated that it was "extremely pleased that the U.S. will "strongly oppose adoption" of France's submission to weaken a Party's ability to set stricter domestic measures to

control importation of CITES-listed species. National sovereignty must not be sacrificed, especially in relation to the strong U.S. laws acknowledged by the [U.S. Fish & Wildlife] Service \* \* \*." One set of comments, which was endorsed by two organizations, agreed with the proposed U.S. negotiating position in opposition to the resolution and stated that the "draft resolution would violate the language of the Convention [and it would] restrict a sovereign right of Parties that is specifically not restricted by the Convention text." The United States agrees.

U.S. Negotiating Position: This resolution, submitted by France, recommends that Parties to the Convention not adopt stricter domestic measures for non-native species, and only institute such steps for indigenous taxa when illegal trade is present. The resolution also recommends that Parties increase their consultation with other range states if enacting stricter domestic measures for non-native species.

The United States strongly opposes adoption of this resolution on the grounds that it is contrary to the text of the Convention and represents an infringement on state sovereignty. As Article XIV, paragraph 1 of CITES states: "The provisions of the present Convention shall in no way affect the right of parties to adopt: (a) stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or (b) domestic measures restricting or prohibiting trade, taking possession, or transport of species not included in Appendices I, II or III."

The resolution submitted by France ignores the series of resolutions adopted at previous COPs, as well as numerous decisions of the Standing Committee, calling for CITES Parties to adopt stricter domestic measures to improve the effective implementation of the Convention for the conservation of species of global concern, regardless of whether the taxa in question were native or non-native to any particular country. It should also be noted that consultations with range states do occur when Parties are considering listing non-native species in the CITES Appendices. Therefore, range states are consulted and their views and data considered prior to any listing of species in the Appendices.

Many countries have adopted a large number of laws and regulations which are stricter domestic measures with regard to imports and exports of CITES-listed species and non-CITES species.

Such laws in the United States include the Wild Bird Conservation Act (16 U.S.C. 4901 *et seq.*), the African Elephant Conservation Act (16 U.S.C. 4201 *et seq.*), the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*), the Migratory Bird Treaty Act (16 U.S.C. 73 *et seq.*), and the Endangered Species Act (16 U.S.C. 1531–1544). The United States has also adopted stricter domestic measures under authority of the Pelly Amendment to the Fisherman's Protective Act (22 U.S.C. 1978).

12. Revision of the Definition of "Primarily Commercial Purposes" [Doc. 10.38]

*Comments:* Seven organizations commented, two of which jointly endorsed one submission. The set of comments which were endorsed by two organizations, supported the proposed U.S. negotiating position and stated "primarily commercial" cannot be defined according to the use of funds earned without violating the treaty [and] acceptance [of the resolution] could lead to exports of large stocks of Appendix I specimens for commercial purposes in violation of \* \* \* Article III." Another commenter agreed with the proposed U.S. position and stated that "this resolution could create loopholes for trade in specimens of Appendix I species. \* \* \*" This commenter also stated that the proposed resolution would "impose an impossible burden of proof upon importing nations by requiring them to assess the exporting nation's reasons for taking of the specimen in question. The determination of "primarily commercial purposes" should be based on the ultimate end of the specimens in trade in the importing country, not activities in the exporting country." One commenter stated that the definition of "primarily commercial purposes" in the draft resolution were "unacceptable" and that the resolution, if passed, "could create loopholes facilitating illegal trade in Appendix I species, most notable elephant ivory." The commenter further stated that the "resolution contradicts the spirit of Article II (1) and Conf. 5.10 which seek to strictly limit commercial sale of Appendix I species \* \* \* Clearly submission of this resolution is another devious attempt to commercialize stockpiled ivory and put a huge wedge in the door to resuming the full-scale trade in elephant products." Another commenter recommended that paragraph 5 of the draft be amended "to make it clearer \* \* \* that the Convention prohibits trade in Appendix I specimens when commercial components are involved only when the purposes of import are

primarily commercial." One commenter stated that the U.S. should "seriously consider [this proposed definition] and [the draft resolution] should be supported by the U.S." This commenter stated that the "definition of 'primarily commercial purposes' needs to be approached with an understanding that appropriately controlled trade in products from well-managed conservation programs can be beneficial both the people and to wildlife conservation."

*U.S. Negotiating Position:* This resolution, submitted by Namibia, would amend portions of Conf. 5.10, thus revising the Parties' interpretation of the term "primarily commercial purposes" in CITES. Conf. 5.10 was developed to help countries apply the terms "primarily commercial purposes", "commercial purposes", and "non-commercial". The Parties recognized that interpretation of the provisions of Article III, paragraphs 3(c) and 5(c) varied significantly between Parties. The key to understanding both the treaty and Conf. 5.10 however is the fact that the decision on whether or not an import permit is contingent upon the finding of the importing country that the import is for non-commercial purposes.

Under this proposed resolution, the "primarily commercial purposes" decision would be based on activities in the exporting country, rather than the importing country (as specified in the treaty), such that transactions with Appendix I specimens or derivatives would not be interpreted as being for "primarily commercial purposes" despite commercial components if the following conditions are met: (1) the specimens and derivatives result from routine conservation and management programs, which are owned and controlled by a government of a Party and (2) the transaction is (a) conducted under the direct and full control of both the importing and exporting governments and is open to inspection by the CITES Secretariat or any body agreed to by both governments and the CITES Secretariat; (b) the exporting country allocates all net income from the transaction to conservation and management programs for the species concerned, its habitat, education and awareness programs, and to the development of communities directly involved in the management and conservation programs; (c) the importing country certifies that the imported specimens will be used in a cultural and traditional manner and will not be re-exported; (d) the exporting government certifies that the export will enhance the status of the species; and,

(e) the transaction receives prior approval by the Standing Committee.

The United States opposes this resolution as written, conditions notwithstanding, as it potentially could create loopholes for trade in specimens of Appendix I species, resulting in commercialization that could lead to the extirpation or extinction of a species. It would also weaken the intent of CITES, which was to strictly regulate trade in specimens of Appendix I species (Article II, paragraph 1). The resolution is not in accordance with the treaty. The United States is sympathetic to the concerns of the proponent country and its conservation efforts; however, the resolution, as written, is inconsistent with the intent of the Convention and could open up loopholes for trade in Appendix I species, that are at a higher risk of exploitation.

13. Criteria for Granting Export Permits in Accordance With Article V, Paragraph 2 [Doc. 10.39]

*Comments:* No comments were received.

*U.S. Negotiating Position:* This agenda item refers to the decision of COP9 directing the Standing Committee to prepare a draft resolution containing criteria for granting export permits in accordance with Article V, paragraph 2 of the Convention. The United States believes that such criteria are not necessary, particularly in light of the adoption of Resolutions Conf. 9.3 and 9.25.

14. Illegal Trade in Whale Meat [Doc. 10.40]

*Comments:* One set of comments was received, which was jointly endorsed by two organizations. These organizations stated that "efforts to halt this illegal trade is contingent on the continued cooperation of CITES and the IWC" and that because "all whales are listed on CITES Appendix I \* \* \* it is important that discussions about the illegal international trade in whale meat continue to occur within the CITES forum." The United States agrees.

*U.S. Negotiating Position:* This is a United States sponsored discussion paper. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this issue. The United States wishes to facilitate discussions of methods of how to better enforce the Convention, as we believe that this is still a significant problem. The U.S. is very concerned about illegal trade in whale products, especially after the recent case of 4–6 tons of meat that were illegally shipped from Norway to Tokyo, Japan. A similar case of whale meat smuggled from

Norway to Japan occurred in 1993. A resolution was adopted by the Parties at COP9, which called for further cooperation between CITES and the IWC in order to stop illegal international trade in whale products. In 1995 the IWC passed a resolution which calls for all governments and other entities with a history of practicing whaling to determine if they have any remaining stockpiles of whale meat. This agenda item will allow for discussion of these issues.

15. Illegal Trade in Bear Specimens [Doc. 10.41]

*Comments:* Two comments were received on this issue, one of which was jointly endorsed by two organizations. One set of comments "wholeheartedly endorses the resolutions" adopted by the Animals and Standing Committees and urged the U.S. "to continue its leadership by doing everything in its power to ensure that the Parties agree to a global moratorium on all trade in bear parts and products." Another set supported the draft U.S. position and stated that they hoped that "the United States will join China at COP10 and call for a global moratorium on the international trade in these valuable bear parts." The comments which were endorsed by two organizations stated that they favored a global moratorium of the bear parts trade and urged the Service promote initiatives to increase law enforcement activities related to illegal wildlife trade, particularly focused on illegal bear gall bladders.

*U.S. Negotiating Position:* Discussions at COP10 of the illegal trade in bear specimens will probably follow from previous discussions held at the last meetings for the Animals and Standing Committees. In response to the serious problems of conservation of bear populations throughout the world caused by the illegal trade in bear parts and products of Appendix I species, the United States placed this issue on the agenda of the Animals and Standing Committees.

One important decision of the Animals Committee recognizes that "bears are native to Asia, Europe, North America, and South America, and as such the problem of conservation of bears caused by illegal trade in their parts and products is a global one." The United States believes that this decision is important in that it reflects an awareness that problems of illegal trade are not limited to one region of the world, but affect all populations and all geographic regions. Again, this points to the need for both domestic and multilateral solutions to these problems.

Upon request from the Animals Committee, the CITES Secretariat issued Notification to the Parties #946 which stressed the serious problems of bear conservation and illegal trade, and requested that Parties submit for discussion at COP10 information on wild bear populations, trade, threats, legislative and/or regulatory controls on bear harvesting, enforcement, interdiction, and prosecution efforts related to illegal trade, the kinds of bear derivatives and products available on the open market, efforts to promote the use of substitutes in traditional medicines, and information on public education and outreach efforts. The purpose for this notification, and the compilation of information, was to ascertain what the real problems are, what efforts have been made by countries, and what solutions could benefit bear conservation. The United States responded to this notification and provided information on its bear populations, and trade and enforcement activities.

The Secretariat will be compiling and reviewing the responses received from the Parties in response to this notification, and preparing a report for discussion at COP10. Upon evaluating this report, the United States will review it closely and develop a policy position. The United States intends to stay deeply engaged with CITES efforts for the conservation of bear populations. Some possible outcomes that the U.S. would support include: 1) Working with key consumer countries to seek solutions to curtailing the illegal trade in bear parts, including adoption of effective legislation and regulation; 2) Increased efforts to obtain biological data for Asian bear populations, along with assessments of the scope and impact of illegal and legal trade; 3) Increased cooperative law enforcement efforts, including bilateral and multilateral law enforcement efforts, including sharing of intelligence information, forensics identification, and training. The issue could indeed be placed on the agenda of the [proposed] Illegal Trade Working Group; 4) Continuation and strengthening of ongoing efforts for cooperation with traditional medicine communities, to increase public awareness and industry knowledge about the conservation concerns associated with the bear trade, and the need for stronger trade controls and conservation measures. Efforts to find substitutes and alternatives should be encouraged; and 5) If the Parties recommend a voluntary suspension of trade in bear products (gall bladders, bile, other organs), support such a

suspension of trade, provided it is coupled with the above efforts. The U.S. could implement such a multilateral decision, if it is based on the fact that any commercial trade in gall bladders or bear bile products (even from Appendix II species) is potentially detrimental to endangered bear populations. Such a suspension should not include trophies of bears, particularly those included in Appendix II; that trade is not believed to pose a conservation or illegal trade problem. Doc. 10.41 was not received in time from the Secretariat to be considered in this notice.

16. Exports of Leopard Hunting Trophies and Skins [Doc. 10.42]

*Comments:* One comment was received on this issue. This commenter "strenuously opposes any actions which may facilitate trade in leopard hunting trophies and skins or weaken the requirements for engaging in such trade."

*U.S. Negotiating Position:* Doc. 10.42 was not received in time from the Secretariat to be considered in this notice.

17. Trade in Tiger Specimens [Doc. 10.43]

*Comments:* Two comments were received on this issue. One commenter stated that "it is hoped the United States will not only maintain the beneficial conservation activities it has already taken, but increase them." The other set of comments which were endorsed by two organizations urged the Service "to advocate whatever measures are necessary to achieve full implementation of Conf. 9.13 by the U.S. and other Parties."

*U.S. Negotiating Position:* Doc. 10.43 was not received in time from the Secretariat to be considered in this notice.

At the 36th meeting of the Standing Committee, all Parties were asked to provide information at the Committee's 37th meeting on their efforts to end trade in tiger parts and products, reduce poaching of wild tigers, and implement Conf. 9.13 (Conservation of and Trade in Tigers) passed at COP9. The United States provided such documents to the Secretariat for the 36th and 37th meetings of the Standing Committee. At the 37th meeting of the Committee the United States reported on the following issues: efforts to interdict illegal shipments coming into the United States; training in Asia on CITES enforcement and implementation; progress made by the Service's National Fish and Wildlife Forensics Laboratory, including analysis of levels of arsenic, mercury, and other chemicals found in

patented traditional Asian medicinal products; the Service's education and outreach program with the Asian community in the United States and a similar outreach program with the traditional Asian medicine practitioner community; the Rhinoceros and Tiger Conservation Act passed by the U.S. Congress and the Service's review of grant proposals under the Act; and funding through the National Fish and Wildlife Foundation for such grants.

On March 13, 1997, the Service announced the awarding of the first-ever grants issued under authority of the Rhinoceros and Tiger Conservation Act of 1994. The Act provides monies to fund projects that will enhance sustainable development programs to ensure effective long-term rhino and tiger conservation. Congress had authorized \$200,000 in funding for fiscal year 1996 and \$400,000 for fiscal year 1997. Ten projects receiving funding were announced, including two specifically targeted on tiger conservation efforts in India, Indonesia, and Nepal, while two additional projects benefiting both tigers and Asian rhinos were funded in India and Indonesia. Combined awards for these projects total \$96,300. Additional monies were allocated to grants for rhino conservation projects (see discussion under item 19). The Service also serves on the council which administers the National Fish & Wildlife Foundation's Save The Tiger Fund, a grant program funded by primarily by Exxon to assist with the conservation of tigers.

#### 18. Trade in African Elephant Specimens

##### (a) Revision of Resolution Conf. 9.16 [Doc. 10.44]

*Comments:* Comments were received from one organization on this specific sub-item, which stated that the U.S. "should heed the warnings in the most recent Panel of Experts report concerning proposed elephant down listings by Zimbabwe, Botswana and Namibia." This commenter further stated that "sufficient trade controls and regulatory enforcement mechanisms—especially in Zimbabwe—are not in place. The commenter added that "the United States should promote ongoing respect for the Panel of Experts procedure and its efforts."

U.S. Negotiating Position: Doc. 10.44 was not received in time from the Secretariat to be considered in this notice. The U.S. supports the Panel of Experts process, and supports detailed review, evaluation, and consideration of the conclusions of the panel.

##### (b) Revision of Resolution Conf. 7.9 [Doc. 10.45]

*Comments:* Comments were received from three organizations on this specific sub-item, of which two organizations endorsed one submission. One commenter stated that the U.S. should support this resolution but "should consider amending Section M \* \* \* to call upon the Parties to take into account the potential impact upon elephant populations in non-proponent range states." The other set of comments, jointly endorsed, supported the Panel of Experts procedure and endorsed some of the changes to Conf. 7.9 proposed by the Standing Committee. These comments also urged the Service "to note \* \* \* at COP10 that it was inappropriate for the Secretariat to have expressed its opinion that there is no need for a special procedure for considering proposals to transfer populations of African elephant from Appendix I to Appendix II \* \* \*".

U.S. Negotiating Position: At the 37th meeting of the Standing Committee discussions were held pertaining to the implementation of Conf. 7.9, which establishes the Panel of Experts process for review of proposals to transfer African elephant populations from Appendix I to II. At that meeting the Secretariat recommended repeal of Conf. 7.9 for several reasons, including their view that the new CITES listing criteria (Conf. 9.24) are sufficient. The United States continues to believe that the Panel of Experts review is important and provides an independent assessment that should be retained. The United States recalls that several African elephant range states at the last meeting of the Standing Committee strongly supported continuation of the Panel of Experts process. The United States continues to advocate that the panel review should be expanded to include review of specific ivory importing countries, if so identified in a proposal. The United States believes that the Standing Committee should not make a recommendation to the COP on repeal of Conf. 7.9, but rather should leave that discussion and decision up to the COP. The United States fully intends to evaluate the analyses in the most recent Panel of Experts report, and to take those analyses into consideration in the development of its positions on proposed transfers of certain African elephant populations to Appendix II.

##### (c) Stockpiles of Ivory [Doc. 10.46]

*Comments:* Two comments were received on this sub-item, one of which was jointly endorsed by two organizations. One commenter stated

that "it is vital that the Service recognize that allowing sale of stockpiles, no matter how seemingly rigid the restrictions on such sales may be, will ultimately provide a laundering loophole for illegal ivory...[which] will undoubtedly lead to a renewed elephant slaughter." The two organizations jointly endorsed one set of comments, agreed with the proposed U.S. position, and stated "no single option regarding ivory stockpiles should be endorsed \* \* \* since countries should be able to evaluate all options."

U.S. Negotiating Position: COP9 asked the Standing Committee to evaluate issues pertaining to ivory stockpiles, and make recommendations to the Parties. At the 37th meeting of the Standing Committee, representatives of Africa reported on a meeting held in Dakar, Senegal of African elephant range states (the United States provided financial assistance for the meeting). At that meeting, several options were presented and agreed upon by the range states. The U.S. position at the Standing Committee meeting was that no single option should be endorsed by the Standing Committee, as long as the options are fully in accordance with the provisions of the CITES treaty, since countries should be able to evaluate all options. The United States continues to support that position. Doc. 10.45 was not received in time from the Secretariat to be considered in this notice.

#### 19. Trade In and Conservation of Rhinoceroses

*Comments:* One set of comments was received which dealt with rhino conservation in general terms. This commenter "agrees with the Service that [Standing Committee Doc. SC.37.17] should not be supported" as it "would be an unconscionable waste of scarce resources \* \* \* to conduct an [sic] study on indicators, when there is not enough resources to provide on-the-ground protection of rhinos in the wild and elimination of rhino horn markets through outreach activities."

*Background:* The 37th meeting of the Standing Committee agreed to support the continued efforts of the IUCN/SSC African Rhino Specialist Group (AfRSG) (Doc. SC.37.17), and agreed to endorse efforts by that group to develop indicators to measure the impact(s) of the CITES listing of the species. While endorsing the efforts, the document prepared by the AfRSG was not adopted or accepted by the Committee. The United States agreed with the Standing Committee's endorsement of the efforts of the AfRSG, but supported the position of the Committee in not adopting the document. The U.S. would

not support any funding from the CITES Trust Fund for those efforts.

On March 13, 1997, the Service announced the awarding of the first-ever grants issued under authority of the Rhinoceros and Tiger Conservation Act of 1994. The Act provides monies to fund projects that will enhance sustainable development programs to ensure effective long-term rhino and tiger conservation. Congress had authorized \$200,000 in funding for fiscal year 1996 and \$400,000 for fiscal year 1997. Four projects were funded, which directly benefit African rhino conservation, two in Kenya, and one each in South Africa and Zaire. An additional five projects were funded, which directly benefit Asian rhinos: two projects are in India and two in Indonesia. Two projects were funded which will benefit both tiger and Asian rhino conservation. Combined awards for these projects totaled \$154,221.

(a) Implementation of Resolution Conf. 9.14 [Doc. 10.47]

*Comments:* No comments were received on this specific sub-item.

U.S. Negotiating Position: Doc. 10.47 was not received in time to be considered in this notice.

(b) Trade in Live Rhinoceroses From South Africa [Doc. 10.48]

*Comments:* One comment was received on this specific sub-item. This commenter stated that "[r]emoval of the annotation without uplisting to Appendix I will be a clear sign that future rhino horn trade is imminent, undermining CITES long-term interest in rhino conservation."

U.S. Negotiating Position: Doc. 10.48 was not received in time to be considered in this notice. At COP9, South Africa's population of the white rhinoceros was transferred to Appendix II, with an annotation to allow only trade in live rhinoceroses and sport-hunted trophies. South Africa will submit a report to COP10 on its implementation of this down listing. The U.S. interpretation of the proceedings at COP9 was that there would be a proposal from the Depositary Government (Switzerland) to transfer the population back to Appendix I, submitted to COP10, as well as a proposal from South Africa to retain the population back to Appendix II (if it wanted to do so). The Secretariat's interpretation differed, and it informed the United States that no such procedure is necessary. South Africa has submitted a proposal to "amend" its annotation for this species. The United States believes that this proposal constitutes a new species

proposal, one which would transfer the population to Appendix II, and as such must be evaluated in the context of the CITES listing criteria in Resolution Conf. 9.24, and be subject to all of the procedures relevant to species listing proposals. The United States believes that these annotations bring up important issues that will be addressed once a document is received on this agenda item.

20. Exports of Vicuña Cloth [Doc. 10.49]

*Comments:* Two comments were received on this issue, one of which was jointly endorsed by two separate organizations. One commenter stated in general terms that the "annotated downlisting [for vicuña wool] has proved problematic and the Parties should revert to the pre-COP9 annotation which only allowed trade in finished vicuña products. International trade in raw wool must be prohibited." The jointly endorsed comments strongly urged the U.S. "to propose that Parties reinstate the wording of the vicuña annotation adopted at COP6, which permitted vicuña in carefully designated areas of Peru and Chile to be downlisted from Appendix I to Appendix II \* \* \* with an annotation to allow the export of fabric and garments made from wool sheared from live vicuña and marked prior to export. Trade in raw wool was prohibited."

U.S. Negotiating Position: Doc. 10.49 was not received in time to be considered in this notice.

21. Conservation of Edible-nest Swiftlets of the Genus *Collocalia* [Doc. 10.50]

*Comments:* No comments were received on this proposed resolution.

U.S. Negotiating Position: At COP9, in response to submission of a proposal to include these species in CITES Appendix II, a decision was adopted to convene an international scientific and management workshop on the conservation of edible-nest swiftlets in the genus *Collocalia*. This agenda item will discuss the results of that workshop, held in Indonesia in 1996. The United States did not attend the workshop. Doc. 10.50 was not received in time for inclusion in this notice.

22. Biological and Trade Status of Sharks [Doc. 10.51]

*Comments:* No comments were received on this issue.

U.S. Negotiating Position: The United States has actively participated in the implementation of Conf. 9.17 which directs the Animals Committee to report to COP10 on the biological and trade status of sharks. The Animals

Committee prepared a discussion paper in this regard. Conf. 9.17 also requested that the Food and Agriculture Organization (FAO) of the United Nations and international fisheries management organizations establish programs to collect and assemble the necessary biological and trade data on sharks species, and that such information be distributed to the Parties at COP10. The recommendations contained in the Animals Committee discussion paper call for continued cooperation between the FAO, international fisheries organizations, and CITES. In addition, many questions were raised concerning technical and practical aspects of implementation concerns associated with inclusion of marine fish species which are subject to large-scale commercial harvesting and international trade, and also listed on the CITES Appendices. Doc. 10.51 was not received in time for inclusion in this notice.

In order to provide a framework for this and other activities that CITES will undertake to implement Con. 9.17, the United States has introduced a resolution for consideration at COP10 concerning the formation of a Marine Fishes Working Group. See the **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution.

23. Trade in Plant Specimens

*Comments:* No comments were received on any of the sub-items related to this issue.

*Background:* Relevant documents were not received in time for inclusion in this notice.

(a) Implementation of the Convention for Timber Species [Doc. 10.52]

U.S. Negotiating Position: At the 37th meeting of the Standing Committee, the Deputy Secretary General of CITES, acting as Chair of the Timber Working Group (TWG), introduced document Doc. SC.37.13, which sought the direction of the Committee on recommendations to be made to the Parties at COP10. (As noted at this meeting, the Secretariat planned to re-introduce this document, unchanged, to COP10 for consideration by the Parties.) At the Standing Committee meeting, the United States noted the positive, productive, and cooperative tone which characterized the TWG meetings. The United States also noted that the document submitted by the TWG (Doc. SC.37.13) was assembled by the technical experts who attended the Group's meetings.

The United States agreed that the resolutions drafted by the TWG should

be submitted to COP10, except the one entitled Regarding Appendix III Listings (TWG.02.Concl.04 (Rev.)). The United States supports all of the draft resolutions, except for that one; the United States opposed the proposed amendment of Conf. 9.25, and will continue to do so at COP10. That draft resolution concludes that limiting an Appendix III listing to geographically separate populations would not necessarily result in enforcement difficulties for Parties; the U.S. disagrees. The draft does not take into account implementation and enforcement concerns, especially for species other than timber tree species. The United States believes that the draft resolution is a misinterpretation of the Appendix III provisions of the CITES treaty.

The topic of extending the term of the TWG was also discussed by the Group itself and reported at the Standing Committee meeting. The TWG recommended that extending the term of the working group be considered, if technical issues need to be addressed, with the same membership, but be convened only at the request of the Standing Committee, to discuss specific issues. The United States supported that recommendation, with the caveat that the Terms of Reference of the TWG remain the same. With regards to United States financial support for future TWG meetings, the United States position is that any such funding is dependent on Federal agency budgets, about which information is not currently available.

(b) Amendment to the Definition of "Artificially Propagated" [Doc. 10.53]

U.S. Negotiating Position: Doc. 10.53 was not received in time for inclusion in this notice.

(c) Disposal of Confiscated Live Plants [Doc. 10.54]

U.S. Negotiating Position: Doc. 10.54 is still under review by the United States. The United States has established a system of Plant Rescue Centers for the placement of confiscated live plants. The Service's Office of Management Authority and the United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) work together closely on the implementation of this rescue center program. There are currently 54 active plant rescue centers in the United States. During 1996, 416 shipments containing 12,633 live plants were confiscated upon import into the United States in violation of CITES. The five families of CITES plants most confiscated were Orchidaceae (8,908 plants), Bromeliaceae (1,280 plants),

Cactaceae (926 plants), Primulaceae (815 plants), and Euphorbiaceae (409 plants). Four hundred fourteen (14) of these shipments containing 12,174 plants were assigned to plant rescue centers. The United States supports the development of CITES guidelines on how to deal with disposal of live confiscated plants, and agrees generally with the Guidelines produced by the Plants Committee working group. However, the United States does not agree with the sale of confiscated specimens to traders, commercial propagators, or others involved in commercial activities. This could encourage potential illegal trade and possibly enable the original importer of the confiscated plants to reobtain these plants, or otherwise too easily benefit from the illegal import; it also violates existing agreements with the U.S. Plant Rescue Centers. The U.S. will discuss the operations of the U.S. Plant Rescue Center Program at the COP.

24. Significant Trade in Appendix II Species

*Comments:* One general comment was received on this issue, which was jointly endorsed by two separate organizations. These comments supported the Service's position and stated: "We believe that the Significant Trade Process is being undermined by the use of consultations with range states in lieu of forwarding specific primary or secondary recommendations." These comments highlighted several "weaknesses" in the Significant Trade Review process including "vaguely worded" recommendations, the Secretariat being "far too easily satisfied that \* \* \* actions taken have fulfilled \* \* \* recommendations," and a new procedure instituted by the Animals Committee "whereby the Conf. 8.9 process is avoided in favor of Committee member consultations with the Party of concern, which eliminates penalties to Parties for not complying with recommendations."

(a) Animals [Doc. 10.55]

U.S. Negotiating Position: Doc. 10.55 was not received in time for inclusion in this notice.

At the 12th meeting of the Animals Committee, the review of species slated for examination in 1995 under the Significant Trade Review process (Conf. 8.9) was discussed at length and recommendations to the Secretariat from each of the CITES Regions were made through the Committee Chair. Prior to the 13th meeting of the Committee it was not clear whether the Secretariat had fully followed through

with primary and secondary recommendations made to range states which are developed in this process. In reviewing the species slated for examination in 1996, the United States recommended that an assessment of the progress made to date by IUCN on developing a target list be conducted, and the United States advocated a rapid completion of the task if it were not yet complete. In addition, the United States stressed the need for field projects to study significantly traded species in the wild, rather than extensive revision of lists in the Significant Trade Review process.

The United States shares concerns that the Significant Trade Review process, particularly regarding recommendations made to the Secretariat for transmission to the range states, is neither specific enough nor sufficiently "action-oriented." The U.S. also shares other concerns regarding consultation with range states, and looks forward to discussions on these issues at COP10. Except for corals and conch (both species under review in this process), the Secretariat has transmitted primary and secondary recommendations on the 1995 species significant trade review to range States.

During discussions at the 13th meeting of the Animals Committee of the 1996 review of taxa in the Significant Trade Review process, there was confusion about the timing of the review cycles used in this process. The United States supports an agreement not to initiate another round of reviews (the 1996 reviews), but to complete the 1995 cycle between that meeting and COP10, and then devote efforts to evaluating the outcomes of previously reviewed species, especially involving Parties receiving primary recommendations from the review process. The United States agrees that insufficient resources are being applied to field studies and that this aspect of the Significant Trade Review process suffers if new species are reviewed before adequate follow-up, such as field studies, have been implemented for previously reviewed species.

The United States introduced a draft resolution on reporting and identification of corals in trade, at the request of the 12th meeting of the Animals Committee. As this is a United States sponsored resolution, see **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution.

(b) Plants [Doc. 10.56]

U.S. Negotiating Position: Doc. 10.56 was not received in time for inclusion in this notice. The United States

supports the recommendations of the working group on significant trade of the Plants Committee. The recommendations are non-controversial, and accomplish a fine-tuning of the process for plants that is already underway for animals. Such an adjustment is needed to accommodate the greater number of higher-taxon listings of plants in Appendix II of the Convention. The United States believes that this process is a generally effective approach, as has been demonstrated, for example, with tree ferns, where entire families are listed.

25. Sale of Tourist Items of Appendix I Species at International Airports, Seaports, and Border Crossings [Doc. 10.57]

*Comments:* One comment was received on this issue, which was jointly endorsed by two organizations. These organizations supported the U.S. submission of this draft resolution, stating that the "sale of Appendix I tourist items encourages illegal trade and hampers enforcement [and] [b]order crossings are ideal places to educate travellers [sic] about the Convention." The U.S. agrees.

U.S. Negotiating Position: This is a United States sponsored resolution. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution.

26. Trade in Specimens of Species Transferred to Appendix II Subject to Annual Export Quotas [Doc. 10.58]

*Comments:* No comments were received on this issue.

U.S. Negotiating Position: Doc. 10.58 was not received in time for inclusion in this notice.

27. Trade in Alien Species [Doc. 10.59]

*Comments:* Comments were received from three organizations on this issue, one set of which was jointly endorsed by two organizations. One commenter stated that this issue "should remain outside the scope of CITES" and since the Convention "is experiencing significant problems fulfilling its current 'obligations \* \* \*' involvement in invasive species issues should be avoided. Another set of comments, jointly endorsed by two separate organizations, "fully supports this document and discussions on the need to prevent the introduction to the wild of live exotic animals and plants that are traded internationally."

U.S. Negotiating Position: This topic is addressed in an issue document co-sponsored by the United States and New Zealand. See **Federal Register** notice of March 27, 1997, for a rationale

explaining the U.S. submission of this document. In response to comments, the United States stresses that CITES is indeed the appropriate forum for the discussion of introductions of invasive species deriving from international trade in live specimens of these species. Alien [nonindigenous] species have been identified as the second largest threat to biological diversity globally after habitat loss and degradation. The U.S. submitted a discussion paper asking that this issue be discussed at COP10. The intent of the United States is to: (1) heighten international awareness of the threats alien species pose to the conservation of biodiversity and focus attention on finding practical solutions to the alien species problems; (2) encourage cooperation and collaboration between CITES and the Convention on Biological Diversity on threats to biodiversity from the introduction of alien species through international trade in these species; and (3) encourage Parties to pay particular attention to these issues when developing national legislation and regulations, when issuing export or import permits for live specimens of potentially invasive species, or when otherwise approving exports or imports of live specimens of potentially invasive species.

28. Establishment of a Working Group for Marine Fish Species [Doc. 10.60]

*Comments:* Comments were received from twelve organizations on this issue, one set of which was jointly endorsed by two organizations. One organization stated that it "applaud[ed] U.S. efforts to ensure that CITES trade rules are fully coordinated with conservation and management rules under other international agreements"; they did express concern for the "open-ended" jurisdiction of the proposed Working Group and the lack of "indication who would be chosen to serve on this working group." Two organizations, in opposing this draft resolution, expressed the view that marine species management and conservation issues should be dealt with only by the United Nations Food and Agriculture Organization (FAO) and either coastal nations or regional fisheries management organizations. Another commenter, whose submission was jointly endorsed by two organizations, supported the draft resolution, and noted that the proposed Working Group "would serve similar function to the [CITES] Timber Working Group". One commenter, a foreign government, stated in opposition to the draft resolution, that not only should the FAO and coastal nations be solely

responsible for marine species management and conservation, but that this draft resolution is unacceptable because of the increased workload it would cause for CITES, and the absence of scientific evidence "of verification of the 'extinction level' to be considered by CITES." Another foreign commenter, in opposing this draft resolution, stated that the U.S. submission of this proposal was "inconsistent with its position committed \* \* \* at the [22nd meeting of the] FAO Fisheries Committee," specifically with regard to the conservation and management of shark species. One other foreign organization, in opposition to the draft resolution, stated that "issues pertaining to marine fishes should be promoted by more appropriate organizations such as the \* \* \* FAO of the United Nations." This commenter also stated the formation of such a working group would complicate "the present thinking on marine living resources [and] might cause unnecessary confusion." Another foreign organization, requesting that the U.S. withdraw the draft resolution specifically because of its involvement in shark management and conservation, expressed concerns that "CITES to a large extent is a relic of the past," and that the draft resolution "perpetuates the scatter-gun, confrontational approach." This organization favored FAO management of shark species. One commenter, expressed the opinion that the submission of the draft resolution was "premature and potentially counterproductive to the conservation and management of ocean fisheries." This commenter also stated that it was "debatable" that several marine species qualify for listing under CITES, that the tasks of the proposed working group would be "overwhelmingly complex," that "regional fishery organizations and coastal nations are responsible for managing and conserving ocean fisheries," that the control of harvests is the "most effective means of conserving marine fish," and that the proposed Working Group's tasks would be "redundant" to the work of the FAO. Another commenter opposed the draft resolution as "costly, useless and inefficient in nature \* \* \* premature, redundant and overlapping." This organization also stated that the working Group's creation would "create another financial and administrative burden for the Convention," and that "it is a utopian idea to try to manage a few selected fish species without managing the totality of the marine species, including the marine mammals."

U.S. Negotiating Position: This is a United States sponsored resolution. See

**Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution. In response to comments received, the United States notes that this proposed working group is modeled after the Timber Working Group established at COP9, and will complement but not in any way supersede efforts of international fishery management organizations. The purpose of the Working Group is not to propose marine fish species for listing, or deal with listing issues in any manner, but rather to investigate concerns associated with inclusion in the CITES Appendices of marine fish species subject to large-scale commercial harvesting and international trade, and develop recommendations on approaches to address identified issues with the FAO and other fishery organizations. In addition, this proposed working group will facilitate liaison between the CITES Animals Committee and the FAO and other international fisheries organizations, in order to complete the implementation of Resolution Conf. 9.17. The United States regrets the misunderstanding, reflected in some comments received, that the proposed working group would take on the work of management of commercial fisheries, which is not within CITES' purview. Rather, if a commercially fished marine species becomes depleted to the point that it qualifies for inclusion in the CITES Appendices, the efforts of this working group will be a vital component of effective implementation of such a CITES listing.

#### 29. Scientific Justification for National Export Quotas [Doc. 10.61]

*Comments:* Two comments were received on this issue, one of which was jointly endorsed by two separate organizations. One commenter stated that the U.S. should oppose this draft resolution as "burdensome and unnecessary." Other comments received, which were jointly endorsed, supported the draft resolution stating that it "would strengthen Resolution Conf. 9.3" by requiring scientific justification for CITES export quotas.

**U.S. Negotiating Position:** This resolution, submitted by Israel, discusses the publication and distribution of CITES export quotas by the Secretariat and recommends the provision of relevant scientific evidence and non-detriment findings by Parties when transmitting their own national export quotas for Appendix II species to the Secretariat.

The resolution raises many concerns which the United States shares and provides for interesting points in need of additional consideration and study by

the Parties. It brings forth a valid point with respect to the need for non-detriment findings in support of export quotas submitted by many Parties. Since CITES requires Parties to make a non-detriment finding when issuing an export permit, providing documentation of such a finding to the CITES Secretariat should not be burdensome to Parties that are effectively implementing the Convention. There have been problems with the quota system where quotas were established and implemented without a scientific justification.

The United States supports the preparation of scientific non-detriment findings and justifications by all Parties for the export of indigenous Appendix II species before authorizing or otherwise issuing export permits, as required by the Convention. Quotas submitted to the Secretariat should be supported by scientific documentation in the exporting country, and the Secretariat and Parties should be active in utilizing the Significant Trade Process to make determinations as to whether Parties are appropriately addressing the scientific needs inherent in issuing realistic and appropriate non-detriment findings. However, this resolution refers to those quotas that are determined by individual exporting countries, and not those quotas that are approved by the COP. At present, the United States is evaluating whether the draft resolution submitted by Israel is needed in order to interpret the Convention, but is currently leaning towards opposing this document.

#### 30. Disposal of Stocks of Dead Specimens of Appendix I Species [Doc. 10.62]

*Comments:* Three comments were received, one of which was jointly endorsed by two separate organizations. One commenter supported the proposed U.S. negotiating position. One stated that "adoption of this resolution would create significant loopholes in enforcement of trade of Appendix I species." This commenter further stated that "an unqualified expansion of the utilization of Appendix I species violates the intent of CITES...which strictly restricts trade in specimens from Appendix I species." Comments which were jointly endorsed by two organizations opposed this draft resolution, stating that it would "weaken Resolution Conf. 9.10 [and] allow use of confiscated specimens giving value to illegally traded specimens, parts and products." Another commenter stated that the U.S. should investigate new approaches to the disposal of stock of dead Appendix

I specimens without either endorsing or opposing the proposed U.S. negotiating position.

**U.S. Negotiating Position:** The draft resolution would modify Conf. 9.10 in that it recommends that confiscated dead specimens of Appendix I species not be destroyed, but utilized for useful purposes in accordance with the Convention, in particular for educational, research or scientific activities, but also for "the cultural and artistic heritage" (translation provided by the Embassy of France). The resolution makes no reference to the enforcement obligation of Parties to CITES as enumerated in Article VIII, but instead cites economic and social development provisions of the Convention on Biological Diversity.

The United States will strongly oppose this resolution and believes that Conf. 9.10 as adopted by the Parties is effective as written. The United States believes that this draft resolution, if adopted, would create a number of enforcement problems, not the least of which would involve the large stockpiles of African elephant ivory currently maintained in a number of range states. By opening the door to the cultural and artistic utilization in international trade of stockpiles of Appendix I species, there would be a serious problem of distinguishing between illegal trade and "cultural" trade. The United States is concerned that such use of these specimens for cultural or artistic purposes could result in increased consumer demand for other such specimens.

In addition, the United States believes that this resolution, if adopted, would detrimentally impact controls on seized Appendix I plants and plant materials. The United States recognizes that there may exist many appropriate cultural or artistic uses of accumulated dead specimens of Appendix I animals and plants. However, the United States also recognizes that establishing appropriate mechanisms to ensure that these specimens are only used in the proper context will be very difficult to achieve.

#### 31. Marking of CITES Specimens [Doc. 10.63]

*Comments:* One set of comments was received, which was jointly endorsed by two separate organizations. These organizations disagreed with the proposed U.S. negotiating position and strongly urged the U.S. to oppose this draft resolution. These commenters stated that the proposed changes would allow "secondary products" to "enter international trade without marking" and expressed concern that the draft resolution's provisions "pose a

significant threat to species which are not currently ranched but may be so in the future."

**U.S. Negotiating Position:** This document was submitted by the CITES Secretariat on behalf of the Animals Committee. The Animals Committee discussed problems of implementation of Conf. 5.16 which lays out the requirements for trade in ranched specimens listed in the Appendices to the Convention. The proposed resolution submitted by the Secretariat seeks to amend the marking requirements to reflect uniform marking only of items of primary economic importance. The resolution also recommends that any ranching proposal include details of the marking system, a list of all specimens of primary economic importance, and a current inventory of such stocks.

The resolution was submitted due to the general belief that the previously designed marking requirements were overly burdensome, unenforceable by national authorities, and otherwise impractical. The United States supports this resolution to create a marking regime which is not only practical and enforceable, but institutes necessary marking controls to implement the ranching requirements that are implemented under the authority of the Convention.

### 32. Universal Tagging System for the Identification of Crocodylian Skins [Doc. 10.64]

**Comments:** No comments were received on this issue.

**U.S. Negotiating Position:** The United States supports universal tagging of crocodylian skins. Doc. 10.64 was not received in time for inclusion in this notice.

### 33. Identification of Corals and Reporting of Coral Trade [Doc. 10.65]

**Comments:** One comment was received on this issue. This commenter supported this U.S. proposal stating that identification and reporting of quantities of coral in international trade "has plagued the trade for many years. The proposed resolution addresses the reporting issues and provides a pragmatic solution for handling recognizable coral...under CITES."

**U.S. Negotiating Position:** This is a United States sponsored resolution. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution, at the request of the Animals Committee.

### 34. Implementation of Article VII, Paragraph 2: Pre-Convention Specimens [Doc. 10.66]

**Comments:** No comments were received on this issue.

**U.S. Negotiating Position:** This is a United States sponsored resolution. See **Federal Register** notice of March 27, 1997 for a rationale explaining the U.S. submission of this resolution.

### 35. Captive Breeding

#### (a) Implementation of Article VII, Paragraphs 4 and 5 [Doc. 10.67; Doc. 10.68; Doc. 10.69]

**Comments:** Comments were received from seven organizations on this issue, one of which was jointly endorsed by two separate organizations. One commenter stated that the draft resolution "is so restrictive and overbearing that it is a disincentive to captive-breeding." Another organization encouraged the Service "to amend its resolution \* \* \* to allow additional animals, eggs, or gametes from the wild to be added to the breeding stock to prevent deleterious in-breeding \* \* \*" This commenter also suggested that there was insufficient time to guarantee that "more good than harm will result" from consideration of this resolution, and requested that consideration be "postponed." One commenter stated that birds "taken before some CITES designation should be exempt" and added further that "laws should encourage the redistribution of bloodlines to facilitate the maintenance of the most genetically diverse populations." Another set of comments expressed support for the U.S. submission, but urged the deletion of language which "permits the augmentation of parental breeding stock with the 'occasional addition of animals, eggs or gametes from wild populations.'" This commenter stated opposition to the placement of confiscated live animals in captive breeding facilities. One commenter expressed opposition to the importation of animals, eggs, or gametes for captive breeding, and also suggested "postponement of discussions" of these issues until after COP10 because Parties "have not had sufficient time to review any documents that may be submitted by the Secretariat \* \* \*" Another organization supported the Service's "efforts to design a comprehensive set of standards and requirements for captive-breeding facilities and applaud their proposal in so far as it establishes a thorough program for registration of facilities." One organization stated its concern with the U.S. draft resolution's "unnecessarily restrictive definition of

F2" but stated that "this proposal serves to further reinforce the need to establish an exemption for 'special circumstances' species such as Asian elephants." This commenter opposed the resolution "in so far as it is more restrictive with regard to application of the definition of captive-bred" but supported the resolution "in so far as it paves the way for a limited, narrowly tailored exemption for species with special circumstances."

The United States submitted documents on captive breeding, and these documents are discussed in the March 27, 1997, **Federal Register** notice.

Doc. 10.67, 10.68.1, and 10.68.2 were not received from the Secretariat in time for inclusion in this notice. At COP9, the Parties directed the Secretariat, working with the Animals Committee, to prepare a new resolution consolidating the various extant resolutions dealing with the determination of whether a specimen is bred-in-captivity, and captive breeding of Appendix I animals for commercial purposes. The United States is closely evaluating the document from the Secretariat, and will provide detailed information, views, and positions throughout COP10. The United States is concerned however that discussions in the Animals Committee and indeed by the Secretariat in its proposed resolution, may go beyond the direction given to the Secretariat and the Animals Committee at COP9.

#### (b) Proposals to Register the First Commercial Captive-Breeding Operation for an Appendix I Animal Species

**Comments:** No comments were received on this specific sub-item.

**U.S. Negotiating Position:** No document has yet been received. Under Conf. 8.15, Parties must submit proposals for inclusion of operations breeding Appendix I species in captivity for commercial purposes. The Secretariat maintains a register of those facilities. Proposals are submitted to the Secretariat, which circulates them to the Parties. When a Party objects to inclusion of a facility in the Secretariat's register, and the objection cannot be resolved by the interested Parties, the proposal is discussed and voted upon by the COP (if the proponent country so wishes). This agenda item will include discussion of any pending proposals.

### 36. Hybrids

#### (a) Amendment to Resolution Conf. 2.13 [Doc. 10.70]

**Comments:** Two comments were received on this specific sub-item, one of which was jointly endorsed by two

separate organizations. One commenter supported the proposed U.S. opposition to this draft resolution, stating that it would weaken Conf. 2.13 "by allowing commercial trade in captive-bred hybrids of CITES-listed species without CITES regulation \* \* \* These changes are contrary to the spirit of the Convention and will weaken species protection and enforcement efforts."

The comments that were jointly endorsed by two separate organizations also supported U.S. proposed opposition to this draft resolution noting that the proposal "would weaken Conf. 2.13 by allowing commercial trade in captive-bred hybrids of CITES-listed species without CITES regulation."

**U.S. Negotiating Position:** This resolution was submitted by Australia and seeks to clarify the situation of animal hybrids. In accordance with Conf. 2.13, some hybrids may be subject to CITES provisions, even though they may not be specifically included in the Appendices to the Convention, if one or more of the parents' taxa are listed. Accordingly, if the parents are included on different Appendices, then the requirements of the more restrictive appendix apply. The proposed resolution would modify this system significantly, by recommending that a hybridized specimen only be considered as an Appendix I species if it was the progeny of one or more wild-caught Appendix I specimens. Hybridized specimens which do not meet the criteria would be treated as Appendix II species, and progeny from hybridized parental stock would be treated as if they were not included on any Appendix to the Convention.

The United States opposes this resolution. The United States believes that Conf. 2.13 is effective as written, well balanced in scope, effect, and intent, and needs no revision. By modifying Conf. 2.13 in the proposed manner, additional layers of complexity and confusion would be added to the issue of trade in hybrid animal species. It could significantly increase illegal trade and risk to wild populations. In addition, these important conservation concerns arise from modifying Conf. 2.13 pursuant to the proposed resolution: (1) Full species in trade could erroneously be declared as hybrids by traders, in which case, effective law enforcement could be difficult. This could be especially significant regarding the trade in birds because of plumage that is highly variable, which may not accurately reflect the parentage of a particular specimen; (2) A captive-breeding facility may require supplementation of wild-caught parental stock in order to

maintain a given level of hybrid specimen productivity; (3) The demand for pure Appendix I specimens will still require the acquisition of wild-caught stock, which may promote the laundering of wild-caught specimens under the guise of being captive-born or captive-bred hybrids; and (4) If hybrids are not protected by the more restrictive Appendix, deliberate hybridization could increase and serve to dilute available blood lines, thereby increasing pressure on wild populations to provide additional genetic material. Australia, the author of the proposed resolution, has concerns over specific species in that country and feels this issue could be satisfactorily addressed with a modification to Conf. 2.13. The United States disagrees with Australia, and strongly prefers that such concerns be addressed in a specific listing proposal.

#### (b) Regulation of Trade in Animal Hybrids [Doc. 10.71]

**Comments:** One set of comments was received on this specific sub-item. This commenter stated that this draft resolution represented "a reasonable approach to the issue of hybrids and the U.S. should support the proposal."

**U.S. Negotiating Position:** Doc. 10.71 was not received in time to be included in this notice. The United States supports the consensus reached by the Animals Committee at its last meeting on this issue, and hopes the Secretariat's document reflects that consensus.

#### 37. Shipments Covered by Customs Carnets [Doc. 10.72]

**Comments:** Comments were received from three organizations, two of which jointly endorsed one submission. One organization supported the "spirit of the resolution in so far as it encourages improved education and training for customs officials, as well as increased awareness of relevant requirements for shipments of wildlife," but expressed concern about the meaning of the draft resolution as it related to the legal force of customs carnets versus CITES permits and certificates, noting that these two different types of documents are "mutually exclusive under current law and practice." The comments which were jointly endorsed supported the draft resolution without providing specifics.

**U.S. Negotiating Position:** This is a United States sponsored resolution. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution.

#### 38. Frequent Transborder Movements of Personally Owned Live Animals [Doc. 10.73]

**Comments:** Comments were received from four organizations, two of which jointly endorsed one submission. One commenter, supporting the proposed U.S. position, stated that the draft resolution "represents a most practical and logical solution to the problems facing private owners of legally acquired and possessed Appendix I species who seek to temporarily transport their animals across international borders \* \* \*" This organization stated that this draft resolution would have very positive effects in gaining captive-bred status for captive-born Asian elephants. The set of comments jointly endorsed by two separate organizations also supported the proposed U.S. negotiating position, and recommended "that the certificate either be presented on re-entry or, if the animal cannot be returned, documentation to that effect be supplied to the \* \* \* state of residence." These comments also stated that their support of the resolution was contingent on the acceptable of amendments being proposed by the United States. Another organization also supported the U.S. proposed position by noting that this proposed resolution "aims at correcting some inconsequential actions."

**U.S. Negotiating Position:** This resolution, jointly submitted by Switzerland and Germany, calls for the creation of a certificate of ownership to accompany CITES-listed, personally-owned, live animals frequently crossing international borders. The United States interprets the term personal or household effects in Article VII, paragraph 3, to include personally owned live animals that were acquired in the owner's state of usual residence. Other countries have not included live animals in their interpretation of this exemption, and the Secretariat maintains that position based on Conf. 4.12. The issuance of separate permits to people with personally owned live animals that frequently cross international borders (falconry practitioners, pet owners who travel, etc.) poses technical and administrative burdens. In addition, the Service is concerned with the number of retroactive permits it has had to issue, since the United States recognizes the exemption while other countries do not.

The United States will support the provisions of this resolution. Adoption of this resolution will reduce the administrative burdens to the animal owner and the countries to which the owner enters and exits, while ensuring

marking and monitoring of movement to prevent illegal activities. However, despite general support for the provisions of this resolution, the United States believes that there remains a need to clarify the following elements in the resolution: (a) the animals must be accompanied by the owner; (b) the certificate of ownership must be validated by a Party's Customs or other appropriate authorities on import and re-export; and (c) the information on numbers of certificates issued by species must be recorded in each Party's annual report. In addition, the United States supports adoption of this resolution only if paragraph (n) is adopted. This provision is to ensure that the owner not sell or transfer a live animal while outside the owner's usual state of residence under the certificate of ownership.

### 39. Live Animals in Traveling Circuses [Doc. 10.74]

*Comments:* Five comments were received on this issue, with one submission endorsed by two separate organizations. One commenter opposed this resolution noting that its provisions "would present opportunities for fraud, for laundering Appendix I animals, and engaging in other illegal activities that would deleteriously affect wild populations as well as the integrity of the Convention." This commenter also stated that the consideration of the passport issue should be "held over for COP11." Another commenter expressed support for the "general concept" of "passports" to facilitate movement of privately owned animals, but expressed concerns with "the resolution's limited application to government-owned or sponsored exhibitions, and the fact that the resolution as drafted does not address the concerns of other parties over appropriate safeguards to prevent illegal activity." One commenter stated that they oppose "this extremely vague resolution" and stated that "animal acts" do not "constitute an art form". This commenter also expressed doubts as to the feasibility of the passport provisions as drafted. Another set of comments, jointly endorsed by two organizations, opposed the draft resolution as "extremely vague and confusing" and stated that it "attempts to amend the treaty by creating a new category of exemption under Article VII."

*U.S. Negotiating Position:* Under CITES Article VII, paragraph 7, a Management Authority may waive the permit requirements for the movement of live animals that are part of a traveling live animal exhibition if the

exporter or importer is registered, the animals qualify as pre-Convention or captive-bred, and the animals are humanely transported and maintained. At COP8, the Parties adopted Conf. 8.16 to correct technical problems and prevent fraud in the movement of animals that are part of traveling exhibitions. Conf. 8.16 recommends that Parties issue a pre-Convention or captive-bred certificate for each animal as proof that the animal was registered. The certificates could be issued for three years and would not be collected at the border to allow for multiple shipments. Parties are expected to mark or identify each specimen.

This proposed resolution, submitted by the Russian Federation, considers a circus to be part of a nation's culture which does not use its animals for primarily commercial purposes. The resolution would grant circuses which are owned or funded by governments a "Certificate of Circus Animal." This certificate could not be issued to private or commercial circuses. The Certificate of Circus Animal would be proof that the circus is registered; that its specimens had been acquired in accordance with CITES; and that an Appendix I specimen that is born to the circus or for an animal acquired by the circus before transfer from Appendix II to Appendix I are of legal origin. This Certificate would be valid for all legal specimens, not just for pre-Convention or captive-bred specimens.

The resolution is an attempt to resolve a number of technical problems encountered by circuses. Currently, circuses can obtain certificates for three years under Conf. 8.16 for pre-Convention or captive-bred animals. But they need to obtain other permits and certificates under Articles IV and V for Appendix II and III wildlife when pre-Convention or captive-bred requirements are not met. The second problem concerns progeny born to circuses that strictly do not meet Conf. 2.12, which is of particular concern for traditional circus species, such as the Asian elephant, that are long-lived and slow-maturing which have not had time to achieve sufficient F2 specimens. The third problem is the continued use of animals that were owned by circuses when a species is listed in Appendix II and then the species is transferred to Appendix I as happened with the African elephant. Some of these animals that are in the possession of a circus do not qualify as pre-Convention under Conf. 5.11 and so may no longer be used by circuses when traveling to other countries.

The United States will oppose this resolution. The United States does not

believe that the CITES Parties should treat circuses owned or funded by a country's government differently from circuses that are privately owned. Although the United States recognizes that animals being moved by circuses are to stay in their possession and are not to be sold while the circus is outside its state of usual residence, the United States considers circuses to be conducting activities that are primarily commercial. The United States also does not agree that circuses should be exempted from the requirements of CITES as long as the Management Authority finds that the animals were legally acquired. This broad general exemption from the provisions of CITES could have serious implications for the conservation of some species.

On the other hand, the United States supports the use of a passport-type certificate similar to the Annex presented in the proposed resolution. The United States also recognizes that there are additional technical issues in Conf. 8.16 that could be clarified and looks forward to opportunities to explore these various issues.

### 40. Transport of Live Specimens [Doc. 10.75]

*Comments:* Four comments were received on this issue, one of which was jointly endorsed by two separate organizations. One commenter referenced the activities of the Animals Committee Working Group focusing on this issue, and stated that the U.S. should not seek any further amendments to the group's recommendations. Another commenter wrote extensively on the IATA live animal transport guidelines, stating that "many of the IATA requirements will greatly contribute to the death or unnecessary abuse of birds in transit." This commenter called on the U.S. to abandon the IATA shipping guidelines. One commenter expressed general concern with the knowledge and expertise of Service wildlife inspectors, and stated that the Party's should "work together to develop a more comprehensive set of guidelines and resources for use by current inspection authorities." Another set of comments, jointly endorsed by two separate organizations, supported the Service's submission without giving detailed comments.

*U.S. Negotiating Position:* This is a United States sponsored resolution on behalf of the Animals Committee. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution. The United States agrees that the consensus document prepared by the Animals

Committee should be adopted without major revisions, while at the same time retaining the essential portions of Conf. 9.23. The CITES Parties have endorsed the IATA Live Animals Regulations, as an international industry standard for the transport of live animals. The United States supports this endorsement, and will work for their implementation and enforcement, while also working to modify the IATA Regulations, when appropriate for the health and welfare of live animals in international trade.

41. Designation of Scientific Authorities [Doc. 10.76]

*Comments:* One comment was received, which was jointly endorsed by two separate organizations. These comments support the U.S. draft resolution.

U.S. Negotiating Position: This is a United States sponsored resolution. See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this resolution.

42. Standard Nomenclature [Doc. 10.77]

*Comments:* No comments were received on this specific issue.

U.S. Negotiating Position: Doc. 10.77 was not received in time for inclusion in this notice.

43. Information on the Population Status and Threats to *Ovis vignei* [Doc. 10.78]

*Comments:* Two comments were received on this issue, one of which was jointly endorsed by two separate organizations. One commenter stated that the U.S. "should oppose the recommendations of the Nomenclature Committee to consider all of the ural as listed on Appendix I." This commenter suggested that the U.S. propose a split-listing "which recognize the conservation programs of range states involving international sport hunting." Another set of comments, which was jointly endorsed, urged the Service to support the finding of the Nomenclature Committee which recommended that all subspecies of *Ovis vignei* be considered as listed on Appendix I. These commenters stated that they "reject plans by IUCN/SSC Caprinae Specialist Group and others to promote trophy hunting of these rare sheep, which are declining in the wild." This commenter supported "non-consumptive" uses of these animals, such that they can "remain in the population where they can continue to contribute to the gene pool of these rare subspecies."

U.S. Negotiating Position: This is an information document submitted by the Government of Germany discussing the

population status and threats to *Ovis vignei*. The United States supports the effort to resolve the listing status of *Ovis vignei* and thanks the Government of Germany for presenting this document. The United States supports the recommendations of the Nomenclature Committee on this issue.

44. Traditional Medicines and CITES [Doc. 10.79 and Doc. 10.80]

*Comments:* Two comments were received, one of which was jointly endorsed by two separate organizations. One commenter was "pleased to see that the United States is willing to promote discussion of the use of threatened and endangered species in traditional medicine." This commenter added, however, that discussions including the traditional medicine community "should not be an examination of ways to facilitate the regular, legal use of these at-risk species in medicine, but rather, a cooperative effort to promote conservation of these animals concomitant with promotion of alternatives to endangered animal remedies." The other comments, which were jointly endorsed, expressed no position.

U.S. Negotiating Position: One of the two documents in this item (Doc. 10.80) is a U.S.-submitted discussion paper, "Flora, Fauna and the Traditional Medicine Community: Working With People To Conserve Wildlife." See **Federal Register** notice of March 27, 1997, for a rationale explaining the U.S. submission of this document. The other discussion paper, "Traditional Medicine and CITES: A Discussion of Traditional East Asian Medicine," was submitted by the United Kingdom (Doc. 10.79).

The United States supports the Annex to Doc 10.79, submitted by the United Kingdom and most of its recommendations. The United States strongly supports cooperative educational efforts, working with consumer communities to increase understanding of the impacts of the wildlife trade and wildlife conservation, and facilitating the use of substitutes and alternatives to endangered species products, while respecting the value of traditional medicines and the cultures and communities that use them. However, it continues to believe that understanding of the relationship between traditional medicine and endangered species is best worked out with the full involvement of each country's traditional medicine practitioners, a process that requires consensus building among members of that community. This involvement is critical if long-term change is to occur in patterns of traditional medicine use.

The United States supports several of the recommendations in Doc 10.79, including the following: (1) a resolution on traditional medicines containing wild species, with the caveat that representatives of traditional medicine communities must be intricately involved in the process; (2) directing the Animals Committee to include within the implementation of Resolution Conf. 8.9, a review of significant trade in animal species for medicinal use, with the understanding that representatives of traditional medicine communities should be asked to provide significant information; (3) directing the CITES Secretariat to convene a technical workshop to establish priority actions for addressing the complex problems of utilization of CITES-listed species in traditional East Asian medicines. The United States supports this recommendation in principle, but believes that such a workshop may be premature. The real work of addressing traditional medicine issues needs to be carried out within countries at local and regional levels, and led by community representatives. The United States recommends that the traditional medicine community and its affiliated industries convene any such technical workshop that is proposed so as to ensure that discussion and consensus reaches the appropriate levels in the community; (4) including within the continuing implementation of Resolution Conf. 8.4, of a review of measures taken by Parties in their national legislation to control the import/export of medicinal products containing CITES-listed species; and (5) strongly encouraging Parties to effectively implement Resolutions Conf. 9.13 and 9.14.

45. Financing of the Conservation of Biodiversity and Development of Sustainable Use of Natural Resources [Doc. 10.81]

*Comments:* Four comments were received, one of which was jointly endorsed by two separate organizations. One organization opposed this draft resolution and stated that conservation funds should be generated "through sustainable use programs, such as sport hunting." Another commenter stated strong opposition, and urged the U.S. to "firmly oppose this study and urge parties and NGO's to raise needed funds through sustainable use programs and through their own government appropriations process." One organization wrote that the U.S. "should strenuously oppose any proposal to conduct a feasibility study on taxing the wildlife trade and the issuance of eco-certificates in order to provide

conservation funds for biodiversity” and instead recommended that range state sustainable use programs could generate conservation funds. Two commenters also opposed this draft resolution stating that its recommendations are “beyond the scope of the treaty [and] would require the Standing Committee to involve itself in the internal finances of Parties.”

**U.S. Negotiating Position:** In order to ensure the sustainable use of wildlife resources and to conserve biodiversity, this draft resolution would mandate that the Standing Committee, in liaison with the Convention on Biological Diversity (CBD), the Global Environmental Facility (GEF), the World Conservation Union (IUCN), and each Party, study the terms and conditions under which the establishment of a tax on wildlife specimens could be implemented and the allocation of such taxes. It recommends that the issuance of labels on wildlife and its products be subjected to the payment of such a tax.

While being supportive of biodiversity conservation and the sustainable use of wildlife, the United States opposes adoption of this resolution. The United States opposes the establishment of an international tax on wildlife use. The text of CITES neither obligates or authorizes Parties to levy any tax, whether direct or indirect, on the trade in animal or plant species that are included in the Appendices to the Convention. Nor is there a mechanism provided in CITES that would administer any funds generated from a tax on trade in a manner that would ensure sustainable trade and habitat conservation. Because the text of the Convention does not address the issue of taxation, the United States must oppose the draft resolution on Constitutional grounds. The Congress of the United States, which has exclusive jurisdiction over the passage of any legislation that would levy taxes on United States entities engaged in international trade, has not authorized such taxes to be imposed as part of the implementation of CITES.

#### 46. Development of an Information Management Strategy [Doc. 10.82]

**Comments:** No comments were received on this issue.

**U.S. Negotiating Position:** The development of an information management strategy by the Secretariat was an item of discussion at the 37th meeting of the Standing Committee. The Secretariat presented a document for consideration by the Committee and described its proposal which involved the World Conservation Monitoring Centre. The United States supports the Secretariat's efforts to develop a better

communication system between its offices and the Parties to facilitate the distribution of Notifications to the Parties and other pertinent information. At the Standing Committee meeting, the United States requested that the Secretariat prepare a list of Parties and their computer needs to assist developing countries in obtaining the necessary computer equipment for an information management system to be put in place.

Doc. 10.82 was not received in time for inclusion in this notice. However, the United States will encourage the Secretariat and Parties to find the most cost effective yet efficient solution to these problems, and work with existing internet providers. The United States would not support a costly feasibility study, if other solutions were readily available. The U.S. will continue to urge the Secretariat to assess the computer and other information management needs of the Parties.

#### 47. Inclusion of Higher Taxa [Doc. 10.83]

**Comments:** Four comments were received, one of which was jointly endorsed by two separate organizations. One commenter supported the proposed U.S. opposition to this draft resolution and stated that “its passage could lead to numerous split-listings which will ultimately make CITES enforcement difficult. [The resolution] is highly illogical and inconsistent with the language of the Convention itself and the new listing criteria adopted at COP9.” Another organization commented that the U.S. should oppose this draft resolution as “confusing, unnecessary” as it would “vastly complicate the listing process \* \* \* [and] lead to a proliferation of split-listings.” One organization disagreed with the proposed U.S. position, as the resolution would “avoid negative consequences \* \* \* on conservation programs” if adopted. Other comments, which were jointly endorsed by two separate organizations, opposed the draft resolution as it “would effectively make listings of higher taxa almost impossible by requiring separate annotations for each species [and] may interfere with management programs \* \* \*”

**U.S. Negotiating Position:** This resolution, submitted by Namibia, recommends that the listing of higher taxa on the Appendices to the Convention not be made without considering negative consequences to geographically distinct populations. It also recommends the use of annotations on the Appendices to the Convention so that generalized indicators would be presented according to the conservation

status and most appropriate management program for each listed species.

The United States opposes this resolution, but hopes that some of the issues raised can be addressed in the Nomenclature Committee. The United States believes that this resolution presents a system which would lead to a proliferation of confusing split-listings. There is already adequate flexibility in the Convention for Parties to make decisions as to how they manage populations of native species listed on the Appendices. In addition, the new listing criteria (Conf. 9.24, Annex 3) already adequately address the issues associated with split-listings, and in general, discourage their use. This subject was addressed at length at COP9, and the submission of this newer resolution does not allow for a fair amount of time for the Parties to implement the terms of Conf. 9.24. The Parties agreed at COP9 that reconsideration of the listing criteria should not occur until COP12, so that there is adequate experience gained with the use of the new listing criteria in Conf. 9.24.

#### 48. Proposals Concerning Export Quotas for Specimens of Appendix I or II Species [Doc. 10.84]

**Comments:** Two comments were received on this issue, one of which was jointly endorsed by two organizations. Both comments were on the markhor (*Capra falconeri*) proposal. One commenter stated that the U.S. should support the proposal to establish quotas as the program which would authorize the export of hunting trophies under this plan “is related to a sustainable use program designed to involve rural villages in the management and conservation of wildlife.” Another set of comments, which was jointly endorsed, urged the U.S. to oppose this draft proposal for several reasons: it “is inconsistent with Article III, para 2(d)” because it would permit “the exporting country to issue an export permit prior to the issuance of an import permit; “is inconsistent with Article III, para 3(c) \* \* \* because it defines ‘primarily commercial purposes’ \* \* \* in terms of the conditions at export; “is inconsistent with Resolution Conf. 2.11 (Rev.) because it removes the authority of the importing country to make an independent finding of non-detriment even if new data becomes available; “is inconsistent with Resolution Conf. 9.21 which requires that a request for a quota for an Appendix I species must be made by a proposal, not a resolution;” and because non-consumptive uses of

markhor specimens will "ensure that animals remain in the population where they can continue to contribute to the gene pool of these rare subspecies."

*U.S. Negotiating Position:* The U.S. supports some aspects of Pakistan's proposed resolution containing both a proposed annual export quota for 6 markhor (*Capra falconeri spp.*) sport-hunted trophies, and an accompanying management plan. Countries can impose export quotas that they believe are needed to protect their wildlife resources and more easily enable them to make the required non-detriment findings. Export quotas on Appendix I species are limited to imports for non-commercial trade, including sport hunting trophies. The process is established in Resolution Conf. 9.21. The United States stated at COP9 that if a quota were adopted by the Parties and the United States felt that it should or could not comply with (e.g., the species was listed under Endangered Species Act and required separate findings, or the United States was not convinced of the biological or trade control information presented), the United States would stipulate to that effect at the time of the relevant COP action. While Pakistan could approve the export of trophies of Appendix I species without obtaining concurrence on a quota from the CITES Parties, having a quota (1) assures the community that such trophies will be accepted by importing countries, and (2) provides the exporting country some additional support to control the level of offtake at the regional level. The biological and implementation information in the proposal appear to be adequate to support the very limited offtake requested in this resolution. The background document submitted provides information on the distribution, status, threats, and conservation measures relating to the markhor in Pakistan.

The United States does not oppose the Pakistan resolution, as the proposed quota of 6 markhor appears to be a conservative harvest level. Furthermore, with some modifications, the conservation plan is very positive. The United States notes that the subspecies *Capra falconeri chialtanensis* = *Capra aegagrus* (Chiltan markhor) is listed as endangered under the Endangered Species Act, although does not appear to be covered by the resolution. However, the straight-horned markhor (*Capra falconeri magaceros*) is also endangered under the ESA, and the finding of enhancement required for imports of endangered species may preclude issuance of permits for their

import, even if the resolution is adopted.

*XV. Consideration of Proposals for Amendment of Appendices I and II (This Item Consists of Four Subitems)*

1. Proposals submitted pursuant to Resolution on Ranching [Doc. 10.85]
2. Proposals resulting from reviews by the Animals and Plants Committees [Doc. 10.86]
3. Proposals concerning export quotas for specimens of Appendix I or II species [Doc. 10.87]
4. Other proposals [Doc. 10.88]

The Service's summary of comments on proposals to amend the appendices and negotiating positions on these proposals will be presented in a separate **Federal Register** notice.

*XVI. Conclusion of the Meeting*

*Comments:* No comments were received on this issue.

1. Determination of the time and venue of the next regular meeting of the Conference of the Parties [Doc. 10.89]

*U.S. Negotiating Strategy:* No documents have been received from the Secretariat regarding candidates as host government for COP11. The United States favors holding COP11 in a country where all Parties and observers will be admitted without political difficulties. The United States will support the holding of COPs on a biennial basis, or, as in the case of COP10, after an interval of approximately two and one half years.

*Other Comments Received*

Numerous comments were received on a variety of issues not directly related to issues on the provisional Agenda of COP10, and are not summarized here. However, information and comments were received regarding the issue of annotations of the CITES appendices for the purpose of transferring a species from Appendix I to II. The U.S. is currently considering whether to submit a draft resolution on this issue, and this issue is still under internal review. One set of comments submitted related to this issue, which was jointly endorsed by another organization as well. These organizations expressed concern that the "lack of guidelines to supervise the use of such annotations may cause many problems that could detrimentally effect [sic] species. For example, the Parties could transfer a species from Appendix I to Appendix II in a two-step process without any of the controls the Parties have adopted to ensure that species are not harmed by increased trade." In addition, these commenters expressed concern that there is currently no resolution in force that

"supervises the use of product annotation, nor do the Parties have a review mechanism to ensure that a product annotation is not detrimental to the survival of the species."

The U.S. is concerned about the lack of guidance given to Parties on this issue due to the lack of an interpretive resolution to date. The U.S. believes that there is a very limited number of situations in which a product annotation may be useful, primarily in cases where multiple parts of a given species may be in trade, with a very wide disparity of value for the different parts and the products subsequently manufactured from them. The U.S. believes that trade in the lower value items may not always be a serious conservation concern, but that clear criteria and guidelines for their use are critical.

*Authors:* This notice was prepared by Bruce J. Weissgold and Dr. Susan S. Lieberman, Office of Management Authority, U.S. Fish and Wildlife Service.

Dated: June 2, 1997.

**John G. Rogers,**

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. 97-14833 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-55-P

**DEPARTMENT OF THE INTERIOR**

**U.S. Fish and Wildlife Service**

**Klamath River Basin Fisheries Task Force; Meeting**

**AGENCY:** U.S. Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces a meeting of the Klamath River Basin Fisheries Task Force, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The meeting is open to the public.

**DATES:** The Klamath River Basin Fisheries Task Force (TF) will meet from 8:00 a.m. to 4:30 p.m. on Thursday, June 26, 1997 and from 8:00 a.m. to 4:30 p.m. on Friday, June 27, 1997.

**PLACE:** The meeting will be held in the Klamath Lake Room at the Shiloh Inn, 2500 Almond Street, Klamath Falls, Oregon.

**FOR FURTHER INFORMATION CONTACT:** Dr. Ronald A. Iverson, Project Leader, U.S. Fish and Wildlife Service, P.O. Box 1006 (1030 South Main), Yreka,

California 96097-1006, telephone (916) 842-5763.

**SUPPLEMENTARY INFORMATION:** The principal agenda items at this meeting will be: (1) an update on ecosystem restoration issues before Congress; (2) a report on National Marine Fisheries Service coho listing and implications for restoration projects; (3) an update from the Klamath Compact Commission on the water supply initiative; (4) an update on Technical Work Group sub-basin planning; (5) a TF decision on the final FY98 work plan; and (6) a decision on whether or how to proceed with the Upper Basin Amendment and assignments.

For background information on the TF, please refer to the notice of their initial meeting that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639).

Dated: May 29, 1997.

**David L. McMullen,**

*Acting Regional Director.*

[FR Doc. 97-14839 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[NM017-1220-00]

#### Notice

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice is an emergency closure of roads to allow for the safety of the "Oh My God 100" motorcycle race located near Cuba, New Mexico. The road closures are to provide safety for the racers and to exclude incidental motorized use along the race course.

The race course is located in:

- T. 20 N., R. 2 W., sections 3, 4, 5, 6, 7, 8, 9, and 10, NMPM
- T. 20 N., R. 3 W., section 1, NMPM
- T. 21 N., R. 2 W., sections 29, 30, 32, 32, and 33, NMPM
- T. 21 N., R. 3 W., section 36, NMPM

The emergency road closure is in accordance with the provisions of 43 CFR 8364.1.

**EFFECTIVE DATE:** The race will be held on June 8, 1997, and the emergency road closures will be in effect from 8:00 a.m. until 2:00 p.m., MST.

**FOR FURTHER INFORMATION CONTACT:** Steve Fischer, Multi-Resources Branch Chief, Rio Puerco Resource Area, 435 Montano Rd. NE, Albuquerque, NM 87107, 505-761-8993.

Dated: May 30, 1997.

**Jack Hall,**

*Acting District Manager.*

[FR Doc. 97-14761 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-AG-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[AK-020-1430-03; F-79402]

#### Realty Action; Notice of Proposed Amendments to Lease Agreement F-79402, Public Service Facilities on the James Dalton Highway, Alaska

**SUMMARY:** Toby M. Williams, DBA Yukon Ventures Alaska, Inc., has requested an amendment to the existing lease. A new structure would be erected between the two existing motel units, and consist of 6 ATCO units approximately 56'x9'6". One unit will be used for bathrooms, furnace and laundry facilities, one unit will be used to house the furnace room and three bedrooms, and the remaining four units will accommodate four bedrooms each. This would provide for 19 additional bedrooms, resulting in an increase in lodging capacity from 100 people to 138 people.

Mr. Williams has also requested an amendment to the existing lease, to accommodate seasonal operation of the facilities in lieu of the current requirement for providing minimal emergency services year round. The proposed months of operation would be from April 1 through October 31 of each calendar year.

**ADDRESSES:** Submit written comments on this notice to the District Manager, Bureau of Land Management, Northern District Office, 1150 University Avenue, Fairbanks, Alaska 99709-3899.

**FOR FURTHER INFORMATION CONTACT:** Linda K. Butts, Realty Specialist, at above address or at telephone (907) 474-2324 or toll free at 800-437-7021.

**SUPPLEMENTARY INFORMATION:** The facility is located within protracted Section 7, Township 12 North, Range 10 West, Fairbanks, Meridian, and contains approximately 25.9 acres.

The BLM requests comments on the public interest and safety impacts of changing the existing lease. Interested parties may submit written comments to the District Manager at the above address until July 21, 1997.

Any adverse comments will be reviewed by the BLM-Alaska State Director, who may vacate, sustain, or modify the realty action and issue a final determination. In the absence of any objection, the final determination of

the Department of the Interior will be made in accordance with this Notice.

Dated: May 30, 1997.

**Dee R. Ritchie,**

*Northern District Manager.*

[FR Doc. 97-14783 Filed 6-5-97; 8:45 am]

BILLING CODE 1430-JA-P

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Notice of Intent to Prepare an Environmental Impact Statement for a General Management Plan for the Big South Fork National River and Recreation Area, Kentucky and Tennessee

**SUMMARY:** The Park is operating without the benefit of a comprehensive framework plan prepared according to National Park Service policies. The Corps of Engineers prepared a Master Plan for the park which was primarily development oriented and in many respects is out of date. Key management concerns include the identification of general strategies for the protection of water quality and quantity, management of natural and cultural resources in the gorge and adjacent area, identification of and provision for desirable visitor experiences, enhancement of relationships with others in the area, and the expectation of little or no increases in budget and staff.

The plan will identify a resource-based framework for the park and describe desired future conditions, alternatives, and general strategies, consistent with the park's purpose, significance, and mandates.

The alternatives and general strategies required to achieve desired future conditions will then be assessed for their environmental effects.

**DATES:** A series of public meetings will be held in surrounding communities through June 1997. Please consult with local newspapers for the times and locations or call the park for this information.

**FOR FURTHER INFORMATION CONTACT:** Superintendent, Big South Fork National River and Recreation Area, 4564 Leatherwood Road, Oneida, Tennessee 37841, Telephone: (423) 569-9778.

**SUPPLEMENTARY INFORMATION:** The National Park Service is beginning this planning process and invites your comments. You may provide your comments in person at the public meetings or by mail to the Superintendent at the above address. Comments by mail should reach the

Superintendent by July 15, 1997. Issues for evaluation may be suggested as well as alternatives for addressing the issues. A draft of the planning and environmental impact statement is expected to be available for public review by the summer of 1998. Your input is appreciated.

Dated: May 22, 1997.

**Daniel W. Brown,**

*Acting Regional Director, Southeast Region.*  
[FR Doc. 97-14879 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-70-M

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Golden Gate National Recreation Area and Point Reyes National Seashore Advisory Commission, Notice of Meeting Cancellation

Notice is hereby given in accordance with the Federal Advisory Committee Act that the meeting of the Golden Gate National Recreation Area and Point Reyes National Seashore Advisory Commission previously scheduled for Wednesday, June 11, 1997 in San Francisco will be cancelled.

The Advisory Commission was established by Public Law 92-589 to provide for the free exchange of ideas between the National Park Service and the public and to facilitate the solicitation of advice or other counsel from members of the public on problems pertinent to the National Park Service systems in Marin, San Francisco and San Mateo Counties. Members of the Commission are as follows:

Mr. Richard Bartke, Chairman  
Ms. Naomi T. Gray  
Mr. Michael Alexander  
Ms. Lennie Roberts  
Ms. Sonia Bolaños  
Mr. Redmond Kernan  
Mr. Merritt Robinson  
Mr. John J. Spring  
Mr. Joseph Williams  
Ms. Amy Meyer, Vice Chair  
Dr. Howard Cogswell  
Mr. Jerry Friedman  
Ms. Yvonne Lee  
Mr. Trent Orr  
Ms. Jacqueline Young  
Mr. R. H. Sciaroni  
Dr. Edgar Wayburn  
Mr. Mel Lane

Dated: May 28, 1997.

**Len McKenzie,**

*General Superintendent, Golden Gate National Recreation Area.*

[FR Doc. 97-14880 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-70-P

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

#### Proposed Water Supply Exchange Contract, Yakima Project, Washington

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** Pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969, as amended, the Bureau of Reclamation (Reclamation) proposes to prepare an environmental impact statement (EIS) on a proposed water exchange contract with Trendwest Resorts, Inc. (Trendwest) in Kittitas County, Washington. The purpose of the water exchange contract is to provide a water supply for a Master Planned Resort, proposed for development by Trendwest on property owned by JELD-WEN, Inc. near Roslyn, Washington. Trendwest intends to purchase 3,500 acre-feet of privately owned water rights in tributaries to the Yakima River which it proposes to exchange for storage water from Reclamation's Yakima Project. The exchange would also enable Reclamation to augment instream flows for anadromous fish in streams tributary to the Yakima River.

**FOR FURTHER INFORMATION CONTACT:** David Kaumheimer, Environmental Programs Manager, or Candace McKinley, Environmental Protection Specialist, at Reclamation's Upper Columbia Area Office, P.O. Box 1749, Yakima, Washington 98907-1749; telephone: (509) 575-5848.

**SUPPLEMENTARY INFORMATION:** Trendwest has submitted an application to Kittitas County (County) to develop a Master Planned Resort on a 7,420-acre site near Roslyn. The County has made a determination of significance under the Washington State Environmental Policy Act (SEPA) and has announced its intention to prepare an EIS under SEPA. Kittitas County has invited Reclamation, Washington Department of Ecology, and the Yakima Indian Nation to be cooperating agencies in that effort. The County's SEPA document will address impacts associated with development of the proposed resort, including impacts associated with water supply alternatives including the proposed water exchange with Reclamation.

Reclamation will not initiate work on its NEPA document until the County has substantially completed its SEPA document. The selection and analysis of water supply alternatives in the SEPA EIS will help Reclamation determine which portions of the overall resort

development should be considered connected actions for the NEPA analysis and whether an EIS or an environmental assessment would be the appropriate NEPA documentation. In the interim, Reclamation assumes that an EIS will be necessary. Reclamation may adopt, with or without supplementary information, the County's SEPA EIS as its NEPA document or may prepare a separate document, incorporating portions of the SEPA EIS by reference, as applicable.

To date Trendwest has acquired water rights to approximately 1,448 acre-feet of water in the Teanaway River and 360 acre-feet of water in Big Creek near Easton, Washington. Additional water purchases would be within the upper portions of the Yakima basin.

#### Public Involvement

Reclamation plans to conduct public scoping meetings to identify water supply alternatives and impacts. These meetings will be held in mid-June of 1997 at locations in Kittitas and Yakima Counties, Washington. The dates, times, and locations of public scoping meetings will be noted in newspapers of general circulation in both Kittitas and Yakima Counties. Reclamation will summarize comments received during the scoping meetings into a scoping document which will be available to the public. The public is also invited to comment on the process Reclamation plans to use to meet its responsibilities under NEPA. Comments may be submitted to the address in the **FOR FURTHER INFORMATION CONTACT** section.

Dated: May 21, 1997.

**John W. Keys, III,**

*Regional Director, Pacific Northwest Region.*  
[FR Doc. 97-14760 Filed 6-5-97; 8:45 am]

BILLING CODE 4310-94-M

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-382]

#### Certain Flash Memory Circuits and Products Containing Same; Notice of Issuance of Limited Exclusion Order and Cease and Desist Order

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order and cease and desist order in the above-captioned investigation.

**FOR FURTHER INFORMATION CONTACT:** Carl P. Bretscher, Esq., Office of the General

Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3107.

**SUPPLEMENTARY INFORMATION:** The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 137), and in sections 210.45 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR §§ 210.45 and 210.50).

The Commission instituted this patent-based section 337 investigation based on a complaint filed by complainant SanDisk Corporation ("SanDisk"). Complainant alleged that respondents Samsung Electric Company, Ltd. and Samsung Semiconductor, Inc. (collectively, "Samsung") had violated section 337 of the Tariff Act of 1930, as amended (19 CFR § 1337), in the importation, sale for importation, and/or sale after importation of certain flash memory circuits by reason of infringement of claim 1, 2, or 4 of complainant's U.S. Letters Patent 5,418,752 (the '752 patent') and/or claim 27 of complainant's U.S. Letters Patent 5,172,338 (the '338 patent').

The administrative law judge ("ALJ") assigned to this investigation held an evidentiary hearing in September and October 1996. On February 26, 1997, the presiding ALJ issued an initial determination ("ID"), in which he found a violation of section 337. Specifically, the ALJ found that Samsung's so-called "original" design products directly infringe the '752 patent, and both Samsung's original and "new" design products directly infringe the '338 patent. The ALJ also found that Samsung could be held liable for contributory and/or induced infringement of the '752 patent under an alternate construction of certain patent claims in issue advocated by Samsung. However, the ALJ declined to make a determination as to whether Samsung's new design products infringe the '752 patent, citing inadequate document production by Samsung.

On March 5, 1997, the ALJ issued his recommended determination ("RD") on remedy and bonding. The ALJ recommended that the Commission issue a limited exclusion order directed toward Samsung's infringing flash memory circuits as well as to downstream products that incorporate such circuits. The ALJ also recommended that the Commission issue a cease and desist order prohibiting Samsung from selling any flash memory devices in the United

States that infringe the patent claims at issue. Finally, the ALJ recommended that the Commission require Samsung to post a bond in the amount of 100 percent of the entered value of the infringing articles during the Presidential review period.

On March 10, 1997, Samsung petitioned for review of nearly all of the ALJ's major findings, while the Commission investigative attorneys ("IAs") filed a more limited petition for review of certain findings regarding the '752 patent. SanDisk and the IAs filed responses to Samsung's petition on March 18, 1997.

On April 15, 1997, the Commission notified the parties that it had determined to review two issues raised by Samsung's petition for review: (1) Whether the ALJ erred in finding that Samsung could be held liable for contributory and/or induced infringement of the '752 patent; and (2) whether the ALJ erred in declining to make a determination as to whether Samsung's new design products infringe the '752 patent. The Commission requested that the parties brief a series of questions regarding these two issues. The Commission also asked the parties to provide written submissions on the proposed remedy, the public interest, and bonding. In accordance with the Commission's directions, the parties filed their initial briefs on April 28, 1997, and their reply briefs on May 5, 1997.

The target date for completion of this investigation was May 27, 1997. However, on May 23, 1997, the parties jointly requested that the Commission extend the target date to June 2, 1997, in order to give the parties time to finalize a settlement agreement and to file a joint motion to terminate the investigation on the basis of the settlement. The Commission granted the motion, with the stipulation that the deadline for submission of the motion to terminate was May 30, 1997. The parties, however, were unable to reach a settlement agreement and no motion to terminate was filed, with the result that the Commission is issuing its final determinations on the violation issues under review and on remedy, the public interest, and bonding on June 2, 1997.

Having reviewed the record in this investigation, including the parties' written submissions, the Commission determined: (1) To reverse the ALJ and find that Samsung is not liable for contributory infringement; (2) to reverse the ALJ and find that Samsung is not liable for induced infringement; and (3) to find that Samsung's new design products do not infringe the '752 patent due to a failure of proof.

The Commission has further determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of infringing flash memory circuits, and carriers and circuit boards containing such circuits, that are manufactured by or on behalf of Samsung. The limited exclusion order does not cover any other products that may contain the infringing circuits, whether manufactured by Samsung or a third party. The Commission has further determined to issue a cease and desist order to domestic respondent Samsung Semiconductor, Inc. prohibiting the importation, selling, marketing, distributing, or advertising of infringing flash memory circuits and carriers and circuit boards containing such circuits.

Finally, the Commission has determined that the public interest factors enumerated in subsections 1337 (d) and (f) do not preclude issuance of the limited exclusion order and cease and desist order, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value of the articles in question.

Copies of the Commission's order, the public version of the Commission's opinion in support thereof, and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. Hearing impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at (202) 205-1810.

Issued: June 2, 1997.

By order of the Commission.

**Donna R. Koehnke,**

*Secretary.*

[FR Doc. 97-14838 Filed 6-5-97; 8:45 am]

BILLING CODE 7020-01-P

## INTERNATIONAL TRADE COMMISSION

[Inv. No. 337-TA-376]

### Certain Variable Speed Wind Turbines and Components Thereof; Notice of Reopening of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that, in response to an order issued by the U.S.

Court of Appeals for the Federal Circuit ("the Federal Circuit") on April 24, 1997, the U.S. International Trade Commission has reopened the above-captioned investigation for further proceedings in accordance with the Federal Circuit's instructions.

**FOR FURTHER INFORMATION CONTACT:**

Mark D. Kelly, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3106.

**SUPPLEMENTARY INFORMATION:** The Commission conducted this patent-based section 337 investigation in 1995 and 1996 based on a complaint filed by Kenetech Windpower, Inc., of Livermore, CA ("Kenetech") to determine whether there was a violation of section 337 in the importation, sale for importation, and/or the sale within the United States after importation of certain variable speed wind turbines and components thereof, by reason of infringement of claim 131 of U.S. Letters Patent 5,083,039 ("the '039 patent") and claim 51 of U.S. Letters Patent 5,225,712 ("the '712 patent"), both patents owned by complainant. Enercon GmbH of Aurich, Germany ("Enercon") and The New World Power Corporation of Lime Rock, Connecticut were named as respondents. The Commission found a violation of section 337 (with regard to the '039 patent only) and, in August of 1996, issued a limited exclusion order excluding the subject wind turbines and components thereof. In order to inform itself regarding the continued presence of a domestic industry, the Commission required complainant Kenetech, which had filed for protection under Chapter 11 bankruptcy, to file quarterly reports detailing its domestic industry activities.

Respondent Enercon appealed the Commission's determination to the U.S. Court of Appeals for the Federal Circuit. After the appeal had been filed, Kenetech sold the '039 patent to Zond Energy Systems, Incorporated ("Zond"). Zond moved to intervene in the appeal. Enercon opposed, arguing that Zond had not shown that it qualifies as a domestic industry and that it thus lacked standing to appear. On April 24, 1997, the Federal Circuit remanded the case to the Commission to determine in the first instance (1) "whether Zond should be substituted for Kenetech;" and (2) "whether Zond qualifies as a domestic industry." The Commission has determined to reinstate the protective order issued in this investigation and to request comments from the parties' counsel on the remand questions in view of the unredacted

quarterly reports submitted to the Commission by Kenetech.

By order of the Commission.

Issued: June 2, 1997.

**Donna R. Koehnke,**

*Secretary.*

[FR Doc. 97-14837 Filed 6-5-97; 8:45 am]

BILLING CODE 7020-02-P

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**Proposed Collection of the ETA 205, Preliminary Estimates of Average Employer Contribution Rates; Comment Request**

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension of the collection of the ETA 205, Preliminary Estimates of Average Employer Contribution Rates. A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before August 5, 1997. The Department of Labor is particularly interested in comments which:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

**ADDRESSES:** Mike Miller, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, Room C-4512, 200 Constitution Ave., N.W., Washington, DC 20210; telephone number (202) 219-9297; fax (202) 219-8506 (these are not toll-free numbers) or e-mail millermj@doleta.gov.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The ETA 205 reports preliminary information on the taxing efforts in States relative to taxable and total wages and allows comparison among States. The information is used for projecting unemployment insurance tax revenues for the Federal budget process as well as for actuarial analyses of the Unemployment Trust Fund. The data is published in several forms and is often requested by data users. In addition, this report helps to fulfill two statutory requirements. Section 3302(d)(7) of the Federal Unemployment Tax Act (FUTA) requires the Secretary of Labor to notify "the Secretary of the Treasury before June 1 of each year, on the basis of a report furnished by such State to the Secretary of Labor before May 1 of such year" of the differences between the average tax rate in a State and 2.7 percent (i.e., section 3302(c)(2) (B) or (C)). These differences are used to calculate the loss of FUTA offset credit for borrowing States. Also, the tax schedules collected are used to assure that States are in compliance with provisions of the Tax Equity and Fiscal Responsibility Act (Pub.L. 97-248), section 281.

**II. Current Actions**

*Type of Review:* Extension.  
*Agency:* Employment and Training Administration.  
*Title:* Preliminary Estimates of Average Employer Contribution Rates.  
*OMB Number:* 1205-0228.  
*Agency Number:* ETC 205.  
*Affected Public:* State Governments.  
*Cite/Reference/Form/etc:* ETA 205.  
*Total Respondents:* 53.  
*Frequency:* Annual.  
*Total Responses:* 53.

*Average Time per Response:* 15 minutes.

*Estimated Total Burden Hours:* 14.

*Total Burden Cost (capital/start):*

Estimated at \$280 which is an allowable cost under the administrative grants awarded to States by the Federal Government.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: May 30, 1997.

**Grace A. Kilbane,**

*Director, Unemployment Insurance Service.*

[FR Doc. 97-14815 Filed 6-5-97; 8:45 am]

BILLING CODE 4510-30-M.

## DEPARTMENT OF LABOR

### Employment Standards Administration

#### Wage and Hour Division; Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract

work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) documents entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, N.W., Room S-3014, Washington, D.C. 20210.

#### Withdrawn General Wage Determination Decision

This is to advise all interested parties that the Department of Labor is withdrawing, from the date of this notice, General Wage Determination No. PA970022 Dated February 14, 1997.

Agencies with construction projects pending, to which this wage decision would have been applicable, should utilize Wage Decision Nos. PA970001 and PA970017. Contracts for which bids have been opened shall not be affected

by this notice. Also, consistent with 29 CFR 1.6(c)(2)(i)(A), when the opening of bids is less than ten (10) days from the date of this notice, this action shall be effective unless the agency finds that there is insufficient time to notify bidders of the change and the finding is documented in the contract file.

#### Modifications to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

##### Volume I

##### Connecticut

CT970001 (Feb. 14, 1997)

CT970003 (Feb. 14, 1997)

CT970004 (Feb. 14, 1997)

CT970005 (Feb. 14, 1997)

##### Massachusetts

MA970001 (Feb. 14, 1997)

MA970007 (Feb. 14, 1997)

MA970012 (Feb. 14, 1997)

MA970017 (Feb. 14, 1997)

MA970018 (Feb. 14, 1997)

MA970019 (Feb. 14, 1997)

##### New Hampshire

NH970001 (Feb. 14, 1997)

NH970005 (Feb. 14, 1997)

NH970007 (Feb. 14, 1997)

NH970008 (Feb. 14, 1997)

##### New Jersey

NJ970002 (Feb. 14, 1997)

NJ970003 (Feb. 14, 1997)

NJ970004 (Feb. 14, 1997)

##### New York

NY970002 (Feb. 14, 1997)

NY970005 (Feb. 14, 1997)

NY970006 (Feb. 14, 1997)

NY970007 (Feb. 14, 1997)

NY970008 (Feb. 14, 1997)

NY970010 (Feb. 14, 1997)

NY970011 (Feb. 14, 1997)

NY970012 (Feb. 14, 1997)

NY970016 (Feb. 14, 1997)

NY970017 (Feb. 14, 1997)

NY970018 (Feb. 14, 1997)

NY970019 (Feb. 14, 1997)

NY970020 (Feb. 14, 1997)

NY970021 (Feb. 14, 1997)

NY970031 (Feb. 14, 1997)

NY970032 (Feb. 14, 1997)

NY970034 (Feb. 14, 1997)

NY970036 (Feb. 14, 1997)

NY970037 (Feb. 14, 1997)

NY970038 (Feb. 14, 1997)

NY970039 (Feb. 14, 1997)

NY970040 (Feb. 14, 1997)

NY970041 (Feb. 14, 1997)

NY970042 (Feb. 14, 1997)

NY970044 (Feb. 14, 1997)

NY970046 (Feb. 14, 1997)

NY970047 (Feb. 14, 1997)

NY970049 (Feb. 14, 1997)

NY970050 (Feb. 14, 1997)

NY970051 (Feb. 14, 1997)

NY970073 (Feb. 14, 1997)  
 NY970075 (Feb. 14, 1997)  
 NY970076 (Feb. 14, 1997)

*Volume II*

## District of Columbia

DC970001 (Feb. 14, 1997)  
 DC970003 (Feb. 14, 1997)

## Maryland

MD970001 (Feb. 14, 1997)  
 MD970002 (Feb. 14, 1997)  
 MD970019 (Feb. 14, 1997)  
 MD970021 (Feb. 14, 1997)  
 MD970023 (Feb. 14, 1997)  
 MD970026 (Feb. 14, 1997)  
 MD970042 (Feb. 14, 1997)  
 MD970046 (Feb. 14, 1997)  
 MD970048 (Feb. 14, 1997)  
 MD970054 (Feb. 14, 1997)  
 MD970056 (Feb. 14, 1997)  
 MD970057 (Feb. 14, 1997)  
 MD970058 (Feb. 14, 1997)

## Pennsylvania

PA970001 (Feb. 14, 1997)  
 PA970002 (Feb. 14, 1997)  
 PA970004 (Feb. 14, 1997)  
 PA970013 (Feb. 14, 1997)  
 PA970016 (Feb. 14, 1997)  
 PA970017 (Feb. 14, 1997)  
 PA970020 (Feb. 14, 1997)  
 PA970032 (Feb. 14, 1997)  
 PA970038 (Feb. 14, 1997)  
 PA970041 (Feb. 14, 1997)  
 PA970042 (Feb. 14, 1997)  
 PA970051 (Feb. 14, 1997)  
 PA970053 (Feb. 14, 1997)  
 PA970062 (Feb. 14, 1997)  
 PA970065 (Feb. 14, 1997)

## Virginia

VA970015 (Feb. 14, 1997)  
 VA970018 (Feb. 14, 1997)  
 VA970034 (Feb. 14, 1997)  
 VA970036 (Feb. 14, 1997)  
 VA970039 (Feb. 14, 1997)  
 VA970051 (Feb. 14, 1997)

*Volume III*

## Alabama

AL970007 (Feb. 14, 1997)  
 AL970008 (Feb. 14, 1997)  
 AL970052 (Feb. 14, 1997)

*Volume IV*

## Illinois

IL970001 (Feb. 14, 1997)  
 IL970002 (Feb. 14, 1997)  
 IL970004 (Feb. 14, 1997)  
 IL970005 (Feb. 14, 1997)  
 IL970006 (Feb. 14, 1997)  
 IL970008 (Feb. 14, 1997)  
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 IL970023 (Feb. 14, 1997)  
 IL970026 (Feb. 14, 1997)  
 IL970039 (Feb. 14, 1997)  
 IL970047 (Feb. 14, 1997)  
 IL970049 (Feb. 14, 1997)  
 IL970053 (Feb. 14, 1997)  
 IL970055 (Feb. 14, 1997)  
 IL970059 (Feb. 14, 1997)  
 IL970065 (Feb. 14, 1997)

## Indiana

IN970001 (Feb. 14, 1997)  
 IN970002 (Feb. 14, 1997)  
 IN970003 (Feb. 14, 1997)  
 IN970004 (Feb. 14, 1997)  
 IN970005 (Feb. 14, 1997)  
 IN970006 (Feb. 14, 1997)  
 IN970016 (Feb. 14, 1997)  
 IN970017 (Feb. 14, 1997)  
 IN970018 (Feb. 14, 1997)  
 IN970020 (Feb. 14, 1997)  
 IN970059 (Feb. 14, 1997)  
 IN970061 (Feb. 14, 1997)

*Volume V*

## Arkansas

AR970008 (Feb. 14, 1997)  
 AR970023 (Feb. 14, 1997)  
 AR970027 (Feb. 14, 1997)

## Iowa

IA970002 (Feb. 14, 1997)  
 IA970005 (Feb. 14, 1997)

*Volume VI*

## Colorado

CO970001 (Feb. 14, 1997)  
 CO970002 (Feb. 14, 1997)  
 CO970003 (Feb. 14, 1997)  
 CO970004 (Feb. 14, 1997)  
 CO970005 (Feb. 14, 1997)  
 CO970006 (Feb. 14, 1997)  
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 CO970021 (Feb. 14, 1997)  
 CO970022 (Feb. 14, 1997)  
 CO970023 (Feb. 14, 1997)  
 CO970024 (Feb. 14, 1997)  
 CO970025 (Feb. 14, 1997)

## Idaho

ID970001 (Feb. 14, 1997)  
 ID970002 (Feb. 14, 1997)

## Montana

MT970002 (Feb. 14, 1997)

## North Dakota

ND970004 (Feb. 14, 1997)

## Oregon

OR970001 (Feb. 14, 1997)  
 OR970017 (Feb. 14, 1997)

## Washington

WA970001 (Feb. 14, 1997)  
 WA970002 (Feb. 14, 1997)  
 WA970003 (Feb. 14, 1997)  
 WA970005 (Feb. 14, 1997)  
 WA970007 (Feb. 14, 1997)  
 WA970008 (Feb. 14, 1997)  
 WA970011 (Feb. 14, 1997)  
 WA970013 (Feb. 14, 1997)

## Wyoming

WY970004 (Feb. 14, 1997)  
 WY970009 (Feb. 14, 1997)  
 WY970021 (Feb. 14, 1997)

*Volume VII*

## California

CA970029 (Feb. 14, 1997)  
 CA970030 (Feb. 14, 1997)

## Hawaii

HI9700001 (Feb. 14, 1997)

**General Wage Determination Publication**

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis—Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

The general wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at (703) 487-4630.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (202) 512-1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the seven separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, D.C. This 30th Day of May 1997.

**Carl J. Poleskey,**

*Chief, Branch of Construction Wage Determinations.*

[FR Doc. 97-14560 Filed 6-5-97; 8:45 am]

BILLING CODE 4510-27-M

**DEPARTMENT OF LABOR****Bureau of Labor Statistics****Proposed Collection; Comment Request**

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested

data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed new "Research on the Feasibility of Collecting Occupational Wage Data by Union Status."

A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before August 5, 1997.

The Bureau of Labor Statistics is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the BLS, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

**ADDRESSEE:** Send comments to Karin G. Kurz, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 3255, 2 Massachusetts Avenue, N.E., Washington D.C. 20212. Ms. Kurz can be reached on 202-606-7628 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Employment Standards Administration (ESA) has determined that research should be conducted into alternative ways of collecting information for Davis-Bacon Act purposes. As a result, ESA's Wage and Hour Division (WHD) wishes to evaluate the usefulness of BLS data in the Davis-Bacon wage determination process.

**The Davis-Bacon Act**

The Davis-Bacon Act (40 U.S.C. 276a) requires that workers employed on Federal construction contracts valued in excess of \$2,000 be paid wages and fringe benefits that, at a minimum, have been determined by the Secretary of Labor to be prevailing for corresponding classes of workers employed on projects similar in character to the contract work in the area where the construction takes place. The prevailing wage is defined by Department of Labor regulations as the wage paid to more than 50 percent of the workers in the job classification on similar projects in the area during the period in question. If the majority of those employed in the classification are not paid the same wage, the prevailing wage is determined by calculating the average of the wages paid. In cases where the majority of workers in a classification are represented by a union and are paid the same rate, the union rate is the prevailing rate.

**Summary**

*Current Actions*

BLS plans to determine the feasibility of using the Occupational Employment Statistics (OES) survey to gather the union/nonunion status of employees in construction industries by detail occupation; the results will be evaluated by ESA to assess their usefulness for Davis-Bacon Act prevailing wage determinations. Specifically the goal is to determine whether, in a mail survey where occupational employment and wage level information is being collected on every employee in an establishment, the respondent also has information on employees' union/nonunion status and would be willing to provide it. The process would consist of three components: a telephone "case study"; a survey form test; and a follow-up Response Analysis Survey (RAS).

The case study would be implemented in early Fiscal Year (FY) 1998 as part of the routine follow-up efforts after the most recent OES data collection cycle. After the initial mail-out of survey forms, OES staff in four states would contact firms by telephone in the construction industries (Standard Industrial Classifications 15, 16, and 17) that did not respond by mail to collect the OES data. After collecting the OES data, the questioner would ask if any of the workers in the establishment belonged to a union. If the response was "yes," the OES staff would proceed through the list of occupations reported by the employer to determine for each occupation whether workers belonged to a union.

The intent of this case study would be to gauge the operational feasibility of soliciting information from respondents on the union/nonunion status of their employees by occupation as part of the regular OES wage survey. This would allow BLS to ascertain whether employers can or will readily provide the union status data, what the relative proportion of respondents that have union workers might be, how soliciting this information would affect employer burden, and how disruptive this collection effort would be to the current OES collection process. This case study would not result in the production of estimates regarding the union/nonunion question.

The survey form test following the case study would take place in FY 1999 and would involve mailing questionnaires similar to the current OES survey form (instead of the regular form) to establishments in the construction industry. BLS would test alternative forms to determine which is able to gather the most accurate information while causing the least additional burden to respondents and having the least negative impact on response rates. The purpose of the survey form test would be to determine, first, whether respondents would be willing to provide information on union/nonunion status by occupation through a mail survey. The test also would determine, through the use of different formats, the one format that obtains the most accurate information with least added burden to respondents. Finally, the test would show what impact, if any, requesting this information on the OES survey form would have on OES response rates.

Depending upon response levels in the survey form test, it is possible that estimates of varying occupational detail could be produced.

The follow-up Response Analysis Survey (RAS) would consist of questions asked over the telephone of 2500 respondents, drawn from construction and non-construction industries. The questioner would ask respondents about the data they reported, what records were used to report the data, how long it took them to complete the survey, etc. One purpose of the RAS would be to gather, from respondents, an idea of the difference in burden placed on respondents between completing the regular OES wage survey form and the survey form containing the union/nonunion questions. The expected time needed to complete each RAS is 30 minutes.

The Bureau of Labor Statistics (BLS) will use the information provided for

statistical purposes only. To the full extent permitted by law, BLS will hold the information in confidence and will

not disclose it without the written consent of respondents.

*Type of Review:* New Collection.  
*Agency:* Bureau of Labor Statistics.

*Title:* Research on the Feasibility of Collecting Occupational Wage Data by Union Status.

Activity form(s)	Total number of respondents	Affected public	Frequency	Total annual response	Average time per response	Est. total burden hours
Case Study .....	2,500	Business and other for profit .....	Once FY98 ..	1,725	10 minutes ...	288
Survey Form Test BLS-2877 715-EZ; BLS-2877 715 Test1; BLS-2877 715 Test2.	9,000	Business and other for profit .....	Once FY99 ..	7,000	1 hour .....	7,000
RAS BLS-2877 715-RAS .....	2,500	Business and other for profit; Not for profit inst.	Once FY98/ FY99.	2,250	30 minutes ...	1,125
Totals .....	14,000	.....	.....	10,975	.....	8,413
Two year average .....	7,000	.....	.....	5,488	.....	4,207

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintenance):* \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the ICR; they also will become a matter of public record.

Signed at Washington, DC, this 3rd day of June, 1997.

**W. Stuart Rust, Jr.,**

*Acting Chief, Division of Management Systems, Bureau of Labor Statistics.*

[FR Doc. 97-14816 Filed 6-5-97; 8:45 am]

BILLING CODE 4510-24-M

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**Supplement to California State Plan; Approval**

**AGENCY:** Occupational Safety and Health Administration, Labor.

**ACTION:** Approval; California State Standard on Hazard Communication Incorporating Proposition 65.

**SUMMARY:** This notice approves, subject to certain conditions, the California Hazard Communication Standard, including its incorporation of the occupational applications of the California Safe Drinking Water and Toxic Enforcement Act (Proposition 65). Where a State standard adopted pursuant to an OSHA-approved State plan differs substantially from a comparable Federal standard, the Occupational Safety and Health Act of 1970 (the OSH Act) requires that the State standard be "at least as effective" in providing safe and healthful places of employment. In addition, if the standard is applicable to a product distributed or used in interstate commerce, it must be

required by compelling local conditions and not pose an undue burden on commerce.

After consideration of public comments and review of the record, OSHA is approving the California standard, with the following conditions, which are applicable to all enforcement actions brought under the authority of the State plan, whether by California agencies or private plaintiffs:

(1) Employers covered by Proposition 65 may comply with the occupational requirements of that law by complying with the OSHA or Cal/OSHA Hazard Communication provisions, as explicitly provided in the State's regulations.

(2) The designated State agency, Cal/OSHA, is responsible for assuring that enforcement of its general Hazard Communication Standard and Proposition 65 results in "at least as effective" worker protection; the agency must take appropriate action to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is Federally approved.

(3) The State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State.

These conditions are based on OSHA's understanding of the State's regulations and on general State plan law. Finally, Proposition 65 also is applicable to non-occupational (i.e. consumer and environmental) exposures. OSHA has no authority to address Proposition 65's non-occupational applications; consequently, they are not at issue in this decision and will be unaffected by it.

**EFFECTIVE DATE:** June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** Bonnie Friedman, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone: (202) 219-8148.

**SUPPLEMENTARY INFORMATION:**

**Contents of OSHA'S Decision**

- I. Background
  - A. Pertinent Legal Authority
  - B. Description of the California State Plan Supplement
    - 1. Federal and State Hazard Communication Standards
    - 2. Proposition 65
    - 3. OSHA Review and Public Comment
- II. Summary and Explanation of Legal Issues
  - A. Applicability of Product Clause to Proposition 65 Requirements
  - B. Overview: OSHA Review of State Standards Under the Product Clause
  - C. Burden of Proof
  - D. Application of the California Standard to Out-of-State Manufacturers and Distributors
  - E. Designated State Agency
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References to the record are made in the text of this decision. The docket number in this case is T-032. References to exhibits in the docket appear as "Ex. \_\_\_\_\_." Exhibit 18 contains all of the public comments filed. Each individual comment has been assigned a number and this notice will refer to individual comments by these numbers—"Ex. 18-\_\_\_\_\_."

## I. Background

### A. Pertinent Legal Authority

The Occupational Safety and Health Act generally preempts any State occupational safety and health standard that addresses an issue covered by an OSHA standard, unless a State plan has been submitted and approved. See *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992). Once a State plan is approved, the bar of preemption is removed and the State is then able to adopt and enforce standards under its own legislative and administrative authority. As a consequence, any State standard or policy promulgated under an approved State plan becomes enforceable upon State promulgation. Newly-adopted State standards must be submitted for OSHA review and subsequent approval under procedures set forth in 29 CFR Part 1953 and OSHA Directive STP 2-1.117, but are enforceable by the State prior to Federal review and approval. See *Florida Citrus Packers v. California*, 549 F. Supp. 213 (N.D. Cal. 1982); *Chemical Manufacturers Association v. California Health and Welfare Agency*, No. CIV. S-88-1615 LKK (E. D. Cal. 1994). On May 1, 1973, OSHA published its initial approval of the California State plan in the **Federal Register**. 38 FR 10717, 29 CFR Part 1952, Subpart K.

The requirements for adoption and enforcement of safety and health standards by a State with an approved State plan are set forth in Section 18(c) of the OSH Act and in 29 CFR Parts 1902, 1952 and 1953. OSHA regulations require States to respond to the adoption of new or revised permanent Federal standards by promulgating comparable standards. As explained in more detail in section B, OSHA adopted a hazard communication standard in November 1983. California adopted its

own hazard communication standard in 1981 and revised it, in response to the Federal standard, in November 1985. California submitted its Hazard Communication Standard to OSHA for approval on January 30, 1986. On January 30, 1992, the State submitted changes to this standard by incorporating relevant provisions of the Safe Drinking Water and Toxic Enforcement Act (Proposition 65). See California Health and Welfare Code §§ 25249.5-25249.13.

Under Section 18(c) of the Act and OSHA's regulations, State plans and plan changes must meet certain criteria before they are approved. The principal criteria are:

- The State must designate a State agency or agencies which is responsible for administering the plan throughout the State. 29 U.S.C. § 667(c)(1).

- If a State standard is not identical to Federal standards, the State standard (and its enforcement) must be at least as effective as the comparable Federal standard. Moreover, if a non-identical State standard is applicable to products distributed or used in interstate commerce, it must be required by compelling local conditions and must not unduly burden interstate commerce. (This latter requirement is commonly referred to as the "product clause.") 29 U.S.C. § 667(c)(2).

- The State must provide for a right of entry and inspection of all workplaces which is at least as effective as that provided in section 8 of the Act and must prohibit advance notice of inspections. 29 U.S.C. § 667(c)(3).

- The responsible State agency or agencies must have "the legal authority and qualified personnel necessary for the enforcement of such standards and adequate funding." 29 U.S.C. § 667(c)(4)-(5).

- To the extent the State's constitutional law permits, it must establish a comprehensive occupational safety and health program for employees of public agencies of the State and its political subdivisions which is at least as effective as the standards contained in an approved plan. 29 CFR § 1952.11.

In enacting the State plan system, Congress' intention was to encourage the States "to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." 29 U.S.C. § 651(b)(11); 29 CFR § 1902.1. Consistent with this Congressional declaration, OSHA has interpreted the OSH Act to recognize that States with approved State plans retain broad power to fashion State standards. As President Reagan noted in Executive Order 12612 (October 26, 1987), "[t]he nature of our constitutional

system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues." Section 18 of the OSH Act reflects this "search for enlightened public policy" not by delegating Federal authority to the States but by removing the bar of preemption through plan approval and, thus, allowing States to administer their own workers' protection laws so long as they meet the floor established by the Federal OSHA program.

### B. Description of the California State Plan Supplement

#### 1. Federal and State Hazard Communication Standards

On September 10, 1980, the Governor of California signed the Hazardous Information and Training Act. California Labor Code, §§ 6360-6399. This Act instructed the Director of Industrial Relations, the State's designee responsible for operation of the OSHA-approved State plan (known as Cal/OSHA) to establish a list of hazardous substances and to issue a standard setting forth employers' duties toward their employees under that Act. The standard, General Industry Safety Order 5194 (8 CCR § 5194), was adopted by the State in 1981. Both the Director's initial list and the standard became effective on February 21, 1983.

Federal OSHA promulgated a hazard communication standard (29 CFR § 1910.1200) in November 1983. The State amended its law in 1985, and, after a period for public review and comment, the California Standards Board adopted a revised standard for hazard communication on October 24, 1985. The standard became effective on November 22, 1985. By letter dated January 30, 1986, with attachments, from Dorothy H. Fowler, Assistant Program Manager, to then Regional Administrator, Russell B. Swanson, the State submitted the standard and incorporated the standard as part of its occupational safety and health plan.

In addition to the supplemental provisions of Proposition 65, the State Hazard Communication Standard differs from the Federal standard in a few minor respects:

(1) The State standard requires that each Material Safety Data Sheet contain certain information including Chemical Abstracts Service (CAS) name (unless its disclosure could reveal a trade secret),

while the Federal standard does not require inclusion of the CAS;

(2) The State standard specifically requires a description in lay terms of the particular potential health risks posed by the hazardous substance, while the Federal standard more broadly requires "appropriate" hazard warnings;

(3) While the Federal standard allows for release of trade secret information to health professionals who enter into confidentiality agreements, the California standard allows access to such information to safety professionals as well; and

(4) The State standard does not include some of the exemptions and exceptions added to the Federal standard in 1994.

See Section II.B.4.

Cal/OSHA enforces the California Hazard Communication Standard, like its other standards, under approved procedures similar to those of Federal OSHA. Safety and health inspectors from the Division of Occupational Safety and Health conduct on-site inspections in response to complaints of workplace hazards or when the establishment is selected for a programmed inspection based on objective criteria, etc. Employer and employee representatives may accompany the inspector. If violations are noted, a citation and proposed penalties are issued to the employer, who has the right of appeal to the California Occupational Safety and Health Appeals Board and thereafter to the courts.

## 2. Proposition 65

In a 1986 referendum, voters of the State of California adopted Proposition 65, the "Safe Drinking Water and Toxic Enforcement Act." Proposition 65 and implementing regulations require any business with ten or more employees that "knowingly and intentionally" exposes an individual to a chemical known to the State to cause cancer or reproductive toxicity to provide the individual with a "clear and reasonable" warning. California Health and Safety Code sections 25249.5 through 25249.13; 22 CCR §§ 12000 *et seq.* In accordance with Proposition 65, the State annually publishes a list of chemicals known to cause cancer or reproductive toxicity. 22 CCR § 12000. Proposition 65 applies broadly to all exposures to listed chemicals; consequently, the law has consumer and environmental applications, as well as the occupational exposures relevant here. Under the Office of Environmental Health Hazard Assessment (OEHHA) regulations, a "consumer product" exposure is "an exposure which results

from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service." 22 CCR § 12601(b). An "occupational exposure" is "an exposure, in the workplace of the employer causing the exposure, to any employee." 22 CCR § 12601(c). "Environmental exposures" include exposures resulting from contact with environmental media such as air, water, soil, vegetation, or natural or artificial substances. 22 CCR § 12601(d). OSHA has no authority to address Proposition 65's consumer and environmental applications; consequently, they are not at issue in this decision and will be unaffected by it.

Proposition 65 was passed by referendum of the voters of California in 1986. On January 23, 1991, the California Court of Appeal ordered the California Occupational Safety and Health Standards Board to amend the State's Hazard Communication standard to incorporate the occupational warning protections of Proposition 65. See *California Labor Federation, AFL-CIO v. California Occupational Safety and Health Standards Board*, 221 Cal. App. 3d 1547 (1990).<sup>1</sup> These changes were adopted on an emergency basis on May 16, 1991, and became effective on May 31, 1991. A permanent standard became effective on December 17, 1991. On January 30, 1992, the State submitted amendments to its Hazard Communication Standard, adapting both the substantive requirements and enforcement mechanism of Proposition 65 and OEHHA's implementing regulations, for application to the workplace. Ex. 4.

Two State agencies have been authorized to issue regulations interpreting and implementing Proposition 65's occupational aspects. As discussed in greater detail in Section III.B.2, Cal/OSHA and OEHHA regulations governing occupational exposures provide three alternative methods of complying with Proposition 65:

(1) Warnings may be given through the label of a product;

(2) Warnings may be given via a workplace sign; or

(3) The general California or Federal Hazard Communication Standard may be followed.

See 8 CCR §§ 5194(b)(6) (B)-(C) and 22 CCR § 12601(c). Compliance with Section 12601(c)—which allows use of California or Federal hazard communication methods—is a defense to supplemental enforcement actions brought under Proposition 65. 8 CCR § 5194(b)(6)(E). The regulations also provide sample language for the label and sign warnings.<sup>2</sup> The sample label and sign language, however, represents a "safe harbor" method of providing Proposition 65 warnings. Again, compliance with either the Federal or general State hazard communication procedures constitutes compliance with Proposition 65 and is a defense to any enforcement action. 8 CCR § 5194(b)(6) (B), (C), (E); 22 CCR § 12601(c)(1)(C).

The Proposition 65 requirements of the California standard are enforceable with regard to occupational hazards through the usual California State plan system of inspections, citations and proposed penalties which has been determined to be at least as effective as Federal OSHA enforcement. 38 FR 10717 (May 1, 1973). The Cal/OSHA enforcement directive on hazard communication (Policy and Procedure C-43) provides that a covered employer may comply with the incorporated Proposition 65 requirements by including the substance in the employer's Hazard Communication Program. In addition, the Cal/OSHA standard incorporates the enforcement mechanism of Proposition 65, which provides for supplemental judicial enforcement by allowing the State Attorney General, district attorneys, city attorneys, city prosecutors, or "any person in the public interest" to file civil lawsuits against alleged violators. Private plaintiffs bringing actions must first give notice to the Attorney General and appropriate local prosecutors, and may proceed if those officials do not bring an action in court within sixty days.

Proposition 65 provides for penalties of up to \$2500 per day, per violation. A

<sup>1</sup>In 1988, the Chemical Manufacturers Association (and other plaintiffs) challenged the applicability of Proposition 65 in the workplace, arguing that the law was preempted because it was not a part of the approved State plan. In 1994, the U.S. District Court for the Eastern District of California ruled that the plaintiffs, as a result of the State's incorporation of Proposition 65 into the State plan, did not have standing to pursue their action and that the issues were not ripe for review. *Chemical Manufacturers Association v. California Health and Welfare Agency*, slip op. at 15-25.

<sup>2</sup>For labels, the warnings which are deemed to meet the requirements of Proposition 65 are: "WARNING: This product contains a chemical known to the State of California to cause cancer," or "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm." For signs, the language deemed to meet the requirements is: "WARNING: This area contains a chemical known to the State of California to cause cancer," or "WARNING: This area contains a chemical known to the State of California to cause birth defects or other reproductive harm."

private plaintiff may obtain up to 25% of penalties levied against a company found in violation of Proposition 65 for failing to provide required warnings. Private actions with regard to occupational exposures have been brought in California courts, and many more have been settled on varying bases prior to trial or prior to initiation of formal court action.

### 3. OSHA Review and Public Comment

On April 18, 1995, the Coalition of Manufacturers for the Responsible Administration of Proposition 65 (the Coalition), filed a petition with OSHA requesting that the Plan change submitting the California Hazard Communication Standard with its incorporation of Proposition 65 be rejected. Ex. 8. The Coalition argued that the substantive and enforcement aspects of Proposition 65 unduly burden interstate commerce. Various parties wrote to OSHA to express support for, or opposition to, the Coalition's petition. Exs. 9–16. Other parties expressed concern to OSHA about the continued enforceability of the private right of action provisions of Proposition 65 in the workplace during the pendency of the OSHA review process.

On September 13, 1996, OSHA requested public comment (61 FR 48443) as to whether to approve the California Hazard Communication Standard incorporating Proposition 65 pursuant to 29 CFR parts 1902 and 1953. OSHA had preliminarily determined that the California plan change was at least as effective as the Federal standard and was applicable to products used or distributed in interstate commerce. OSHA sought comment on these determinations as well as the "product clause" requirements for standards which differ from the relevant Federal standard—i.e. whether the State standard is required by compelling local conditions or poses any undue burden on interstate commerce. (As discussed in Section II.B, in its Directive STP 2–1.117 governing the review of different State standards, OSHA specifically stated that public comment would constitute its initial means of assessing the product clause implications of a State standard and that absent record evidence to the contrary a State standard would be presumed to meet the test.)

Following OSHA's September 13, 1996 request for comment on the proposed standard, 207 commentors submitted statements. Many of the commentors opposing the standard are companies which have experienced, or fear experiencing, private enforcement lawsuits under Proposition 65. In a

number of these cases, the commentor did not make it clear whether the company involved had been sued under Proposition 65's occupational, consumer or environmental applications. *E.g.*, Ex. 18–2, 18–23, 18–127, 18–130, 18–133. As noted previously, OSHA's decision can have no effect upon enforcement actions alleging consumer or environmental exposures.

## II. Summary and Explanation of Legal Issues

The comments filed with OSHA presented a variety of issues, each of which will be discussed below. Section III of this notice discusses the more specific provisions of the California standard in light of the requirements of Section 18 of the OSH Act, particularly the product clause. In this Section, however, OSHA will discuss several general legal questions at issue here.

Some commentors have raised issues involving application of the OSH Act's "product clause" to the Proposition 65 elements of the California standard. First, several commentors have questioned whether OSHA should apply the product clause to Proposition 65's substantive requirements and enforcement methods. See Section II.A. Second, OSHA provides an overview of the product clause and outlines the principles OSHA will apply in analyzing product clause issues. See Section II.B. Third, OSHA historically has treated State standards as presumptively compliant with the product clause. OSHA Instruction STP 2–1.117 (August 31, 1984); *see, e.g.*, 62 FR 3312 (January 22, 1997) (approval of Washington State standard amendments for acrylonitrile, 1,2-dibromo-3-chloropropane, and confined space). A few commentors maintain that California must bear the burden of proof on this issue under the Administrative Procedure Act (APA). See Section II.C. Section II.D discusses a jurisdictional issue: whether California may, under the auspices of its OSHA-approved State plan, apply its standard to out-of-state manufacturers. Some commentors argue that Proposition 65's supplemental enforcement mechanism violates Section 18's requirement that a "designated State agency" bear responsibility for administering a State plan. See Section II.E. Finally, Section II.F addresses Proposition 65's exemption for public sector employers.

### A. Applicability of Product Clause to Proposition 65 Requirements

Cal/OSHA, writing on behalf of itself, the State Attorney General, and OEHHA, maintains that the product

clause does not apply to the substantive requirements imposed by Proposition 65. Ex. 6; *see also* Exs. 18–61, 18–62, 18–111, 18–155. Some commentors (*e.g.* Ex. 18–155) also have argued that, even assuming the product clause applies to the substantive provisions of Proposition 65, it does not apply to the law's supplemental enforcement provisions.<sup>3</sup> Because OSHA finds that Proposition 65's supplemental enforcement provisions do not violate the product clause (see Section III.B.5, below), it is not necessary for OSHA to decide whether State enforcement may, in some cases, be subject to the product clause. Accordingly, the remainder of this section will address only Cal/OSHA's argument about the product clause's applicability to Proposition 65's substantive provisions. Ex. 18–155, page 9.

Relying upon statements made in Congressional debate leading to enactment of the OSH Act in 1970, California argues that the product clause was intended only "to limit states from imposing different product design standards for the safety of products," specifically machinery products. Ex. 6, pages 21–22. In contrast,

Far from requiring changes to equipment or products moving in interstate commerce, Proposition 65's warning requirement only requires that warnings be given somehow. They need not be given by a product label, or even through the [Hazard Communication Standard]. Compliance may be obtained where the employer posts an appropriate sign meeting all of the requirements set forth in 22 CCR § 12601(c). This could be accomplished without making any change to the MSDS, and results in complete compliance with Proposition 65.

Ex. 6, pages 21–22. Other supporters of the proposed standard argue, more generally, that the product clause does not apply to warning requirements because warnings (*e.g.* labels, signs, material safety data sheets, training) do not affect product design. *E.g.* Exs. 18–61, 18–62.

As other commentors (*e.g.* Exs. 18–58, 18–148, 18–153, 18–154, 18–156) point out, however, in its Hazard Communication Standard rulemakings,

<sup>3</sup> This argument rests upon the language of Section 18(c)(2):

[T]he text of the Occupational Safety and Health Act is clear that the product clause and its two-part test do not even apply to enforcement. Rather, § 667(c)(2) requires "standards (and the [ir] enforcement)" to be at least as effective as Federal standards, but the product clause applies only to "standards," and makes no mention of enforcement. Thus, OSHA need only consider whether the enforcement of California's HCS and Prop 65 is "at least as effective" as Federal OSHA, and OSHA need not concern itself with whether the private right of action in any way burdens interstate commerce.

OSHA determined that the product clause is applicable to substantive State hazard communication requirements "[b]ecause the Hazard Communication Standard is 'applicable to products' in the sense that it permits the distribution and use of hazardous chemicals in commerce only if they are in labeled containers accompanied by material safety data sheets[.]" 48 FR 53280, 53323 (November 25, 1983). Similarly, in its decision approving California's ethylene dibromide standard, OSHA found the product clause applicable because "the standard establishes conditions and procedures which restrict the 'manufacture, reaction, packaging, repackaging, storage, transportation, sale, handling and use' of the chemical product, ethylene dibromide (EDB), as well as the handling and exposures which may result after EDB has been applied as a fumigant to fruit products." 48 FR 8610, 8611 (March 1, 1983).

OSHA continues to believe that the product clause applies to substantive State hazard communication requirements. As several commentators note (e.g. Exs. 18-41, 18-153), Section 18(c) is phrased broadly. On its face, the statute says simply that the product clause applies to all standards which are "applicable to products which are distributed or used in interstate commerce[.]" 29 U.S.C. § 667(c)(2). It is undisputed that the California standard may, in certain circumstances, apply to products "distributed or used in interstate commerce" because California employers may receive goods from out-of-state suppliers. Thus, the standard comes within the plain language of Section 18(c). OSHA's current interpretation of the product clause is most consistent with this statutory language. See generally Sutherland Statutory Construction, §§ 45.02, 46.01 (4th ed. 1984).<sup>4</sup>

### B. Overview: OSHA Review of State Standards Under the Product Clause

OSHA's decision on the approvability of the California standard involves the relationship between the State police power to regulate health and safety and the Federal power to regulate commerce. Throughout the history of the United States, the States and localities traditionally have used their police powers to protect the health and safety of their citizens. *Medtronic v.*

*Lohr, Inc.*, \_\_\_\_\_ U.S. \_\_\_\_\_, 116 S. Ct. 2240, 2245 (1996). At the same time, the Commerce Clause of the U.S. Constitution provides that "Congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several states[.]" Article I, section 8.

In the absence of a Federal statute specifically addressing the issue, the Federal courts have interpreted the Commerce Clause to limit, implicitly, the power of the States to regulate interstate commerce. Under this "dormant commerce clause," the courts have "distinguished between State statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). As the Court stated in *Taylor*, "[t]he limitation imposed by the Commerce Clause on State regulatory power 'is by no means absolute,' and 'the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.'" *Id.*, citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); see also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *Kleenwell Biohazard Waste v. Nelson*, 48 F.2d 391, 398 (9th Cir.), cert. denied 115 S. Ct. 2580 (1995) (footnote omitted). In reviewing State legislation under the dormant commerce clause, courts consider both the nature and importance of the local interest and any burden on commerce. The case law recognizes that a State has an important stake in promoting the health of its citizens through measures that do not discriminate against or impermissibly restrict interstate commerce. *Id.*; see also *Taylor*, 477 U.S. 131.

In the OSH Act, Congress has enacted a statute, and the preemptive effect of that statute turns on Congressional intent. See generally *Medtronic*; *Gade*, 505 U.S. 88. The language of the product clause must be read against the backdrop of longstanding judicial deference to State sovereignty in the area of health protection. *Medtronic*, 116 S. Ct. at 2250. In *Gade*, the Court held that the OSH Act preempts States without State plans from enforcing occupational safety and health standards on issues addressed by Federal standard; laws of general applicability are not preempted. 505 U.S. at 97, 107-108.

As discussed in Section I.A, Section 18 of the OSH Act removes the bar of Federal preemption for approved State plans, restoring to the States the police power to protect occupational safety

and health, provided that the requirements of Section 18 are met. See also *Gade*, 505 U.S. at 102 (describing Section 18 as giving "States the option of pre-empting Federal regulations by developing their own occupational safety and health programs").

The ability of the States to devise and develop occupational safety or health approaches is limited by the requirements of Section 18(c), including the product clause, which requires that State standards applicable to products not unduly burden interstate commerce, and that they be justified by "compelling local conditions." At the same time, however, Section 18 specifically allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA. The Act's drafters clearly envisioned the "at least as effective" requirement as providing a floor, not a ceiling, for future worker protections efforts by State plan States. See Senate Committee on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970* at 297, 1035 (92d Congress, 1st Session, June 1971) (*Legislative History*). Thus, State standards must pass the "product clause" test, but the States also are free to devise not only more stringent substantive standards but also supplementary enforcement procedures. See *Legislative History* at 1035 (OSH act does "not envision a complete takeover of the field by the Federal government"; OSHA's responsibility is "merely to see to it that certain minimum requirements were met and that beyond those the health and safety of most workers would be left to [the] states"). The flexibility granted the States under Section 18 also is in keeping with Congress' stated purpose of "encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" and its intent to allow the States "to conduct experimental and demonstration projects in connection therewith[.]" 29 USC § 651(b)(11).

The OSH Act's product clause reflects in substantial part terminology and principles developed by the Federal courts in applying the dormant aspects of the Commerce Clause. Notwithstanding the limits of the dormant commerce clause, Congress may grant to the States greater powers to regulate commerce than they otherwise would possess. *Maine v. Taylor*, 477 U.S. at 138-39; citing *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); see also *Florida Citrus Packers v. California*, 549 F. Supp. at 215. In *Citrus Packers*,

<sup>4</sup> As discussed in Section II.B, however, the legislative history of the product clause is a helpful aid in understanding the somewhat ambiguous structure of the product clause "test," which requires an examination of compelling local conditions and the extent of any burden on commerce.

the court found that Section 18 of the OSH Act represents "a broad grant of regulatory power to the states" and, thus, "an attack based upon unduly burdening commerce is limited to those situations where the product standard applies." 549 F. Supp. at 216. The similarity in language between Section 18(c)(2) and dormant commerce clause principles, then, suggests that a principal function of the product clause is to ensure that Section 18 is not read as a grant of power to violate normal Commerce Clause restrictions.

Thus, OSHA agrees with those commentators (e.g., Exs. 18-40, 18-160, 18-163, 18-164, 18-167, 18-174) who have argued that dormant commerce clause case law is relevant to analysis of issues under the product clause. That said, however, OSHA concludes that Congress authorized the agency to give somewhat more strict review under Section 18(c)(2) to State standards that address issues covered by a Federal standard than a court would give under the dormant commerce clause. This conclusion is supported by the limited legislative history of the product clause and the different structural positions presented. In dormant commerce clause cases, courts are considering State attempts to promote health and safety or other local interests in the absence of Federal regulation. Under Section 18(c)(2), on the other hand, the Federal standard provides a uniform floor of protection.

Although there is no committee report explaining the language, the limited Congressional floor discussion concerning the product clause focused on possible State design requirements for machinery products and the possible economic waste resulting from non-uniform State requirements. See, e.g., *Legislative History* at 500-501, 1042 (statements of Representative Railsback and Senator Saxbe). Absent some indication of protectionist discrimination, it is doubtful that a court would reject a State safety requirement because it led to "economic waste." See, e.g., *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938) (upholding State regulation of weight and width of trucks); compare *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (rejecting similar statute where majority of justices found that the State statute either created a disproportionate burden for out-of-state interests or was protectionist in intent); *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, (7th Cir. 1995) (sustaining city ban on spray paint, despite possibility that it was "economic folly"). The examples considered by

Congress suggest that it envisioned OSHA's disapproval of State standards under some circumstances in which the courts would uphold a State law against a dormant commerce clause challenge.

At the same time, the Congressional intent to allow States the flexibility to develop their own occupational safety and health plans, with the Federal standards as a "floor" rather than a "ceiling," must be kept in mind. OSHA's interpretation of the product clause should be "consistent with both federalism concerns and the historic primacy of State regulation of matters of health and safety," see *Medtronic*, 116 S. Ct. at 2250, and with Congress' use of terminology which harkens back to dormant commerce clause principles.

Accordingly, in analyzing differences between Federal and State standards under the product clause, OSHA will first determine whether the State standard is required by compelling local conditions. Consistent with the State historic power to regulate health and safety, a State standard that advances the health and safety of the State's workforce meets this test, provided that the standard does not promote or result in economic protectionism. As discussed in the next section, OSHA will accept the State's determination on this point, in the absence of evidence to the contrary. Thus, OSHA will not simply defer to the State's determination, but will consider "rebuttal" evidence and arguments. In addition, even if a State standard is required by compelling local conditions, OSHA must determine whether the standard imposes an undue burden upon commerce. The burden of establishing an undue burden will be upon the opponents of a State standard (see also Section D); OSHA will consider any alleged burdens in light of the importance of the State interest involved.

OSHA will consider the specific "compelling local conditions" underlying the California standard in Section III.A. Here, however, OSHA notes that many commentators opposing the standard interpret the phrase "compelling local conditions" to be limited to interests which are "unique" to California.<sup>5</sup> E.g. Exs. 18-41, 18-58. OSHA disagrees. Conditions unique to a given State are a sufficient, but not a necessary, basis for a finding of compelling local conditions. Although its focus in past State plan supplement decisions has been on the conditions

prevailing in the State involved [see, e.g., 48 FR 8610 (decision approving California ethylene dibromide standard)], OSHA has never said that a State must establish that the conditions of concern to the State's lawmakers are not prevalent in any other State as well. Such an interpretation would be inconsistent with the plain meaning of "compelling"; more than one State may have a compelling interest in regulating particular safety issues. Simply put, "compelling local conditions" are compelling conditions which exist locally.

Requiring a State to establish unique local conditions also would be inconsistent with the courts' treatment of this issue under the dormant commerce clause. Under the dormant commerce clause, courts look for "local" conditions which may be, but frequently are not, unique to the State involved. E.g. *Maine v. Taylor*, 477 U.S. 131 (upholding discriminatory Maine statute banning importation of baitfish); *Kleenwell Biohazard Waste*, 48 F.3d at 396 (upholding State concern with ensuring safe disposal of solid waste).

### C. Burden of Proof

A few commentators assert that California should bear the burden of proving that its proposed standard is at least as effective as the Federal standard and does not violate the product clause. E.g. Ex. 18-160<sup>6</sup> at pages 2-4 and 18-174 at pages 4-5. This argument relies upon Section 556(d) of the Administrative Procedure Act (APA), 5 USC § 556(d), and the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994). California, in response, argues that Section 556(d) is not applicable to these proceedings because no formal hearing is involved. Ex. 22. The AFL-CIO (Ex. 18-155) points out that the applicable OSHA Instruction, STP 2-1.117 (August 31, 1984) effectively places the burden of proof upon opponents of a State standard for purposes of the effectiveness and product clause tests:

In the absence of record evidence to the contrary (including evidence developed by or submitted to OSHA during its review of the standard), the State standard shall be presumed to be 'at least as effective' as the Federal standard and shall be presumed to be in compliance with the product clause test of section 18(c)(2) of the Act.

<sup>6</sup>Shell Oil and Elf Atochem further assert that California must meet its burden of proof by "more than a mere preponderance of the evidence." Ex. 18-160, pages 7-8. The burden of proof under the APA is preponderance of the evidence. *Greenwich Collieries*, 114 S. Ct. at 2257; *Steadman v. SEC*, 450 U.S. 91, 95 (1981). OSHA has not changed that test by regulation or policy.

<sup>5</sup>Industry commentators also have maintained that Proposition 65's exemption for public sector and some small employers demonstrates that there is no compelling need for the law. OSHA discusses this argument in Section II.A.2.

STP 2-1.117, page 2.

Initially, OSHA notes its agreement with California that Section 556(d) of the APA does not apply to this decision to approve the State standard. Section 556(d) applies only "to hearings required by section 553 or 554 of this title to be conducted in accordance with this section." This decision involves no hearing, and Sections 553 and 554 do not apply. Section 553 applies only to rulemakings. This decision is not a rulemaking, but rather an "order" within the nomenclature of the APA. The decision is a final disposition in an agency process respecting the "grant" or "conditioning" of an agency "approval" or "other form of permission." 5 U.S.C. §§ 551 (6)-(9).

Section 554 does not apply because that section applies only to adjudications "required by statute to be determined on the record after opportunity for agency hearing." The OSH Act requires "due notice and opportunity for a hearing" before OSHA rejects a State plan or plan modification, but requires no hearing before OSHA approves a plan or modification. 29 USC § 667(d). The statutory language quoted above regarding plan rejection proceedings may be insufficient, by itself, to trigger application of Section 554 or 556. See *Chemical Waste Management v. EPA*, 873 F.2d 1477, 1480-82 (D.C. Cir. 1989); *U.S. Lines v. FMC*, 584 F.2d 519, 536 (D.C. Cir. 1978). OSHA, however, has by regulation made Section 556 applicable to rejection proceedings. 29 CFR §§ 1902.17-18, 1953.41(d)(2). The regulations expressly authorize, on the other hand, a decision to approve a State plan or modification without a formal hearing. 29 CFR §§ 1902.11, 1902.13. It is therefore abundantly clear that Section 556(d) does not apply here.

The formal distinction between the process for approving or rejecting a State standard under an approved State plan reflects the real difference between these decisions under the framework of Section 18 and the Federal system. A modification to an approved State plan takes effect prior to and pending OSHA review of the modification. A decision to reject the modification works an abrupt change in the status quo and overrides the determination of a sovereign State. A decision to approve, on the other hand, leaves the status quo and the State's determination unchanged. In effect the decision is not to institute the formal trial-type proceedings required for rejection.

OSHA's historic placement of the burden of proof upon parties opposing a State standard is consistent with Section 18(c)(2), the applicable

regulations, the APA, and the case law. As was discussed in the preceding section, the product clause reflects in substantial part dormant commerce clause case law. Under that case law, the burden of persuasion rests upon the party claiming that a State regulation violates the dormant commerce clause (unless there is evidence of protectionist discrimination by the State). *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir.), cert denied \_\_\_\_\_ U.S. \_\_\_\_\_, 115 S. Ct. 297 (1994), citing *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 525-26 (1989); *Maine v. Taylor*, 477 U.S. at 138; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

In addition, under the dormant commerce clause, the judgments of State lawmakers about the necessity or wisdom of non-discriminatory laws are entitled to considerable, and perhaps total, deference from the courts: if a State articulates a legitimate, non-discriminatory local interest to support an enacted law, "courts should not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'" *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987), citing Justice Brennan's concurring opinion in *Kassel*, 450 U.S. at 679; *Pacific Northwest Venison Producers*, 20 F.3d at 1012.

Because of the similarities between dormant commerce clause principles and the product clause, OSHA believes it is appropriate to apply the same burdens of proof and persuasion as are applied under the dormant commerce clause. Nevertheless, because OSHA also concludes that Congress intended State standards to be subject to somewhat greater scrutiny than they might receive by the courts applying the dormant commerce clause (see Section II.B, above), OSHA will not defer to a State's legislative judgment regarding local conditions to the extent a court might. The agency will presume that a State standard meets the requirements of Section 18(c)(2), but that presumption may be rebutted with appropriate evidence.

This overall approach is in harmony with the idea that Congress, by enacting the product clause, intended to recognize that States adopting State plans retain broad regulatory power over workplace safety and health, but not to allow the States to engage in regulation which otherwise would violate the dormant commerce clause. Imposing the burden of persuasion upon parties opposing a State regulation also is consistent with the basic nature of the "defense" available under the dormant

commerce clause or product clause; these are affirmative defenses. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25 (1937) (treating constitutional challenge to National Labor Relations Act as affirmative defense). Under the APA, the party presenting an affirmative defense bears the burden of persuasion. *Greenwich Collieries*, 114 S. Ct. at 2257-58; *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In keeping with the principles applied under the dormant commerce clause and the nature of the product clause "defense," parties opposing a State standard should bear the burden of proving violations of Section 18(c)(2), unless there is evidence that the standard is linked to economic protectionism. Here, there is no evidence that the voters of California were motivated by economic protectionism in passing Proposition 65.<sup>7</sup> The law, as enacted, applies with equal force to in-state and out-of-state businesses. In addition, although several commentators rely upon dormant commerce clause case law involving discriminatory statutes (e.g., Exs. 18-40, 18-160), they presented no evidence suggesting the statute is discriminatory. See also Ex. 22 (Attachment B, description of ballot initiative). Opponents of the California standard, therefore, bear the burden of proving that it does not satisfy Section 18(c)(2).

#### D. Application of the California Standard to Out-of-State Manufacturers and Distributors

Several commentators raised the issue of whether supplemental enforcement of Proposition 65 against out-of-state manufacturers and distributors<sup>8</sup> is in accordance with Federal and State requirements. Section 18(b) of the Act provides that "[a]ny State which \* \* \* desires to assume responsibility for development and enforcement therein of occupational safety and health standards \* \* \* shall submit a State plan[.]" Section 18(c)(1) of the Act and 29 CFR § 1902.3(b) require that a State plan designate the agency or agencies responsible for administering the plan throughout the State.

<sup>7</sup> As discussed in Section II.D, Proposition 65 as incorporated into the State plan can apply only to California employers. When determining whether the statute was motivated by economic protectionism, however, it is appropriate to examine the intent behind the statute as a whole, not simply its occupational applications. The remaining discussion in this section, therefore, should be understood in this light.

<sup>8</sup> Whenever this decision uses the word "manufacturers" or "vendors," it is intended to include distributors.

To date, Cal/OSHA itself has not enforced its Hazard Communication Standard, including Proposition 65, against out-of-state vendors. However, private parties have instituted enforcement actions against out-of-state manufacturers in their role as vendors of products to which employees of other employers are exposed in California.

Several commentators cite statements by various California officials which appear to indicate that Proposition 65 as incorporated into the State plan may not be enforced against out-of-state vendors. Exs. 18-153, 18-154, 18-162, 18-174. While Proposition 65 itself applies to any "business" exposing an individual to a hazardous substance, the regulation incorporating Proposition 65 into California's Hazard Communication Standard states that an "employer which is a person in the course of doing business . . . is subject to [Proposition 65]." 8 CCR § 5194(b)(6)(A). The Initial Statement of Reasons issued by the Cal/OSHA Standards Board in adopting Proposition 65 said that the purpose of the incorporation was so "employers in California who come within the scope of Proposition 65 will be prohibited from knowingly and intentionally exposing their employees[.]" Ex. 18-156.

In addition, some commentators cite an October 1, 1992 letter from Steve Jablonsky, Executive Officer of the Cal/OSHA Standards Board, to OSHA, which states that employers need not rely on suppliers in order to comply with Proposition 65 as incorporated into the State plan. Mr. Jablonsky stated that employers could comply with Proposition 65 in various ways, including compliance with the general hazard communication provisions and posting of signs in the workplace. Exs. 18-156, 18-162, 18-174. Similarly, a February 16, 1996 letter from John Howard, Chief, Division of Occupational Safety and Health, to OSHA indicated that there should be no effect on out-of-state employers because signs in the workplace, which are the responsibility of the California employer of the exposed employees, would be sufficient warnings. Ex. 6. In addition, in October 1992, when moving to dismiss *Chemical Manufacturers Association, et al. v. California Health and Welfare Agency*, the California Attorney General noted that Proposition 65 does not place any burdens on out-of-state suppliers. Ex. 18-174.

Commentors claim that private enforcement appears to place full responsibility for warning California employees upon out-of-state manufacturers and that application of the standard against out-of-state manufacturers is inconsistent with

California's past statements on this subject. Exs. 18-81, 18-153, 18-154, 18-162. Organization Resource Counselors maintains that product manufacturers who distribute signs for workplace postings are sued despite providing the signs. Ex. 18-150. Others note that the California Attorney General argued, in *Industrial Truck Association, Inc. v. Henry*, that the State standard authorizes enforcement of Proposition 65 against out-of-state manufacturers who supply their products to California employers. Exs. 18-153, 18-154, 18-162, 18-174.

Some commentators assert that Proposition 65 as incorporated into the State standard should not be enforced against out-of-state manufacturers because a State plan by definition can only be enforced against in-State employers. Shell Oil Company and Elf Atochem North America maintain that a State plan cannot reach beyond its own borders to bring enforcement actions against employers for conduct that occurred in workplaces in other States covered by their own State programs or Federal OSHA. Ex. 18-160. Melvin B. Young notes that this is the only part of any State plan which provides for enforcement against businesses outside of the State. Ex. 18-142.

California's response relies upon the fact that Federal OSHA also imposes duties on manufacturers and that the courts have upheld such requirements. Ex. 22. See *General Carbon Company v. Occupational Safety and Health Review Commission*, 860 F.2d 479 (D.C. Cir. 1988). Others who support enforcement of the standards against out-of-state employers maintain that manufacturers are in the best position to assess the hazards and effectively communicate them. In these commentors' views, if manufacturers are not held responsible for exposures to their products, the burden will fall on tens of thousands of California employers. *E.g.*, Ex. 18-167.

OSHA finds that under its requirements governing State plans, a State plan may only enforce its standards within its borders. This conclusion is based upon the language of Section 18 of the OSH Act. Section 18(b) provides that a State may "assume responsibility for development and enforcement *therein* of occupational safety and health standards" (emphasis added). 29 U.S.C. § 667(b). Similarly, Section 18(c)(1)'s requirement for a designated State agency assigns responsibility to that agency for enforcing the State plan "throughout the State[.]" 29 U.S.C. § 667(c)(1); see also 29 CFR § 1902.3(b). Clearly, although Congress provided broad powers to the States under Section 18, these powers

did not extend to enforcing State laws outside of the State's boundaries.

OSHA's conclusion on this point also is consistent with the practical aspects of the State plan system. No other State plans enforce their occupational safety and health standards against employers who do not have workplaces in the State. Some States have adopted standards which differ from Federal standards and which indirectly affect (but do not regulate) out-of-state manufacturers, and these standards have been reviewed and approved under the product clause requirements of Section 18(c)(2) of the Act. See, e.g., 51 FR 17684 (approval of Arizona's short-handled hoe standard); see also OSHA Directive STP 2-1.117. However, in these cases, the State does not take action against out-of-state manufacturers but against those in-state employers who use the affected product. Although, as noted in California's response, the Federal and other State-plan Hazard Communication Standards do impose responsibilities on manufacturers, State plans do not issue citations against out-of-state manufacturers for incomplete or inaccurate Material Safety Data Sheets (MSDS) used by in-state employers. Rather, the State would refer the matter to the Federal Area Office or other State plan in whose jurisdiction the manufacturer operates. Similarly, if Federal OSHA finds during an inspection that an MSDS used by an employer is incomplete or inaccurate and the manufacturer or supplier is located in a State with an approved State plan, OSHA would refer the matter to the State plan. OSHA Instruction CPL 2-2.38C, page 18 (October 22, 1990).

Out-of-state chemical manufacturers and distributors are subject to the Federal Hazard Communication Standard, or to the State plan standard for the State in which they are located. Allowing application of the California standard out-of-state would mean that out-of-state manufacturers are subject to duplicative regulation. As the Supreme Court noted in *Gade*, "the OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation[.]" 505 U.S. at 100.

Based upon the information in the record, it is unclear to OSHA whether the State, by its incorporation of Proposition 65 into the State plan, intended to apply Proposition 65 to out-of-state employers in their role as vendors. On the one hand, a facial understanding of the regulatory language suggests, as some commentors argue, that the State standard applies only to "employers" who expose their own "employees," in the employer's

own workplace, to Proposition 65 chemicals. 8 CCR § 5194(b), 22 CCR § 12601(c). On the other hand, some statements from California agencies, especially the Attorney General's statements in the *Industrial Truck Association* case, appear to endorse the idea of out-of-state application of the State plan.

Whatever the truth may be about the State's intentions here, the OSH Act does not permit out-of-state enforcement of a State's laws under the auspices of an approved State plan. Therefore, Proposition 65 as incorporated into the State plan may only be enforced against in-State employers. The State may, of course, apply its laws to all workplaces within California, including those maintained by manufacturers or distributors incorporated in other States; in that situation, the "out-of-state" business also would be an "in-state" employer. Additionally, OSHA is addressing only the State's authority under the State plan. This decision leaves open the possibility that the State may have other legal authority under which it can apply Proposition 65 to out-of-state businesses. OSHA has no authority to resolve that question. Most important, as OSHA has noted previously, Proposition 65 applies to consumer and environmental exposures. This decision does not affect actions brought under these aspects of the law.

#### E. Designated State Agency

Several commentors addressed the issue of whether Proposition 65's provision for supplemental enforcement violates the OSH Act's criteria for a designated State agency. Section 18(c)(1) of the OSH Act and regulations at 29 CFR § 1902.3(b) require that a plan designate a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State. Although Section 1902.3(b)(3) allows an agency to delegate its authority through an interagency agreement, the State designee must retain legal authority to assure that standards and enforcement provided by the second agency meet Federal effectiveness criteria.

Commentors raised two issues regarding the relation of Proposition 65 to these criteria. The first issue involves the diversity of agencies involved in the enforcement of Proposition 65, including the OEHHA, the State Attorney General and local prosecutors. The Proposition 65 regulations which were incorporated into the California Hazard Communication Standard were originally promulgated by OEHHA. The State Attorney General has interpreted Proposition 65 when representing the

State in lawsuits in filed against it. The Attorney General and District Attorneys may also initiate enforcement actions under Proposition 65. Some commentors contend that because these agencies may take action independently of Cal/OSHA, their role does not meet the criteria in Section 18(c)(1) of the Act and 29 CFR § 1902.3(b). Exs. 18-41, 18-88, 18-127, 18-156, 18-164, 18-174, 18-191, 18-201.

Some commentors allege that these agencies have not issued appropriate guidance to employers on complying with Proposition 65. For example, Ashland Chemical Company comments that it sought confirmation from the Attorney General that its warnings were acceptable under Proposition 65 and did not receive a reply. Ex. 18-191. Commentors have also pointed out that California agencies have issued conflicting interpretations about Proposition 65 in its workplace application. The Coalition notes that an October 1, 1992 letter from Steve Jablonsky, Executive Officer of the Cal/OSHA Standards Board, to OSHA states that employers need not rely on suppliers in order to comply with Proposition 65 as incorporated into the State plan. However, the Attorney General argued in *Industrial Truck Association, Inc. v. Henry* that Proposition 65 does apply to out-of-state manufacturers who supply their products to California employers. Ex. 18-174.

Some commentors also maintain that the private right of action authorized by Proposition 65 as included in the California Hazard Communication Standard violates the requirement for a designated agency because the designee does not retain authority over private enforcement actions. Exs. 18-81, 18-96, 18-121, 18-144, 18-147, 18-150, 18-160, 18-164, 18-169, 18-173, 18-174, 18-191, 18-201, 18-204. These commentors assert that the negotiation of settlements between plaintiffs and employers results in different requirements for different employers, so that employers cannot be aware in advance of the requirements placed upon them. According to these comments, no California agency has, or is willing to exercise, an oversight role of private litigation which would provide consistent and coherent interpretations. Some commentors also claim that the absence of a private right of action under the Federal OSH Act indicates that Congress did not favor occupational safety and health enforcement by private parties. Therefore, according to these commentors, OSHA should not approve a private right of action in a State plan.

Other commentors maintain that nothing in the OSH Act precludes a State from allowing private rights of enforcement under a State plan, and as long as the basic plan meets the criteria for a designated agency, any additional enforcement would only increase effectiveness. Exs. 18-155, 18-168.

In response to the comments, the State of California (Ex. 22) notes that Cal/OSHA remains responsible for the administration and enforcement of standards set forth in the plan. OEHHA does not have authority to make changes to the State plan; any change in the Proposition 65 regulations would have to be adopted by the Standards Board. On the issue of private litigation, the State asserts that since private enforcement only applies to Proposition 65, the standard remains as effective as the Federal. Cal/OSHA also points out that courts have the authority to stay litigation of some Proposition 65 occupational exposure claims, pending resolution by Cal/OSHA of issues within its expertise. This has been done in *As You Sow v. Turco Products*. The State contends that Cal/OSHA should not be held responsible for suits of private parties or settlements reached without court involvement.

OSHA finds that neither a distribution of functions among agencies nor private rights of action are prohibited under State plan provisions. OSHA has approved a provision for court prosecution of occupational safety and health cases by local prosecutors under the Virginia State plan (see 41 FR 42655; September 28, 1976). Although the Federal Occupational Safety and Health Act does not authorize private enforcement, OSHA State plans do not operate under a delegation of Federal authority but under a system which allows them to enact and enforce their own laws and standards under State authority. Therefore, nothing in the Act prevents States with approved plans from legislating such a supplemental private right of action in their own programs. In fact, other State plans include OSHA-approved provisions for private rights of action in cases of alleged discrimination against employees for exercising their rights under the plans.

In the case of Proposition 65, private enforcement is supplemental to, not a substitute for, enforcement by Cal/OSHA. Private enforcement, therefore, should not detract from Cal/OSHA's responsibilities to enforce State standards. In addition, OSHA notes that California is required under Proposition 97 to "take all steps necessary to prevent withdrawal of approval for the

State plan by the Federal government." California Labor Code § 50.7(d).

However, under the Act and OSHA regulations, the designated agency must retain overall authority for administration of all aspects of the State plan. State designees are required to take appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in their enforcement programs resulting from adverse administrative or judicial determinations. See 29 CFR § 1902.37(b)(14). Therefore, OSHA expects Cal/OSHA to ensure that enforcement of the standard remains at least as effective as the Federal Hazard Communication Standard and consistent with the conditions under which the standard is Federally approved by taking appropriate action when necessary to address adverse court decisions in private party suits, Cal/OSHA enforcement actions or State Attorney General or local prosecutors' actions. Failure to pursue necessary remedies would result in OSHA's reconsideration of its approval of the standard.

#### F. Exemption for Public Sector Employers

Section 18(c)(6) of the Act and regulations at 29 CFR § 1902.3(l) require that a State plan must, to the extent permitted by its constitutional law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which is as effective as the standards contained in the plan.

The Coalition asserts that the exemption of public sector agencies from providing Proposition 65 warnings violates this criterion. Ex. 18-174. In its response, the State of California maintains that since State and local government employees are covered by the other hazard communication provisions, their lack of coverage under the supplemental provisions should not pose a problem. The State also notes that government employees would receive warnings from other businesses which supply products to public agencies. In addition, the State contends that because government officials are accountable to the public in other ways, it is not necessary for them to be subject to the requirements of Proposition 65 as well. Ex. 22.

The basic warning requirements of the Hazard Communication Standard and Cal/OSHA's enforcement of the standard do apply to public sector employers. As discussed below, the chemicals covered by, and the warning

requirements of, Proposition 65 do not differ significantly from, and thus are not significantly more protective than, California's other hazard communication requirements.

Moreover, because compliance with Proposition 65 can be achieved via use of the measures provided in the Cal/OSHA or Federal Hazard Communication Standard (see Section III.B.2), public sector employers will, in fact, be in compliance with Proposition 65 for all substances covered by the general California standard if they comply with the general standard. As a practical matter, this means that public sector employers will only be exempt from Proposition 65 warning requirements relating to a few substances (e.g. aflatoxins, discussed in Section III.B.3, below). Therefore, OSHA finds that California's protection of these employees is as effective as its protection of private sector employees, meeting the criterion in section 18(c)(6) of the Act.

OSHA has never required States to use the same enforcement methods in the public sector as they do in the private sector. Nevada, among other States, imposes penalties upon public sector employers only for serious violations. 46 FR 42843 (August 25, 1981). California itself does not have financial penalties for public sector employers. See California Labor Code § 6434. OSHA also has approved other State plans which lack public sector penalties. E.g. 44 FR 44 28327 (May 15, 1979) (Maryland). Therefore, OSHA finds that the exemption of public agencies from suits under Proposition 65 is not in violation of OSHA requirements for public sector programs, particularly as public sector employers are subject to enforcement actions by Cal/OSHA for non-compliance with the general State Hazard Communication Standard. In addition, Federal requirements which would force a State to submit to private suit raise issues under the Eleventh Amendment. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct 1114 (1996).

#### III. Summary and Explanation of Remaining Issues Under Section 18

In this Section, OSHA will analyze the remaining issues, which involve combined legal and factual questions arising under the various provisions of Section 18(c)(2). Initially, OSHA notes that although many comments assume significant differences between the substantive provisions of Proposition 65 and the Federal standard, OSHA's detailed analysis of the California regulations and the record discloses that most of these alleged differences do not,

in fact, exist. With a few exceptions, Proposition 65 and the Federal standard cover the same chemicals and the same concentrations of chemicals. See Section III.B.3.

Whenever chemicals are covered by both Proposition 65 and the Federal standard, they will be covered by the general State standard. In that situation, employers must comply with the State standard's general (i.e. non-Proposition 65) hazard communication requirements, which are virtually identical to the Federal standard's requirements. In those relatively few cases where a chemical is not covered by Federal or State hazard communication requirements, businesses can comply with Proposition 65's occupational aspects by applying Federal hazard communication methods to those chemicals. Consequently, Proposition 65, in practice, should impose only minor additional requirements. See Section III.B.3.

Procedurally, there are several differences between the Federal and State standards. Most obviously, the State standard provides for supplemental enforcement by private parties; the Federal standard does not. OSHA concludes, however, that these procedural differences do not require rejection of the California standard. See Section III.B.5.

Accordingly, and as set forth below, OSHA is approving the California standard, including Proposition 65. This approval, though, is contingent upon OSHA's understanding of Proposition 65's compliance provisions and the conclusion that the State cannot apply Proposition 65 to out-of-state businesses under the auspices of the State plan. OSHA also expects Cal/OSHA to exercise its role as the designated State agency to ensure that Proposition 65's enforcement comports with these understandings and does not result in a less effective standard.

#### A. Compelling Local Conditions

##### 1. Overview

As outlined in Section II.B, OSHA's analysis under the product clause first requires it to consider whether "compelling local conditions" support the California standard. OSHA finds that the State plan requirements presently under review, including the general California Hazard Communication Standard and the occupational aspects of Proposition 65, are justified by compelling local health and safety concerns.

When Proposition 65 was adopted by the voters of the State of California in 1986, the law's public-health objectives

were succinctly set forth in the ballot initiative and in the law's preamble, which found that the "lives of innocent people are being jeopardized" by the lack of information about toxins; that "hazardous chemicals pose a serious threat to their well-being;" and that conventional enforcement efforts by public agencies "have failed to provide them with adequate protection." Ex. 22, Attachment B.

"Right to know" laws like Proposition 65 promote the general public's knowledge about safety and health issues. By ensuring that people have information about hazards and risks associated with chemicals, these laws allow workers and other persons to protect themselves against hazardous exposures and resulting illnesses. Right-to-know laws also encourage the market to reformulate hazardous products to reduce or eliminate the risks associated with a product's use. Absent access to relevant information about chemical hazards and risks, workers cannot protect themselves or the public at large from potentially devastating exposures.

Access by workers and their representatives to information about toxic substances in the workplace is an issue recognized by OSHA, by Congress, and generally by the occupational safety and health community as a central element in any effort to provide for safe and healthful workplaces throughout the nation. Congress included in OSHA's standard-setting authority an explicit requirement to "prescribe the use of labels or other appropriate forms of warning" for the protection of workers from the hazards of chemicals in their workplaces. 29 U.S.C. § 655(b)(7). In promulgating the Federal HCS in 1983, OSHA extensively reviewed available statistics and documented an unacceptably high incidence of chemically-related illnesses and injuries. 48 FR 53282 (1983). OSHA also found—with substantial support not only from workers, other government agencies and public interest groups, but from many industry members and trade associations—that implementation of appropriate hazard communication in the nation's workplaces "would serve to decrease the number of such incidents by providing employees with the information they need to help protect themselves, and ensure that their employers are providing them with the proper protection." *Id.* The crucial importance of hazard communication was well-recognized in OSHA's 1989 Safety and Health Program Management Guidelines, which provide that one of the cornerstones of effective protection of worker safety and health is ensuring

that workers have adequate information to protect themselves and others:

The commitment and cooperation of employees in preventing and controlling exposure to hazards is critical, not only for their own safety and health but for that of others as well. That commitment and cooperation depends on their understanding what hazards they may be exposed to, why the hazards pose a threat, and how they can protect themselves and others from the hazards.

See 59 FR 3904.

Right-to-know laws also enhance the ability of the public and individuals to ensure that their government (Federal, State or local) acts appropriately to protect their interests. Committee on Risk Perception and Communication, National Research Council,<sup>9</sup> *Improving Risk Communication* 111 (National Academy Press, 1989) ("[a] central premise of democratic government—the existence of an informed electorate—implies a free flow of information"). By enacting Proposition 65, the voters sought to exercise their right and responsibility to oversee the functioning of their government. Thus, the principles which led California voters to enact Proposition 65 in 1986—the perceived threat to the "lives of innocent people" and their well-being, the lack of information about hazardous chemicals, and the failure of "conventional enforcement efforts by public agencies" (Ex. 22, Attachment B)—are widely known and accepted.

One factor OSHA has historically considered in determining whether a State's interest is a compelling one is the extent to which the industrial hazard sought to be addressed is prevalent within the State. Here, the standard at issue relates not to a particular trade but to the hazard posed by toxic chemicals used throughout industry. Although the commentators raise some arguments against a finding of compelling local conditions (see discussion in Section III.A.2 and discussion below), none question the State's interest in hazard communication or the extent of hazardous exposures in California. Moreover, it is obvious that California, with an economy larger than that of most of the world's nations, has within its jurisdiction a significant portion of the toxic exposures occurring daily in the United States. See also 48 FR 8610 (decision approving California ethylene dibromide standard and noting extent of relevant exposure within State). The number of out-of-state businesses

responding to OSHA's request for comments, and the volume of chemical shipments to California suggested in their submissions, also attest to the number of occupational chemical exposures likely to occur within the State.

California's interest in protecting the public's "right to know" is particularly compelling here because it is acting not only to protect the general public health and safety, but to protect the rights of individual citizens to make informed decisions about matters affecting their own health and welfare. Just as a patient has the right to consent to, or refuse, medical treatment, see *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) citing *Schloendorff v. Society of New York Hospital*, 105 N. E. 92, 93 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body"), so, more generally, persons have a right to understand the hazards to which they are exposed and determine whether they wish to take any risk involved.

Dormant commerce clause case law also supports OSHA's analysis. As OSHA discussed in Section III.A., there is no evidence that the California voters harbored any intent to discriminate against out-of-state employers or manufacturers; to the contrary, the law on its face is fully applicable to all private sector businesses which meet the ten-employee size limit. Instead, California voters appear to have been exclusively concerned with public health and safety, which undeniably constitutes a "legitimate" or "compelling" objective within the meaning of dormant commerce clause decisions. See, e.g. *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 397 (9th Cir. 1995) ("[r]egulations that touch on safety are those that the Court has been most reluctant to invalidate"), citing *Raymond Motor Trans. Co. v. Rice*, 434 U.S. 429 (1978); see generally *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) ("Public health and well-being have been recognized as compelling governmental interests in a variety of contexts"). Consequently, under the dormant commerce clause, California's non-discriminatory intent would lead the courts to uphold Proposition 65.

Finally, the primary difference between the California and Federal standards is the California standard's incorporation of Proposition 65's provision for citizen enforcement of disclosure laws to augment the scarce resources available to regulatory agencies and public prosecutors. Thus, California may reasonably conclude that enactment of Proposition 65 should lead

<sup>9</sup>The National Research Council comprises councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

to more effective enforcement of the measures prescribed in the Federal standard and improved dissemination of information about hazardous chemicals. (By way of example, in Section III.B.5, OSHA discusses an instance in which an employer who was not in compliance with the general California (or Federal) standard was brought into compliance as a result of a private enforcement action.) This additional enforcement mechanism also is entirely consistent with the employee-protection concerns that motivated Congress in 1970 and that remain relevant today. In 1970, Congress found safety and health inspectors in "critically short supply[.]" Legislative History at 161. Today, there are two thousand Federal and State plan inspectors, who must cover more than six million workplaces. Neither OSHA nor Cal/OSHA has "the resources to find every violation of every law," *Carnation Co. v. Sec'y.*, 641 F.2d 801, 805 (9th Cir. 1981).

OSHA emphasizes that private suits under Proposition 65 form a supplement, not a substitute, to conventional enforcement of the State's Hazard Communication Standard already being provided by Cal/OSHA. Indeed, the California standard reflects OSHA's previous findings in its hazard communication rulemakings because the primary focus of the State standard is a close adaptation of the Federal standard. Under the applicable regulations, compliance with the measures prescribed by the Federal standard is an acceptable means of compliance with Proposition 65. See Section III.B.2. Accordingly, the State's further incorporation of Proposition 65 into the standard simply provides a supplemental method of ensuring that the standard, as a whole, functions effectively.

Other State plans approved by OSHA contain private rights of action intended to supplement the anti-discrimination provisions of the State plan. North Carolina Code § 95-243; California Labor Code § 98.7(f). Whether such supplements are a useful or appropriate addition to State plan authority is a matter for the State to decide. In the present case, OSHA accepts the judgment of California voters that compelling local conditions justify the inclusion of Proposition 65's additional enforcement remedies into the State plan.

It is true, as several industry commentators point out, that the Federal OSH Act contains no private rights of action or citizen suit provisions. Exs. 18-41, 58, 65, 96, 139, 150, 160, 162, 165. As OSHA explained in Section I.A, however, the OSH Act specifically

allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA. The OSH Act, therefore, does not bar the States from adopting supplemental enforcement mechanisms.

As OSHA noted at the outset, the voters of California have a compelling interest in protecting their right to information about possible risks to their safety and health. *Id.*; compare *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 409 (1994) (rejecting a discriminatory town regulation governing solid waste disposal because the town had "any number of nondiscriminatory alternatives \* \* \* [including] uniform safety regulations enacted without the object to discriminate"). There is no indication in the statutory language of Section 18(c)(2) or the legislative history of the Act that Congress intended to bar a State's voters from determining how to best protect their right to make informed decisions. Rather, the limited legislative history shows that Congress simply wanted "to prevent States from making unreasonable limitations[.]" *Legislative History* at 501 (statement of Senator Saxbe).

## 2. Commentor Rebuttal Arguments

As discussed in Sections II.B and II.C, OSHA will presume in the absence of evidence to the contrary that a State's law enacted to foster its workers' safety and health meets the product clause's requirement for compelling local conditions. Industry commentators raised two arguments to rebut the idea that Proposition 65 is supported by compelling local conditions. First, as OSHA outlined and rejected in Section II.B, industry commentators have alleged that California must establish conditions unique to California in order to support approval of the standard. Second, the commentators also assert that the State's failure to apply Proposition 65 to public sector employers (and small businesses) constitutes evidence that California has no compelling local need for Proposition 65. *E.g.*, Exs. 18-150, 18-174. Organization Resource Counselors (ORC) (Ex. 18-150) states that these exemptions effectively exclude 50% of California employees from coverage. California, in response, says that "while the exemption for small businesses may cover a large number of businesses, such businesses are responsible for a relatively small share of the handling of hazardous chemicals." Ex. 22, pages 11-12. California maintains that the law applies "to the big businesses that produce more than 90% of all hazardous waste in California." *Id.*,

citing Proposition 65 ballot argument, Attachment B to Exhibit 22.

Proposition 65's exemptions do not provide evidence of discriminatory intent, and do not undermine California's putative interest in protecting its workers' safety and health. The exemption for businesses employing ten persons or fewer applies to all such businesses, regardless of whether they are located inside or outside of the State. Moreover, even assuming that ORC has correctly estimated the percentage of employees covered, its comment does not address the percentage of employees exposed to covered chemicals. No inference, then, can be drawn regarding the intent of California's voters in passing Proposition 65, or the effect of the exemptions.

Finally, as outlined in Section C, there are, in fact, few differences between the occupational aspects of Proposition 65 and the Federal or general State standard. As a practical matter, the effect of the public sector and small business exemptions is to free these entities from the threat of supplemental enforcement. OSHA concludes that it is within the voters' discretion to conclude that small businesses should not be subject to the penalties available under Proposition 65. Employees working for these businesses will still be protected by the general California standard.

## B. Remaining Section 18(c)(2) Issues

### 1. Overview

The following sections of OSHA's decision analyze the remaining issues arising under Section 18(c)(2) of the Act: whether the California standard is at least as effective as the Federal standard, and whether the California standard imposes an undue burden upon commerce.

Commentors have argued that the Proposition 65 components of the California standard require warnings for chemicals not covered by the Federal Hazard Communication Standard and that Proposition 65's warning requirements are in addition to those required by the Federal standard. Section II.B.2 addresses OSHA's reasons for concluding that use of the measures prescribed by the Federal or general California Hazard Communication Standard will constitute compliance with Proposition 65. Section III.B.3 discusses coverage issues. First, OSHA addresses its reasons for concluding that almost all of the chemicals and concentrations of chemicals covered by Proposition 65 are covered by the Federal standard as well. Second, the

decision addresses Proposition 65's applicability to California manufacturers other than chemical manufacturers. Section III.B.4 discusses the substantive differences between the Federal and general California hazard communication standards, including the argument by some commentators that the California standard does not protect trade secrets as effectively as the Federal standard. Section III.B.5 discusses Proposition 65's supplemental enforcement provision.

## 2. Businesses Can Comply With Proposition 65 by Using Methods Prescribed by the Federal Hazard Communication Standard

Although there are minor differences, discussed in the next section, between the coverage of the Proposition 65 elements of the State plan and the Federal standard, the requirements for compliance are the same. Some commentators have argued that the Proposition 65 elements of the California standard require businesses to provide warnings which are not required by the Federal Hazard Communication Standard. The particular focus of these comments is upon the possibility that Proposition 65 requires a "safe harbor" label where the Federal standard would not, or where the Federal standard would require only Material Safety Data Sheet. E.g. Exs. 18-3, 18-149, 18-162.

Other commentators point out that the California standard, as discussed in Section III, permits businesses to comply with Proposition 65 by complying with the general State or Federal standards. Exs. 18-61, 18-143, 18-155. OSHA agrees with the latter commentators and is noting this understanding as a basis for its approval of the standard. OSHA's analysis of the California standard is as follows.

Section 5194(b)(6) of the standard, 8 CCR § 5194(b)(6), incorporates Proposition 65 and outlines the various permutations possible between the remainder of the California standard and its Proposition 65 elements. Admittedly, Section 5194(b)(6) is not a model of clarity. As OSHA's analysis of the regulations shows (see below), however, when a chemical is covered solely by the Proposition 65 list, businesses may comply with Proposition 65 by complying with the Federal Hazard Communication Standard. And when a chemical is covered both by Proposition 65 and the general State standard, businesses must comply with Proposition 65 by complying with the general State standard, which is virtually identical to the Federal Hazard Communication

Standard. (For the minor differences, see Sections III.B.3 and 4.)

Section 5194(b)(6) divides exposures into three types:

(1) Section 5194(b)(6)(B) covers exposures to chemicals which appear on the Proposition 65 list and which are subject to general State hazard communication requirements. For these exposures, businesses must comply with the general State hazard communication requirements.

(2) Section 5194(b)(6)(C) covers exposures to chemicals which appear on the Proposition 65 list but which would not otherwise be subject to general State hazard communication requirements. For these exposures, businesses have a choice between several alternative methods of compliance, one of which is compliance with the information, training and labeling requirements of the Federal Hazard Communication Standard.

(3) Section 5194(b)(6)(D) covers exposures to chemicals which do not appear on the Proposition 65 list. These exposures are not relevant to OSHA's analysis here.

As a practical matter, almost all chemicals covered by Proposition 65 will be covered by the Federal and general State hazard communication requirements and, therefore, will be subject to Section 5194(b)(6)(B). For these exposures, compliance with subsections (d) through (k) of the California standard [8 CCR §§ 5194 (d)-(k)] is "deemed compliance with the Act." 8 CCR § 5194(b)(6)(B). With some slight variations discussed elsewhere in this decision (see Section III.B.4), Sections 5194(d) through (l) track the provisions of the Federal Hazard Communication standard at 29 CFR § 1910.1200(d)-(l). Section 5194(k) sets forth five appendices. Appendices A-D appear to be identical to Appendices A-D to 29 CFR § 1910.1200, the Federal standard.<sup>10</sup>

In those rare situations involving exposures to chemicals which appear on the Proposition 65 list but which are not covered by the Federal or general State standards, Section 5194(b)(6)(C) will govern. Under that regulation, employers must provide "a warning to employees in compliance with

California Code of Regulations Title 22 (22 CCR) Section 12601(c)" (the OEHHA regulations implementing Proposition 65) or comply with the requirements of Sections 5194(d)-(k). 8 CCR §§ 5194(b)(6)(C). Under Section 12601(c), compliance with Proposition 65 can be achieved via compliance with the Federal (or, if the business so chooses, the general State) Hazard Communication Standard. 22 CCR § 12601(C)(1)(c).

Section 12601(c) begins with the statement:

Warnings for occupational exposures which include the methods of transmission and the warning messages as specified by this subdivision shall be deemed clear and reasonable.

The remainder of Section 12601(c) sets forth three alternative methods of providing acceptable warnings:

1. The business may place on the product's or substance's label a warning which complies with the criteria for consumer product warnings [see 22 CCR §§ 12601 (b)(1)(A), (b) (3)-(4), (c)(1)(A), (c)(2)]; or

2. The business may post a clear and conspicuous workplace sign [see 22 CCR §§ 12601(c)(1)(B)]; or

3. The business may comply with the information, training, and labeling requirements of the Federal Hazard Communication Standard, the California Hazard Communication Standard, or (in cases involving pesticides) California's Pesticides and Worker Safety requirements [see 22 CCR § 12601(c)(1)(C)].

Except in the case of pesticides (discussed in Section III.B.3), then, Section 12601(c) provides that compliance with the measures provided by the Federal Hazard Communication Standard constitutes compliance with Proposition 65.

Although California's statements about the proper interpretation of its standard have been ambiguous, OSHA believes the foregoing understanding is consistent with the State's interpretations. In its February 16, 1996 submission (Ex. 6), Cal/OSHA (on behalf of itself, OEHHA and the Attorney General), stated that:

[T]he Cal-HCS allows compliance to be achieved either through compliance with subsections (d) through (k) of the HCS, or, where the HCS would not require a warning, either through the methods set forth in subsections (d) through (k) or the alternative warning methods in 22 CCR § 12601(c).

Under the "HCS Method," "a company may simply give the Proposition 65 warning through a method that complies with the HCS." Ex. 6, page 6; see also Ex. 6, pages 7-9; Ex. 18-174A,

<sup>10</sup>There is no Section 5194(j). Appendix E consists of Proposition 65 regulations from Title 22 of the California Code of Regulations, which "are printed in this Appendix because they provide terms and provisions referred to in subsection (b)(6) (emphasis added). Appendix E also includes all of the regulations governing warnings for consumer and environmental exposures. 22 CCR §§ 12601 (b), (d). OSHA interprets the California standard to include these provisions solely for the purpose of providing easy access to code sections referenced in the Standard.

Attachment 5, page 3) (Letter from California DOSH to parties in *AYS v. Turco*). Such methods generally would include providing relevant material safety data sheets, labels, and (for employers) training. Similarly, California states that if a business chooses to comply with Section 12601(c),

§ 12601(c) itself refers back to the HCS warning methods by providing that compliance may be achieved through “a warning to the exposed employee about the chemical in question that fully complies with all information, training and labeling requirements of the Federal Hazard Communication Standard” \* \* \*. However, the regulation does *not* provide specific safe harbor warning language where the HCS method is used to give the warning.

Ex. 6, page 11; see also Cal/OSHA Enforcement Directive, Policy and Procedure C-43. Similarly, Section 5194(b)(6)(E) provides that compliance with the Federal Hazard Communication Standard “shall be deemed a defense” in any enforcement action brought under Proposition 65. *Id.*, incorporating 22 CCR § 12601(C)(1)(c).

California does point out that while the language of any “hazard warning” “need satisfy only the more general standard of § 5194(c)” —i.e. “Any words, pictures, symbols or combination thereof appearing on a label or other appropriate form of warning which convey the health hazards and physical hazards of the substance(s) in the container(s)—such a warning must be “clear and reasonable” to meet the requirements of Proposition 65. See Ex. 6 page 9; see also 29 CFR § 1910.1200(c).

One commentator, Dow Chemical (Ex. 18-162, page 9), seizes upon a similar statement by OEHHA in its promulgation of 22 CCR § 12601(c) (see Ex. 18-174A, Attachment 2 at page 37) to argue that California will not, in fact, recognize compliance with the Federal standard as compliance with Proposition 65. In its statement however, OEHHA’s focus was upon the fact that the Federal standard requires only an “appropriate” warning and does not prescribe specific warning language;<sup>11</sup> thus, OEHHA believed that California would have to independently evaluate Federal label or MSDS warnings to determine if they were “clear and reasonable” in accordance

<sup>11</sup> OEHHA also noted that there might be situations in which the Federal standard would not apply to particular employees, but Proposition 65 would. OEHHA did not want Section 12601(c) to be understood to relieve businesses of the duty of providing warnings to these additional employees. Ex. 18-174A, Attachment 2 at page 37.

with Proposition 65’s requirements. In OSHA’s view, Dow’s comment misses a central point. The Federal standard does not prescribe specific warning language. That fact, however, is not a license for businesses to create unclear or unreasonable warnings. An unclear or unreasonable warning would not meet Federal requirements. Thus, there is no substantive distinction between the Proposition 65’s requirement of a “clear and reasonable” warning and the Federal (and State) requirement of an “appropriate” warning. Compliance with the Federal standard, then, constitutes compliance with the Proposition 65.<sup>12</sup> As stated previously, however, in most cases chemicals on the Proposition 65 list will be subject to the general State Hazard Communication Standard and, therefore, employers will have to comply with the State standard. No commentator has pointed to any significant differences between the labeling and MSDS requirements of the two standards. Compare 29 CFR §§ 1910.1200 (f)-(g) with 8 CCR §§ 5194 (f)-(g); see also discussion of trade secrets (California requirement of CAS numbers) in Section III.B.4. Proposition 65, therefore, does not undermine effectiveness or result in an undue burden on commerce.<sup>13</sup>

### 3. Comparison of Coverage Under Federal Standard and Proposition 65

*Overview:* OSHA has identified three general areas in which the California standard, including Proposition 65, differs from the Federal standard. In sections three through five, OSHA will discuss these differences and analyze them in light of the requirements of Section 18 of the OSH Act.

Before proceeding to these differences, however, it is important to recognize the overall similarities between the State and Federal

<sup>12</sup> For example, it appears that several businesses have been sued because the warnings they provided were phrased in “and/or” terms and, thus, did not specify whether the chemical involved was a carcinogen or a reproductive toxicant. *E.g.* Ex. 18-39. An “and/or” warning also would fail to meet the requirements of the Federal standard because it does not “convey the specific physical and health hazard(s).[.]” 29 CFR § 1910.1200(c) (emphasis added).

<sup>13</sup> Assuming, for purposes of argument, that the California standard did require businesses to add a consumer “safe harbor” label warning to a product for which the Federal standard would require only an MSDS, OSHA finds that such a requirement neither undermines effectiveness nor constitutes a violation of the product clause. Although some commentators asserted that these labels result in “over warning,” the record contains no copies of labels which would undermine the effectiveness of the Federal standard and there is no evidence demonstrating the burden on commerce which has resulted. Most of the commentators’ complaints, in any case, focus on the requirements imposed by voluntary settlements, a subject we discuss below.

standards. In particular, many commentators maintain that the chemicals and concentrations of chemicals covered by Proposition 65 and the Federal standard differ significantly. See, for example, Exs. 18-153, 18-154, 18-162, 18-164, 18-165, 18-166. This is understandable, particularly in light of the fact that the California standard’s incorporation of Proposition 65 specifically provides for “Exposures Subject to Proposition 65 Only.” 8 CCR § 5194(b)(6)(B). However, once the Federal and State standards are analyzed, it becomes apparent that they are, in fact, quite similar. Most important, both standards require appropriate warnings whenever there is reliable scientific evidence to support the view that a particular chemical is hazardous. As a consequence, both standards, with a few exceptions, cover the same chemicals and concentrations of chemicals.

Under the Federal standard, covered businesses must take appropriate steps to communicate possible chemical health hazards (including carcinogens and reproductive toxins) whenever

a. A chemical appears on certain “floor” lists referenced in the standard; or

b. “There is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees” [see 29 CFR § 1910.1200(c)]

See 29 CFR § 1910.1200(c), (d) (3)–(4). The general California standard is equally specific. 8 CCR §§ 5194(c), (d) (3)–(4). Accordingly, Federal and State hazard communication coverage is not limited to specific lists of chemicals but is broad and flexible enough to take into account any chemical which, whether listed or not, meets the “one study” test.

Proposition 65 relies upon a list of chemicals. The Proposition 65 “list” is based in part upon the “floor” lists used in the Federal standard and in part upon the State’s evaluation of scientific evidence. See generally California Health and Welfare Code §§ 25249.8 (a)–(b).

Much of the confusion in the comments over the chemical coverage issue appears to reflect an undue focus upon comparing the floor lists referenced in the Federal standard with the Proposition 65 list.<sup>14</sup> Although there

<sup>14</sup> The existence of the Proposition 65 list represents another difference between the California and Federal standard, but the list itself does not violate the product clause. There is no evidence that California’s preparation of a list of hazardous chemicals results in a less effective standard or imposes a burden upon commerce. Indeed, the list as a supplement to the general hazard communication requirements should benefit

is a great deal of overlap between these Federal and Proposition 65 lists, preoccupation with them overlooks the fact that even if a chemical is not on the Federal floor list, it must be classified as a hazardous chemical under the Federal standard if there is at least one scientifically valid study to support a finding that the chemical poses a health hazard to employees. Similarly, chemicals are placed on the Proposition 65 list only after a finding by the State (or another Federal agency) that valid scientific evidence supports their classification as a carcinogen or reproductive hazard.<sup>15</sup>

Proposition 65 requires the California Governor to compose (and regularly update) a list of chemicals known to be carcinogens or reproductive toxins. The statute established four mechanisms for including a particular chemical on this list. First, Proposition 65 created an initial list, which consisted of chemicals automatically included by virtue of their recognition as carcinogens or reproductive toxins by the International Agency for Research on Cancer (IARC) or OSHA. See California Health and Safety Code § 25249.8(a), *incorporating* California Labor Code §§ 6382 (b)(1), (d); see also *AFL-CIO v. Deukmejian*, No. C002364 (California Court of Appeals, 1989). As the court in *AFL-CIO* recognized, the initial Proposition 65 list simply mirrored the Federal floor listing references to carcinogens identified by the National Toxicology Program (NTP) or IARC and to carcinogens or reproductive toxins otherwise covered by OSHA (under 29 CFR Part 1910 subpart Z). See 29 CFR

both workers and businesses by providing another, comprehensive resource for obtaining information about certain substances.

<sup>15</sup> For example, Dow Chemical Company cites fifteen substances which, it states, "are treated as carcinogens by Prop. 65 but are not similarly classified by OSHA/NTP/IARC[.]" Ex. 18-162, page 14 footnote 6. Although it is not entirely clear, this statement suggests that Dow believes hazard communication about cancer risk is unnecessary unless a chemical is specifically recognized as a carcinogen by IARC, NTP or an OSHA standard. This focus misses the "one study" requirement of Section 1910.1200(c). The flaw in Dow's analysis is apparent when at least one of its sample chemicals, captan, is considered. Captan's primary use is as a pesticide and that use generally would be regulated by the U.S. Environmental Protection Agency rather than OSHA. See OSHA's 1994 preamble to the Hazard Communication Standard, 59 FR 6126, page 6143 (February 9, 1994). OSHA, however, would regulate the manufacture and formulation of captan and its non-pesticidal uses and recognized the possibility that it is a carcinogen in its 1992 proposed rule on air contaminants, noting that animal studies have been contradictory but that "high doses caused significant incidences of" cancer in mice. See 57 FR 26002 (June 12, 1992). Thus, there appears to be "statistically significant evidence based on at least one study" that captan is a carcinogen and subject to OSHA hazard communication requirements.

§§ 1910.1200(d) (3)-(4) and Appendix A. Consequently, the initial Proposition 65 list represented chemicals which would be covered under the Federal standard.

Proposition 65 also provides three methods of supplementing the initial list. These three methods rely upon scientific evidence that a chemical causes cancer or reproductive toxicity and, thus, again mirror the Federal standard. Under California Health and Safety Code Section 25249.8(b), a chemical is listed if, "in the opinion of the state's qualified experts"

a. "Scientifically valid testing" shows that the chemical causes cancer or reproductive toxicity;

b. "A body considered to be authoritative by" the State's experts formally identifies the chemical as a carcinogen or reproductive toxin [hereafter, "authoritative bodies mechanism"]; or

c. A State or Federal agency has "formally required" the chemical to be labeled or identified as a carcinogen or reproductive toxin [hereafter, "formally required to be labeled mechanism"].

The California Code of Regulations, see 22 CCR §§ 12301-12306, implements these provisions by creating a "Science Advisory Board" (SAB) which, in turn, comprises two committees: the "Carcinogen Identification Committee" and the "Developmental and Reproductive Toxicant (DART) Identification Committee." 22 CCR § 12302(a). The committee members are the "State's qualified experts" in their relevant fields for purposes of Proposition 65. See 22 CCR § 12301-2. They advise and assist the California lead agency, the Office of Environmental Health Hazard Assessment (OEHHA), in implementing Proposition 65. 22 CCR § 12305.

As is clear from the statute, when the committees themselves determine that a particular chemical causes cancer or reproductive toxicity, they must rely upon "scientifically valid testing." California Health and Welfare Code § 25249.8(b); 8 CCR §§ 12305 (a)(1), (b)(1). This same "scientifically valid testing" would trigger the Federal standard's requirement for hazard communication when "there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles" of a potential health hazard. Here again, then, Proposition 65 would not apply to chemicals not covered by the Federal standard.

The committees similarly must rely upon valid scientific evidence when they identify a chemical through Proposition 65's authoritative bodies

mechanism.<sup>16</sup> To rely upon an authoritative body's identification of a chemical as hazardous, the committees must find "sufficient evidence" of carcinogenicity or reproductive toxicity from studies in humans or in experimental animals. 22 CCR § 12306 (e)-(g). Moreover, OEHHA can reject a chemical "if scientifically valid data which were not considered by the authoritative body clearly establish that the chemical does not satisfy the criteria" of subsections (e) and (g). 22 CCR § 12306 (f), (h). OEHHA also affords all interested persons an opportunity to object to a chemical's listing on "the basis \* \* \* that there is no substantial evidence that the criteria identified in subsection (e) or in subsection (g) have been satisfied." 22 CCR § 12306(l). The "scientifically valid data" required when the committees identify a chemical for listing under the authoritative bodies mechanism would activate hazard communication requirements under the Federal standard as well.

Finally, under 22 CCR § 12902, OEHHA can identify a chemical pursuant to Proposition 65's "formally required to be labeled" mechanism when "substantial evidence exists to support a finding that the chemical meets the requirements of this section." Labeling requirements imposed by a State or Federal agency would have to be based upon at least some scientific evidence; thus, the Federal standard would cover these chemicals if they were not excluded for other reasons.

Thus, regardless of the mechanism used to list a chemical under Proposition 65, the ultimate question is whether there is scientific evidence to support a finding that a chemical is a carcinogen or reproductive toxin.

<sup>16</sup> As of September 1996, California had identified five "authoritative bodies": IARC; the National Institute for Occupational Safety and Health (NIOSH); the National Toxicology Program (NTP); the U.S. Environmental Protection Agency (USEPA); and the U.S. Food and Drug Administration (USFDA). 22 CCR § 12306(l). Here again, there is considerable overlap between the Federal and State standards: the Federal standard similarly explicitly recognizes IARC and NTP as authoritative sources for identifying hazardous chemicals. See 29 CFR §§ 1910.1200(d)(4)(I)-(ii) and Appendix A. In addition, OSHA has consistently relied upon information provided by NIOSH in promulgating hazard communication requirements. See, for example, the preamble to the 1994 amendments to the Federal standard, 59 FR 6126, 6150-51, 6154 (February 9, 1994). The Federal standard does not similarly require reliance upon "lists" compiled by USEPA or USFDA. However, because those agencies base their determinations upon scientific evidence, it is highly likely that the Federal standard would treat a chemical as hazardous if those agencies determined it to be so. (As a practical matter, however, such chemicals might be exempted under 29 CFR § 1910.1200(b)(6), a question addressed below).

Because the Federal standard requires hazard communication so long as there is one reliable scientific study to support the requirement, it is no less expansive than Proposition 65 with regard to cancer and reproductive hazards. 29 CFR §§ 1910.1200(c) (definition of "health hazard"), 1910.1200(d).

Indeed, the Federal standard may, if anything, encompass more chemicals than Proposition 65:

The results of any studies which are designed and conducted according to established scientific principles, and which report statistically significant conclusions regarding the health effects of a chemical, shall be a sufficient basis for a hazard determination and reported on any material safety data sheet. 29 CFR § 1910.1200, Appendix B, paragraph 4. Businesses also may report "other scientifically valid studies which tend to refute the findings of hazard," but the existence of refuting studies does not dissolve the obligation to report the hazard. *Id.* In contrast, it appears that, except for its initial listing mechanism, Proposition 65 requires that the weight of the evidence support the placement of a substance on the statutory list.<sup>17</sup>

The only exceptions to this general principle involve certain chemicals or concentrations of chemicals which are exempted from coverage under the Federal standard in some circumstances. OSHA will discuss these in the next sections and analyze them in light of "effectiveness" and "undue burden" requirements of Section 18(c)(2).

**Mixtures:** Under the Federal standard, chemicals present at certain low concentration levels in "mixtures" may not be subject to hazard communication requirements. Some commentators (e.g. 18-65, 18-96) allege that Proposition 65 requires businesses to provide a warning for such chemicals when the Federal standard would not. To some degree, these commentators misunderstand the Federal requirements; they are correct, however, to the extent that Proposition 65 allocates the burden of proof differently than the Federal standard does. This different allocation of burden of proof, however, does not violate Section 18 of the Act. See below.

A "mixture," under the Federal standard, is "any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction." 29 CFR § 1910.1200(c). Section 1910.1200(d) requires businesses to determine the

hazards of chemical mixtures. It further provides, with respect to health hazards associated with untested mixtures, that "the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section[.]" 29 CFR § 1910.1200(d)(5)(ii). In the case of mixtures containing chemicals in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent), businesses must communicate hazards if they have evidence that the chemical involved "could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health risk to employees in those concentrations[.]" 29 CFR § 1910.1200(d)(5)(ii) (emphasis added).

Thus, under the Federal standard, a business must follow hazard communication requirements a) whenever a reproductive toxin is present in a mixture at a concentration of one percent; b) whenever a carcinogen is present at a concentration of 0.1% or greater; or c) whenever either hazard is present at any concentration and there is evidence that an exposure limit will be exceeded or a possible health risk posed.

Proposition 65 similarly exempts certain chemical mixtures from coverage, but the relevant exemption is phrased differently: a chemical exposure is exempted from coverage if "the person responsible" for the exposure can show that:

a. "The exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer" and

b. "That the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity[.]"

California Health and Welfare Code § 25249.10(c); see also 8 CCR § 5194(b)(6)(D).

Some commentators appear to interpret the Federal standard's reference to "a concentration of one percent" (or .1%) as a "cut off" point at which no hazard communication warning is required. *E.g.* 18-106. This understanding is not quite correct. Both the Federal standard and Proposition 65 require hazard communication whenever a chemical poses a health risk, regardless of its

concentration in a mixture. Similarly, both provide an exemption from coverage for chemicals which do not pose a health risk to workers. The central difference between the two standards is in the allocation of burden of proof: the California standard imposes the burden of proof upon the business causing the exposure; the Federal standard does not. In essence, the substance of the two standards is the same but the procedures used to apply them differ.

The contrasting burdens of proof under the Federal and California standards do not provide any basis for OSHA to reject the California supplement. It cannot logically be argued that imposing the burden of proof upon business will result in less effective protection for workers. If anything, reversal of the burden of proof should result in more effective protection by requiring employers to provide a warning unless they have some affirmative proof that a substance is not hazardous in a particular concentration.

This difference between the standards also does not create an undue burden on commerce. First, the Supreme Court has held that a State statute's creation of a presumption which may be rebutted by a defendant does not offend the dormant commerce clause. See *Atlantic Coast Line R. Co. v. Ford*, 287 U.S. 502, 509 (1933). In keeping with OSHA's earlier statements (see Section II.B) about the importance of dormant commerce clause case law in analyzing OSH Act product clause issues, OSHA finds that California's decision to shift the initial burden of proof to defendants does not impose an undue burden on commerce.<sup>18</sup>

Second, even assuming this statutory presumption theoretically could impose an undue burden on commerce, there is no evidence to support such a burden in this case. Although many commentators

<sup>18</sup> Shell Oil also maintains that Proposition 65's rebuttable presumption offends Federal APA and the due process clause of the fourteenth amendment to the U.S. Constitution. 18-160, page 21. The Federal APA does not apply to State proceedings. See 5 U.S.C. § 551; *Day v. Shalala*, 23 F.3d 1052, 1064 (6th Cir. 1994). Rebuttable statutory presumptions do not offend due process, when there is a rational connection between "the fact proved and the fact inferred." *Atlantic Coast Line*, 287 U.S. at 508-9 (upholding presumption of negligence where railroad company failed to give prescribed warning signals); see also *Usery v. Turner-Elkhorn Mining Company*, 428 U.S. 1, 28 (1976) (upholding various presumptions under Federal Black Lung Benefits Act). The presumption created by Proposition 65 is rational because there is a logical connection between the fact that a particular substance is hazardous (the fact proved by the substance's presence on the Proposition 65 list) and "the fact inferred"—that the substance is hazardous in a particular mixture. *Id.*

<sup>17</sup> Under the non-Proposition 65 elements of the California standard, of course, businesses would be required to educate workers about hazards covered by the Federal standard, regardless of Proposition 65's applicability.

complained generally about the burden imposed by Proposition 65's "no significant risk" option, none provided sufficient information addressing the specific point at issue here—that is, whether any business producing a mixture with a chemical which would not require hazard communication under the Federal standard was required by Proposition 65 to provide a warning. Rather, the examples provided by the commentators tend to bolster the opposite point of view.

One commentator, Chemspec, for example, stated that it was "sued by a private bounty-hunter under California's Proposition 65 for our products that contain nitrilotriacetic acid and its salt (NTA), which appear on the Proposition 65 chemical list" as a carcinogen. In response to the threatened suit, the Chemspec states, it produced two consultant reports demonstrating that not "only did both risk assessments predict exposures well below any warning threshold, both independent risk assessments cross-correlated. The bounty-hunter, however, simply dismissed the results out of hand, and threatened to leave the question to a 'battle of experts' trial." Ex. 18-127; see also Ex. 18-174, page 47.

The lawsuit against Chemspec involved nitrilotriacetic acid (NTA), trisodium nitrilotriacetate (NTA-Na<sub>3</sub>) and 1, 4-Dioxane. Ex. 18-174B, Attachment 25, Exhibit 3 (settlement agreement). One consultant's report (18-127A) addresses NTA-Na<sub>3</sub> and indicates that Chemspec primarily sells two carpet cleaning agents in California, "powdered Formula 90 and liquid Formula 77," which "typically contain 4.6 percent NTA-Na<sub>3</sub> and 6.5 percent NTA-Na<sub>3</sub> respectively." The second consultant's report addresses NTA, with respect to a variety of both consumer and occupational products.<sup>19</sup> The consultant's analysis indicates that NTA's concentration in all of these products is .1% or greater. See 18-127B, pages 14-20.

Given the fact that NTA and NTA-Na<sub>3</sub> are present in these products at concentrations of 0.1% or greater, the Federal Hazard Communication Standard requires appropriate hazard warnings regardless of the consultant's predictions about ultimate exposure.

<sup>19</sup> Neither consultant's report addresses 1, 4-Dioxane and neither Chemspec nor the Coalition mention this chemical in their comments. Consequently, even assuming that the private plaintiff's complaints about NTA and NTA-Na<sub>3</sub> were without merit under Proposition 65, OSHA could not conclude that the lawsuit, as a whole, had no legal basis. Similarly, to the extent the private lawsuit was based upon consumer product exposure, OSHA's review of the California standard could have no effect.

See *General Carbon Co. v. Occupational Safety & Health Review Comm'n*, 860 F.2d 479, 483-85 (D.C. Cir. 1988) (accepting OSHA's interpretation of standard as requiring manufacturer to label product, even where product, as ultimately used by worker, might not pose a hazard). Although it is not entirely clear from Chemspec's comments or the remaining material in the record,<sup>20</sup> it is possible that Chemspec believes the low concentrations and exposure assessments relieve it of any burden to provide hazard warnings. This, if true, would be an incorrect assumption.

*Articles:* The Coalition (Ex. 18-174) alleges that Proposition 65 treats "articles" differently than the Federal standard. OSHA concludes that this is a distinction without a difference.

The Federal standard defines an "article" as:

a manufactured item other than a fluid or particle: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities, e.g., minute or trace amounts of a hazardous chemical (as determined under paragraph (d) of this section), and does not pose a physical hazard or health risk to employees.

29 CFR § 1910.1200(c). Articles are specifically exempt from coverage under the Federal standard; however, manufacturers bear the burden of proving that the product is an article as defined in Section 1910.1200(c). 29 CFR § 1910.1200(b)(6)(iv). Establishing

<sup>20</sup> Although the Coalition maintains that Chemspec "labeled their products and distributed MSDSs in full compliance with the Federal standard" (Ex. 18-174, page 47), the Coalition does not state whether "full compliance" included labeling and MSDSs for all of the chemicals and products involved in this lawsuit. Chemspec itself does not address this issue and there is no indication that it ever attempted to argue that, because it was in "full compliance" with the Federal standard, it was in compliance with Proposition 65. As discussed in Section III.B.2, where, as here, a chemical is covered by both Proposition 65 and general State—and Federal—hazard communication requirements, compliance with the general State standard constitutes compliance with Proposition 65, and the compliance requirements of the State and Federal standards are virtually identical. The omission of this issue from Chemspec's or the Coalition's discussion suggests that Chemspec might have believed the Federal standard imposed no obligations for the particular products in question. On the other hand, the record contains MSDSs for two, and a label for one, of Chemspec's products, all of which contain what appear to be hazard communication warnings for the chemicals involved here. Ex. 18-127, 18-127A. Because the lawsuit involved twenty-one other products, however, OSHA cannot determine whether Chemspec believes it was in compliance with the Federal standard.

exemption requires the manufacturer to show, inter alia, that the product poses no health risk. *Sec'y of Labor v. Holly Springs*, 16 BNA OSHC 1856 (June 16, 1984).

Proposition 65 does not have a similarly explicit exemption for "articles"; however, as a practical matter, a manufacturer can establish a California exemption for a product which is a Federal "article" by showing that the product poses no significant risk (or no observable effect, in the case of reproductive toxins). Under both the Federal and California standards, then, the manufacturer bears the burden of proving that the product poses no health risk and the distinction, as initially noted, is one without a difference.<sup>21</sup>

*Pesticides:* The Federal standard exempts from labeling requirements "[a]ny pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*), when subject to the labeling requirements of that act and labeling regulations issued under that Act by the Environmental Protection Agency." 29 CFR § 1910.1200(b)(5)(I). In its 1994 amendment of the Federal standard, OSHA further indicated that, following EPA's promulgation of its Worker Protection Standard for Agricultural Pesticides, OSHA agreed "not to cite employers who are covered under EPA's final rule with regard to hazard communication requirements for pesticides." 59 FR 6126, 6143 (February 9, 1994).

The Western Wood Preservers Institute (Ex. 18-2) objects to Proposition 65's application to arsenically-treated wood products.<sup>22</sup> The Institute also outlined a settlement agreement it reached with a private plaintiff, under which members of the industry provide Proposition 65 warnings via ink stamps or end tags. In this context, arsenic is a pesticide and thus would be subject to regulation by EPA rather than OSHA. The National Cotton Council (Ex. 18-159) objected

<sup>21</sup> It is true that the California standard outlines specific requirements for proving "no significant risk" and the Federal does not. See 22 CCR §§ 12705-12821. OSHA, however, has never dictated to the States exactly how they must interpret phrases such as "no significant risk." In any case, no commentator has come forward with evidence comparing the burdens of proving "no significant risk" under the State and Federal standards.

<sup>22</sup> In terms of product clause analysis, WWPI's comments focus solely on an alleged burden placed upon out-of-state manufacturers shipping treated wood into California. OSHA's finding that California may not apply its State plan standards to out-of-state manufacturers should ameliorate WWPI's concern. In addition, these products have consumer uses which are not addressed by this decision.

more broadly to Proposition 65's application to pesticides, noting that "the Federal HCS does not require labeling of pesticides[], which are covered by U.S. EPA regulations, whereas the CA Governor's List[] \* \* \* includes many pesticides." [footnotes omitted].

OSHA finds that neither comment provides a basis for rejecting the State standard. First, where pesticides are concerned, compliance with Proposition 65 in the occupational setting is based upon compliance with California's Pesticides and Worker Safety Requirements. See 3 CCR §§ 6701-6761, as incorporated into the State plan by 8 CCR § 5194(b)(6)(C) and 22 CCR § 12601(c)(1)(C). Neither the Western Wood Preservers nor the Cotton Council alleges that compliance with California's worker pesticide regulations has proven burdensome in the past.<sup>23</sup> With respect to the settlement outlined by the Wood Preservers, the comment provides insufficient information for OSHA to determine whether occupational exposures were involved; assuming they were, however, Section 12601(c) of OEHHA's occupational regulations provides that compliance with California's worker pesticide regulations constitutes compliance with Proposition 65. The Institute's member companies, therefore, faced no additional compliance burden under Proposition 65 which they did not face as a result of the worker pesticide regulations. The voluntary settlement reached by the Institute does not negate the defense available through Section 12601(c). The industry simply failed to avail itself of that defense.

Second, to the extent these commentators object to "labeling" requirements allegedly imposed by Proposition 65, they overlook the Ninth Circuit's decision in *Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992), cert. denied 506 U.S. 825 (1992). In *CSMA*, the court found that Proposition 65 does not require labeling and that, if it did, the law would be preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). 958 F.2d at 945. Consequently, pesticide manufacturers and users cannot be required by private plaintiffs enforcing Proposition 65 to provide particular labeling.

*Aflatoxins*: The National Cotton Council (18-154) argues that Proposition 65 covers aflatoxins, a biological hazard, whereas the Federal standard does not. The Council is

correct. The Federal Hazard Communication Standard does not require warnings for aflatoxins or other biological hazards. This is because aflatoxins do not come within the scope of the Federal standard, which was "intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards" (emphasis added). 29 CFR § 1910.1200(a)(2). In 1994, OSHA specifically amended the standard to reflect this fact, adding Section 1910.1200(b)(6)(xii), which exempts biological hazards. 29 CFR § 1910.1200(b)(6)(xii). OSHA then explained that:

Although OSHA has never considered either radioactivity or biological hazards to be covered by the HCS, OSHA has received inquiries regarding such coverage, and therefore added specific exemptions for these types of hazards in the NPRM. \* \* \* OSHA believes that this particular rulemaking is more appropriately limited to chemical hazards, although OSHA does not discourage employers from including coverage of such agents in their hazard communication programs.

59 FR 6126, 6155 (February 9, 1994).

It is unclear whether Cal/OSHA's incorporation of Proposition 65 into the State plan was intended in bring aflatoxins (and other biological hazards) within the scope of the State plan. In practical terms, aflatoxins would be unlikely to present an occupational hazard; their presence on the Proposition 65 most likely relates to the hazard they present in consumer products which, as stated previously, will not be affected by OSHA's decision. If the State does not intend to bring aflatoxins within the scope of the State plan, California need not establish that Proposition 65's coverage of biological hazards meets the requirements of Section 18(c)(2).

If the State does intend to apply its Hazard Communication Standard to biological occupational hazards, OSHA finds that Section 18(c)(2) does not prohibit the State from doing so. As OSHA stated in the 1994 preamble, the Federal exclusion of biological hazards was not intended to discourage employers from including these hazards in their hazard communication programs. A State standard covering biological hazards is more effective than a Federal standard which does not cover such hazards. In addition, there is no evidence that coverage of biological hazards would impose an undue burden on commerce. Only one commentator (the Cotton Council) raised this issue and it presented no evidence of Proposition 65

enforcement actions involving occupational biological hazards.

*California Non-Chemical Manufacturers*: The Coalition argues that the California standard increases the kinds of products to which hazard communication requirements apply by requiring manufacturers other than chemical manufacturers (e.g. truck manufacturers) to provide warnings. Ex. 18-174, page 28. Based upon OSHA's findings on the out-of-state manufacturers issue (see Section II.D), the State plan will not regulate out-of-state vendors; this finding may moot the bulk of the Coalition's objections. The question remains, however, whether the California standard covers in-state manufacturers other than chemical manufacturers (hereafter "non-chemical" manufacturers), which would make its coverage more expansive than the Federal standard, which applies only to chemical manufacturers as manufacturers. As discussed in Section II.D, above, California's position on application of its standard to non-chemical manufacturers is unclear. On the one hand, California's incorporation of Proposition 65 imposes the law's obligations upon "employers" (8 CCR § 5194(b)(6)) and defines an "occupational exposure" as one occurring "in the workplace of the employer causing the exposure, to any employee." 22 CCR § 12601(c), as incorporated into the California standard by 8 CCR § 5194(b)(6)(C). This regulatory language suggests that the State plan would subject a manufacturer to Proposition 65 requirements only if the manufacturer was an "employer" within the meaning of the State plan and only with respect to the manufacturers' particular employees.

On the other hand, the California Attorney General has argued that the State plan's Proposition 65 requirements also apply to manufacturers other than chemical manufacturers (hereafter "non-chemical manufacturers"). The Attorney General's position appears to be based upon the fact that some products of non-chemical manufacturers may be combined with a chemical to produce a hazardous chemical. For example, an industrial truck uses diesel fuel, which produces exhaust which is a hazardous chemical. See Ex. 18-156. The Attorney General also has taken the position that Section 12601(c)'s definition of an "occupational exposure" does not limit the State plan's Proposition 65 coverage to the duties owed by manufacturers to their own employees. Rather, the Attorney General has maintained that the State plan imposes obligations upon manufacturers in their relation to the employees of other businesses.

<sup>23</sup> California promulgated the regulations referenced in Section 12601(c) in 1988.

Consequently, it appears that California may extend hazard communication requirements to non-chemical manufacturers in their role as manufacturers, which exceeds the scope of the Federal standard.<sup>24</sup> Ex. 18-174, Attachment 31.

OSHA finds that this potential difference in coverage between the Federal and State standards does not violate Section 18(c). Facially, application of hazard communication requirements to non-chemical manufacturers should lead to more, not less, effective protection for employees and there is no evidence suggesting otherwise. Accordingly, OSHA finds that this requirement does not result in less effective protection. Application of Proposition 65 to California non-chemical manufacturers also does not violate the product clause.

Proposition 65, by its terms, applies only to exposures occurring within California. Goods which are manufactured in California by California employers and which remain in that State do not enter interstate commerce, and requirements applicable to such products do not constitute a burden on interstate commerce. Although some manufacturers maintain that they cannot distinguish between goods that will be shipped to points in California and goods that will be shipped elsewhere (and they therefore may elect to apply Proposition 65 warnings to all products regardless of destination), the manufacturer's voluntary assumption of such a task is not imposed by Proposition 65's terms. Finally, even assuming that non-chemical manufacturers are induced by Proposition 65 to provide labeling not otherwise required by hazard communication requirements, they have submitted no concrete evidence establishing the extent of the burden imposed.

#### 4. Substantive Differences Between the Federal and General California Standards

In addition to the objections raised to the Proposition 65 elements of the California standard, commentators have objected to several parts of the general (*i.e.* non-Proposition 65) California standard. These objections relate to trade secret issues; the failure of the State standard to exclude all substances excluded by the Federal standard; and

a requirement in the State standard that potential health risks be described "in lay terms."

*Trade Secrets:* Some commentators allege that the California Hazard Communication Standard does not provide adequate protection for trade secrets, as required by OSHA. OSHA's general State plan regulations at 29 CFR § 1902.4(c)(viii) require that a State plan provide adequate safeguards to protect trade secrets, by such means as limiting access to such trade secrets to authorized State officers or employees and by providing for the issuance of appropriate orders to protect the confidentiality of trade secrets.

Shell Oil Company and Elf Atochem North America, Inc., maintain that the California standard does not meet this criterion because it allows access to trade secrets by safety professionals who are not State officials or employers. Ex. 18-160. Other commentators assert that the California requirement that Material Safety Data Sheets (MSDS) contain the Chemical Abstract Service number will jeopardize trade secrets by allowing outsiders to determine the composition of products. Exs. 18-40, 18-154. The Federal standard does not require inclusion of the CAS number. The Color Pigments Manufacturers Association alleges that the California standard fails to require health and safety professionals to treat trade secrets confidentially. Ex. 18-40.

The California Hazard Communication Standard allows disclosure of information to both safety and health professionals, while the Federal Hazard Communication Standard requires disclosure only to health professionals. The inclusion of health professionals in the Federal standard extends trade secret access beyond State officials and employers, the groups previously listed in the general State plan regulation. The State argues that its provision further broadening access to safety professionals is more protective of worker safety, because many safety and health programs are managed by safety professionals who have both safety and health expertise. Importantly, the State requires all persons receiving such trade secret information to treat it confidentially 8 CCR § 5194(I)(3)(E). OSHA finds that California has adequate reason to extend disclosure to safety professionals and that this extension of access does not result in less effective protection of trade secrets. In addition, while requiring that CAS numbers be included on a MSDS, the standard also provides an exemption for trade secrets. 8 CCR § 5194(I)(1). Therefore, OSHA finds that the State standard's protection

of trade secrets is in accordance with State plan requirements.

*California's Omission of Federal Exemptions and Exclusions:* The Chemical Manufacturers Association (CMA) generally protests that the California standard does not include "the exemptions and exception added to the Federal HCS in 1994." Ex. 18-154, page 12. One of these differences, the Federal exclusion of biological hazards, is discussed above (see "Aflatoxins"). In any case, however, CMA does not explain how this difference results in a less effective standard or produces a burden on commerce and, in fact, states that the differences between the Federal and general California standard "in practice \* \* \* have not presented significant problems for employers and manufacturers." *Id.*, page 4. Logically, if California's standard is stricter than the Federal standard, it should result in more effective protection for workers. OSHA therefore concludes that California's failure to adopt all of the exemptions or exceptions added to the Federal standard in 1994 does not require rejection of the standard.

*California's Requirement for Use of Lay Terminology on MSDSs:* The general California standard requires that an MSDS include "[a] description in lay terms, if not otherwise provided, \* \* \* of the specific potential health risks posed by the hazardous substance intended to alert any person reading the information." 8 CCR § 5194(g)(2)(M). The Federal standard does not include this language, but does require that the MSDS describe "[t]he health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical." 29 CFR § 1910.1200(g)(2)(iv). The Chemical Manufacturers Association objects to the California requirement but, again, does not explain how it could result in less effective protection or impose an undue burden upon commerce. Ex. 18-154, page 12. See also Ex. 18-121. California's requirement for the use of lay terminology on MSDSs does not appear to undermine the potential effectiveness of its standard. Indeed, in a 1990 grant program announcement, OSHA recognized that the use of lay language on MSDSs may enhance worker understanding of hazards. 55 FR 18195 (May 1, 1990). There also is no evidence that a requirement for the use of lay terminology would pose an undue burden on commerce. As similarly discussed in the context of Proposition 65 (see Section III.B.2), "appropriate" hazard warnings should be "clear and reasonable"; warnings which use lay

<sup>24</sup> California has the power to impose hazard communication requirements obligations upon all employers (in their role as employers) located within the State. The California standard does not exceed the Federal in this respect. Equally clearly, and as discussed above, it cannot impose such obligations upon out-of-state employers under the State plan.

terminology should meet both requirements.

#### 5. Supplemental Enforcement

The most extensive comments to OSHA about Proposition 65 have come from businesses concerned about their vulnerability to lawsuits brought by private plaintiffs under Proposition 65. Commentors also have raised some objections to the participation of the California Attorney General and local prosecutors in Proposition 65 actions, which are discussed in Section II.E.

Proposition 65's supplemental enforcement provisions are the one area where the California standard does differ, clearly and significantly, from the Federal standard. OSHA nevertheless finds that this private right of action does not render the California standard unapprovable. The OSH Act does not prohibit the States from fashioning their own enforcement strategies and the private right of enforcement, as a supplement to standard Cal/OSHA enforcement, violates none of the provisions of Section 18. OSHA notes that Cal/OSHA continues to enforce its Hazard Communication Standard, issuing, for example, citations for almost 1000 violations of the standard during Fiscal Year 1996.

Before outlining its decision on this issue in more detail, OSHA notes initially that most of the anecdotal evidence supplied by commentors about the burdens created by this private right of enforcement involved consumer or environmental (either in addition to, or instead of, occupational) exposures to chemicals. *E.g.* Exs. 18-133, 18-137, 18-149, 18-162. Again, OSHA's decision on the approvability of the State occupational standard cannot affect Proposition 65's consumer and environmental applications.

*Effectiveness:* Industry commentors generally maintain that Proposition 65's supplemental enforcement provision does not enhance the California standard's effectiveness and may, in fact, render the standard less effective. *E.g.* Exs. 18-65, 18-143, 18-150, 18-160, 18-162, 18-174. Most of the comments also involve other allegations of Section 18 violations. For example, some commentors believe that Proposition 65 enforcement is less effective because Cal/OSHA generally is not involved in the suits or because private plaintiffs do not meet the OSH Act's requirement for "qualified personnel." These issues are discussed separately, above.

The remaining general allegation of ineffectiveness involves some commentors' beliefs that most lawsuits brought by private plaintiffs under

Proposition 65 are frivolous. As noted previously, much of this anecdotal evidence appears to concern lawsuits involving consumer or environmental exposures, which are beyond OSHA's jurisdiction. In addition, OSHA's review was made more difficult by a general failure to the commentors to provide specific information. In many cases, commentors alleged that they were in compliance with the Federal standard and were unfairly sued by private plaintiffs. Their comments, however, did not provide sufficient information for OSHA to determine whether they were, in fact, in compliance with the Federal standard. Moreover, based upon the evidence in the comments, none of the commentors alleging that Proposition 65 supplemental lawsuits are frivolous has ever actually moved a California court to dismiss a lawsuit as frivolous. Many have accepted settlements that imposed requirements equal to or beyond those asked by the California Hazard Communication Standard and Proposition 65.<sup>25</sup>

On its face, a supplemental enforcement provision should make a State standard more, not less, effective because it provides an additional method of ensuring that a standard is followed. If a defendant subject to a Proposition 65 lawsuit believes that the complaint is frivolous, it should bring that complaint to the attention of the court considering the lawsuit. In any case, given the absence of specific information about the lawsuits involved, OSHA cannot determine that private lawsuits filed under Proposition 65 have resulted in less effective worker protection.

On the other hand, there does appear to be some evidence that Proposition 65's supplemental enforcement provision has led to better enforcement of California's Hazard Communication Standard generally. For example, the Environmental Defense Fund *et al.* (Ex. 18-163) note the case of *Gonzalez v. Rubber Stampede*, Alameda Superior Court No. 714908-3, in which a company which initially had no hazard communication program was sued by one of its workers. Settlement of the lawsuit led to the company's agreement to hire a hazard communication consultant and to implement the consultant's recommendations within ninety days. See Exs. 18-163 (page 10, note 15) and 18-155C (page 30).

Similarly, in *Badenell v. Zurn Industries et al.*, No. 92-2993 (C.D. Cal.),

<sup>25</sup> The only commenter to address this issue states that no defendant has ever moved to dismiss a suit he filed as frivolous. The record contains no evidence contradicting this assertion. Ex. 18-167.

Wilkinson Regulator, a manufacturer of brass parts, was sued under Proposition 65 by four workers, two of whom had elevated blood lead levels requiring medical intervention. The company was not following the Cal/OSHA lead standard and its hazard communication program apparently did not include information about lead. The Federal court ordered Wilkinson to request inspections by Cal/OSHA and the company ultimately agreed to comply with all OSHA-recommended procedures and to adhere to the lead standard. Wilkinson also was charged with violating Proposition 65's environmental exposure provisions by dumping lead-laden rinse water; the court ordered the company to clean up any lead contamination that resulted from that activity. Ex. 18-163, page 10 n. 15; see also Ex. 18-155C, page 24.

Cal/OSHA's resources, like those of any government agency, are necessarily limited. *Accord Carnation Co. v. Sec'y.*, 641 F.2d 801, 805 (9th Cir. 1981). Given this fact, both Federal and State laws provide an incentive for voluntary compliance. The State may reasonably determine that supplemental private enforcement will produce Hazard Communication Standard compliance at more workplaces than Cal/OSHA could expect to visit, as it apparently did in the cases involving Wilkinson and Rubber Stampede.

In sum, commentors opposing the standard have produced no reliable evidence showing that Proposition 65's supplemental enforcement option has resulted in less effective protection for workers, and the available evidence indicates that California could reasonably conclude that this enforcement method has resulted in increased protection for some workers.

*Product Clause:* The primary objection raised by industry commentors to Proposition 65's supplemental enforcement mechanism is an alleged burden on commerce created by the burden of litigating cases in California. See, *e.g.* Exs. 18-23, 18-40, 18-41, 18-58, 18-65, 18-75. Many of these comments relate to the burden imposed upon out-of-state businesses. OSHA's finding that supplemental lawsuits cannot be brought against out-of-state businesses under the auspices of the State plan (see Section II.D, above), therefore, moots many of these comments.

None of the comments establish a violation of the product clause. The commentors generally cite two competing burdens in this respect: they either may settle cases brought by private plaintiffs and avoid the costs of litigation, or they may litigate cases (and

possibly avoid any award of damages). OSHA finds that any burden imposed by voluntary settlements reached between businesses and private plaintiffs in individual cases is not an undue burden on commerce for purposes of the product clause. Although some commentators attempt to characterize such settlements as "extortion" (Exs. 18-92, 18-145, 18-162), there is no evidence to support the idea that these settlements have been involuntary. Nor can OSHA assume, in the absence of specific information, that cases that are voluntarily settled are without merit.

The litigation costs cited by the commentators (e.g. Exs. 18-23, 18-40, 18-41, 18-58, 18-65, 18-75, 18-164) also do not establish an undue burden on commerce. To begin with, it seems questionable whether the burden of litigating a case could constitute a burden on "commerce," if the substantive requirements at issue in the litigation are legitimate State requirements. In fact, no commentator cited, and OSHA could not locate, any cases specifically addressing the general question of whether a law's enforcement provisions can burden commerce if its substantive provisions do not. The Supreme Court has rejected the argument that a State statute shifting attorney fees violates the dormant commerce clause. *Missouri, Kansas & Texas Railway Co. of Texas v. Harris*, 234 U.S. 412, 416 (1914). Proposition 65's provision for attorney's fees, therefore, does not constitute an undue burden on commerce. The only other relevant cases are two decisions addressing the question of whether an award of punitive damages could create an undue burden on commerce. Both courts rejected this idea. *Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693 (U.S. District Court for the Northern District of Georgia, 1980); *Brotherton v. Celotex Corp.*, 493 A.2d 1337 (Superior Court of New Jersey, Law Division, March 15, 1985). These decisions suggest that the penalties available under Proposition 65 also do not constitute an undue burden on commerce.

The dearth of relevant case law on this enforcement issue reflects the fact that the courts, in considering cases under the Commerce Clause, do not consider the enforcement provisions of particular laws. Rather, these decisions focus on burdens posed by the substantive aspects of particular laws. The courts' focus on the substantive aspects of laws is logical because the burden of litigating a case is not a burden on "commerce." The product clause, like the Commerce Clause,

"protects the interstate market, not particular interstate firms[.]" *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978); *Kleenwell Biohazard Waste*, 48 F.3d at 397.

Although burdens on individual businesses could, in some circumstances, add up to a burden on the interstate market, the purely anecdotal evidence in this record does not support such a finding. OSHA received 156 comments from opponents of the standard, but only about fifteen provided specific information about particular lawsuits and the burdens allegedly imposed. Most of these lawsuits involved out-of-state businesses, many of whom should be exempt from enforcement under the auspices of the State plan, as discussed in Section II.D. Almost all of these lawsuits, as stated before, involved voluntary settlements, which have limited relevance to OSHA's consideration of product clause issues. Many cases involved consumer and environmental exposures; the expenses associated with settlements or litigation of such cases are not imposed by Proposition 65's occupational applications.

For example, one lawsuit brought to OSHA's attention was *As You Sow v. Shell Oil, Inc.* This case is now pending before the San Francisco Superior Court. Although this suit appears to have occupational aspects, the plaintiff's arguments also focus on potential exposure to consumers. See Ex. 18-174A, Attachment 3 (plaintiff's pleading), pages 3, 5, 14-15, 26. Furthermore, several of the issues pending before the court appear to turn on the proper interpretation of Proposition 65 and OEHHA regulations—e.g. what does it mean to "knowingly and intentionally" expose someone to a Proposition 65 chemical? Issues relating to consumer exposures are beyond OSHA's jurisdiction. Some additional issues do involve the intersection between Proposition 65 and the Federal Hazard Communication Standard—i.e. As You Sow argues that Shell's warning system does not comply with the Federal standard (and therefore does not comply with Proposition 65); Shell argues that it does. See Ex. 18-174A, Attachment 3, pages 18, 27-28 and Ex. 18-174B, Attachment 12 (defendant's pleading), pages 20-31. However, OSHA has no evidence showing that the California court is not capable of resolving the contested issues fairly and reasonably.

Finally, even where the commentators do provide information about expenses associated with lawsuits which were, at least in part, related to occupational

exposures, the evidence is insufficient to allow OSHA to judge the quality and extent of any burden imposed. For example, one of the few cases about which information is available is As You Sow's lawsuit against Chemspec. See Exs. 18-127, 18-174 (pages 47-48). Chemspec itself provided no specific information about the financial burden imposed by the settlement. However, the Coalition states that Chemspec paid \$12,000 in "[d]irect costs of settlement" and \$40,000 "to rework labels, MSDSs, and reformulated [sic] products[.]" Neither Chemspec nor the Coalition provided information regarding Chemspec's financial condition or the extent to which Chemspec manufactured or sold listed chemicals, which makes it impossible for OSHA to determine the relative burden imposed. In addition, it is unclear whether Chemspec was in compliance with the Federal standard for the chemicals in question prior to the settlement of the lawsuit. See Section III.B.2. Finally, as noted in Section III.B.3, some of the products involved in the lawsuit were consumer products; to the extent the settlement and other expenses reflect costs attributable to Proposition 65's consumer applications, those expenses are not relevant to OSHA's consideration under the product clause. Accordingly, there is insufficient evidence in the record to allow OSHA to find that the occupational aspects of Proposition 65 have created an undue burden on interstate commerce.

### C. Inspections, Employer/Employee Rights

Some commentators also addressed whether Proposition 65's private enforcement mechanism, as incorporated into the State plan, meets OSHA requirements for enforcement under a State plan, including employer and employee rights. Section 18(c)(3) of the OSH Act requires State plans to provide for a "right of entry and inspection of all workplaces" which is at least as effective as the provisions of the Act. OSHA regulations require that a State plan: provide for inspection of covered workplaces in the State where there are reasonable grounds to believe a hazard exists (29 CFR § 1902.4(c)(2)(I)); provide an opportunity for employees and their representatives to bring possible violations to the attention of the State agency with enforcement responsibility (29 CFR 1902.4(c)(2)(ii)); provide for an employer to have the right of review of violations alleged by the State, abatement periods, and proposed penalties (29 CFR 1902.4(c)(2)(xii)); and for employees or their representatives to

have an opportunity to participate in review proceedings (29 CFR 1902.4(c)(2)(xii)).

Several industry commentators allege that because the Proposition 65 supplemental enforcement provisions do not involve on-site inspections, walkaround by employer and employee representatives, and administrative review, they do not meet these criteria and should not be approved. Exs. 18-41, 18-58, 18-59, 18-65, 18-81, 18-96, 18-121, 18-134, 18-142, 18-144, 18-148, 18-150, 18-152, 18-153, 18-154, 18-160, 18-164, 18-169, 18-174. (No workers or organizations representing their interest complained about the rights afforded employees, however.) Some commentators believe that businesses are not given adequate notice of alleged Proposition 65 violations and a reasonable amount of time to abate them. The Industrial Truck Association asserted that OSHA cannot enforce without conducting an inspection and that the agency therefore cannot authorize such enforcement by a State plan. Ex. 18-160.

Cal/OSHA in its response asserts that as long as it continues to enforce the Hazard Communication Standard in accordance with its approved inspection procedures, supplemental private enforcement does not need to meet the criteria. (Ex. 22)

As discussed in Section I.A, State plans do not operate under a delegation of Federal authority but under their own authority, and therefore they may use methods of enforcement not included in the Federal Act. OSHA finds that the private enforcement mechanism of Proposition 65 incorporated into the State plan serves only to supplement the enforcement provided by Cal/OSHA and therefore does not need to include the same enforcement mechanisms used by Cal/OSHA. Regular State plan enforcement of the Hazard Communication Standard, including Proposition 65, is still available. Employees continue to have the right to file complaints with Cal/OSHA regarding alleged hazard communication violations, including violations of Proposition 65, and to participate in inspections and review proceedings. In addition, employees have the right to file suits under Proposition 65 and may file amicus briefs in third-party actions. Significantly, neither workers nor organizations representing their interests complained of the rights afforded to employees under Proposition 65's supplemental enforcement provision.

While Proposition 65 does not provide for the setting of specific

abatement dates, employers must be served with a "Notice of Intent to Sue" before a private suit is filed. Some commentators have stated that these notices have been inadequate in the past. E.g. 18-133, 18-144, 18-164, 18-207. Employers, of course, have all rights available under the judicial system in enforcement proceedings and may bring any inadequacies in the notices of intent to sue to the attention of the courts. Moreover, California recently adopted regulations which clarify the notice requirements and require greater specificity than some previous notices of intent contained. See 22 CCR § 12903 (effective April 22, 1997). These new regulations should alleviate the concerns raised in the comments.

#### *D. Qualified Personnel*

Some commentators have questioned whether Proposition 65 as incorporated into the California Hazard Communication Standard complies with the OSHA requirement that State plans be enforced by qualified personnel. Section 18(c)(4) of the OSH Act and 29 CFR § 1902.3(h) require that the designated agency or agencies have a sufficient number of adequately trained and qualified personnel necessary for the enforcement of standards. Several commentators pointed out that the prosecutors and private citizens bringing enforcement actions under Proposition 65 need not have specific training or expertise in occupational safety and health. Ex 18-63, 18-150, 18-160, 18-162, 18-166, 18-174. In its response, California maintains that as long as the basic hazard communication requirements are enforced by qualified Cal/OSHA personnel, the supplemental enforcement need not meet these criteria.

OSHA finds that since the designated agency, which enforces hazard communication requirements comparable to those of Federal OSHA, does have qualified personnel to enforce those requirements, there is no violation of this requirement. In addition, while actions under Proposition 65 may be brought by prosecutors or private citizens, the decisions in these cases are made by State courts, which are also the final arbiters in contested Cal/OSHA enforcement actions.

#### **IV. Decision**

Based upon the analysis set forth in Sections II and III, OSHA approves the California standard, including Proposition 65 and its supplemental enforcement provision, but subject to the following conditions, which are applicable to all enforcement actions

brought under the authority of the State plan, whether by California agencies or private plaintiffs:

- Employers covered by Proposition 65 may comply with the occupational requirements of that law by complying with the measures provided by the OSHA or Cal/OSHA Hazard Communication Standard, as provided in the State's regulations.
- The designated State agency, Cal/OSHA, is responsible for assuring that enforcement of its general Hazard Communication Standard and Proposition 65 results in "at least as effective" worker protection; the agency must take appropriate action to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is federally approved.
- The State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State.

With these conditions in mind, OSHA has determined that:

(1) The California standard is at least as effective as Federal OSHA's Hazard Communication Standard. With a few additions which do not undermine (and may enhance) protection of employees' rights to know about workplace hazards, the standard covers the same chemicals and concentration of chemicals as are covered by the Federal standard. Similarly, the California standard, like the Federal standard, requires clear and reasonable communication of hazard information. The standard also adequately protects business trade secrets. Finally, the evidence available to OSHA does not show that supplemental enforcement of Proposition 65 has resulted in less effective enforcement of hazard communication requirements.

(2) The substantive hazard communication requirements contained in the California standard are applicable to products which are distributed or used in interstate commerce. Consistent with the principle set forth in the 1983 Federal Hazard Communication Standard, OSHA finds that the standard is applicable to products in the sense that it permits the distribution and use of hazardous chemicals in commerce only if they are in labeled containers accompanied by material safety data sheets.

(3) The California standard does not pose an undue burden on interstate commerce. The substantive differences

between the general hazard communication requirements and the Federal hazard communication standard have not been shown to pose a burden on commerce. In addition, the substantive requirements of Proposition 65 may be met by compliance with the general Federal and State hazard communication requirements, thus not posing any additional burden on employers. Finally, based on the evidence in this record, neither financial burdens associated with voluntary settlement of Proposition 65 cases nor the burden of litigating cases has been shown to create an undue burden on interstate commerce within the meaning of the product clause.

(4) The California standard is required by compelling local conditions. The voters of California have a legitimate and compelling local interest in determining how their right to hazard information can best be protected.

(5) The California standard also complies with the remaining requirements of Section 18 of the Act. Cal/OSHA, as the designated State agency, is responsible for the effective administration of the plan throughout the State. This designation meets the requirements of Section 18(c)(1). The State also has adequately trained personnel for the enforcement of the standard, pursuant to Section 18(c)(4). Finally, both the administrative system available under the general California standard and the judicial enforcement available under Proposition 65's supplemental enforcement mechanism adequately protect the rights of employers and employees.

OSHA, accordingly, approves the California Hazard Communication Standard, including its incorporation of Proposition 65, subject to the stated conditions. Finally, as noted at the outset of this decision, OSHA has no authority to address Proposition 65's consumer and environmental applications, and this decision does not affect those applications.

#### V. Location of Supplement for Inspection and Copying

A copy of the California Hazard Communication standard may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, OSHA, 71 Stevenson Street, Suite 415, San Francisco, California 94105; and California Division of Occupational Safety and Health, Department of Industrial Relations, 45 Fremont Street, Room 1200, San Francisco, California 94105; Office of the Director, Federal-State Operations, OSHA, U.S. Department of

Labor, Room N-3700, 200 Constitution Avenue, NW, Washington, DC 20210.

**Authority:** Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR part 1902, Secretary of Labor's Order No. 1-90 (55 FR 9033).

Signed in Washington, D.C., this 2nd day of June, 1997.

**Greg Watchman,**

*Acting Assistant Secretary.*

[FR Doc. 97-14723 Filed 6-5-97; 8:45 am]

BILLING CODE 4510-26-P

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Nuclear Waste; Notice of Meeting

The Advisory Committee on Nuclear Waste (ACNW) will hold its 93rd meeting on July 23-25, 1997, in Building 189—Auditorium, Southwest Research Institute, Center for Nuclear Waste Regulatory Analyses (CNWRA), 6220 Culebra Road, San Antonio, Texas.

The entire meeting will be open to public attendance.

The schedule for this meeting is as follows:

*Wednesday, July 23, 1997—8:30 a.m. until 6:00 p.m.*

*Thursday, July 24, 1997—8:30 a.m. until 6:00 p.m.*

*Friday, July 25, 1997—8:30 a.m. until 12:00 noon*

A. A full day's session will be devoted to reviewing the performance assessment (PA) capability of the NRC and CNWRA staffs. This review will include discussions of both high- and low-level waste PA, as well as, the use of PA in site decommissioning management plan remediation efforts. The session will also focus on the use of PA in calculating the consequences of igneous activity on a high-level waste repository, on the use of PA in the prioritization process, and on PA integration into the overall regulatory process.

Representatives from the NRC and CNWRA will participate.

B. A full day's session will be devoted to reviewing the use of probabilistic performance assessment approaches for waste management. The transition to risk-informed, performance based regulation will form part of the discussion. Representatives from the NRC, CNWRA, DOE, and the nuclear industry will participate.

C. The ACNW will hear a description of science and engineering experiments currently in progress at the CNWRA.

D. *Preparation of ACNW Reports*—The Committee will discuss potential reports, including igneous activity

related to the proposed Yucca Mountain Repository, and other topics discussed during the meeting as the need arises.

E. *Committee Activities/Future Agenda*—The Committee will consider topics proposed for future consideration by the full Committee and Working Groups. The Committee will discuss ACNW-related activities of individual members.

F. *Miscellaneous*—The Committee will 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 October 8, 1996 (61 FR 52814). 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 Chief, Nuclear Waste Branch, Mr. Richard K. Major, as far in advance as practicable so that appropriate arrangements can be made to schedule the necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during this meeting will 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 Chief, Nuclear Waste Branch, 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 notify Mr. Major as to their particular needs.

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 Mr. Richard K. Major, Chief, Nuclear Waste Branch (telephone 301-415-7366), between 8:00 A.M. and 5:00 P.M. EDT. The CNWRA contact in San Antonio is Ms. Bonnie Caudle (telephone 210-522-5157).

ACNW meeting notices, meeting transcripts, and letter reports are now available on FedWorld from the "NRC MAIN MENU." Direct Dial Access

number to FedWorld is (800) 303-9672; the local direct dial number is 703-321-3339.

Dated: June 2, 1997.

**Andrew L. Bates,**

*Advisory Committee Management Office.*

[FR Doc. 97-14809 Filed 6-5-97; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards Joint Meeting of the ACRS Subcommittees on Materials and Metallurgy and on Severe Accidents

#### Postponed

A joint meeting of the ACRS Subcommittees on Materials and Metallurgy and on Severe Accidents scheduled to be held on June 10, 1997, Room T-2B3, 11545 Rockville Pike, Rockville, Maryland, has been postponed due to the unavailability of documents. Notice of this meeting was published in the **Federal Register** on Friday, May 9, 1997 (62 FR 25677). Rescheduling of this meeting will be announced in a future **Federal Register** notice.

*For further information contact:* Mr. Noel F. Dudley, cognizant ACRS staff engineer (telephone 301/415-6888) between 7:30 a.m. and 4:15 p.m. (EDT).

Dated: June 2, 1997.

**Sam Duraiswamy,**

*Chief, Nuclear Reactors Branch.*

[FR Doc. 97-14808 Filed 6-5-97; 8:45 am]

BILLING CODE 7590-01-P

## OFFICE OF PERSONNEL MANAGEMENT

### The National Partnership Council

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice of meeting.

**TIME AND DATE:** 1:00 p.m., June 11, 1997.

**PLACE:** U.S. Office of Personnel Management, Executive Conference Room 5A06A, Theodore Roosevelt Building, 1900 E Street, N.W., Washington, DC 20415-0001. The conference room is located on the fifth floor.

**STATUS:** This meeting will be open to the public. Seating will be available on a first-come, first-served basis. Individuals with special access needs wishing to attend should contact OPM at the number shown below to obtain appropriate accommodations.

**MATTERS TO BE CONSIDERED:** A panel of agency and union representatives will discuss challenges to labor-management partnerships and suggest ways the National Partnership Council (Council) may enhance efforts to build and sustain partnerships in the Federal labor-management relations community. The Council will discuss the work plan for the Council's Partnership Facilitation Project. Members will review a questionnaire instrument that will be used to gather additional information on potential participants in the Partnership Facilitation Project. Other agenda items include staff updates on the 1997 National Partnership Award Announcement, a briefing on the National Performance Review/Office of Personnel Management sponsored survey on reinvention results, and a discussion of the National Skills Standards Board.

#### CONTACT PERSON FOR MORE INFORMATION:

Michael Cushing, Director, Center for Partnership and Labor-Management Relations, Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street, NW., Room 7H28, Washington, DC 20415-0001, (202) 606-2930.

**SUPPLEMENTARY INFORMATION:** We invite interested persons and organizations to submit written comments. Mail or deliver your comments to Michael Cushing at the address shown above. To be considered at the June 11 meeting, written comments should be received by June 9.

Office of Personnel Management.

**James B. King,**

*Director.*

[FR Doc. 97-15005 Filed 6-5-97; 8:45 am]

BILLING CODE 6325-01-U

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 35-26722]

### Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

May 30, 1997.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the

Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by June 23, 1997, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

#### Southwestern Electric Power Company, et al. (70-5741)

Southwestern Electric Power Company ("SWEPCO"), 428 Travis Street, Shreveport, Louisiana 71156-0001, Public Service Company of Oklahoma ("PSO"), 212 East Sixth Street, Tulsa, Oklahoma 74119-1212, and Central Power and Light Company ("CPL"), 539 North Carancahua Street, Corpus Christi, Texas 78401-2802 (collectively, "Applicants"), all wholly-owned electric utility subsidiaries of Central and South West Corporation, a registered holding company, have filed a post-effective amendment under sections 6(a), 7, 9(a), 10 and 13(b) of the Act, and rules 54, 90 and 91 thereunder. The original application-declaration was filed under sections 6(a), 7, 9(a), and 13(b) of the Act, and rules 90 and 91 thereunder.

Pursuant to prior Commission orders dated April 6, 1976 and August 9, 1976 (HCAR Nos. 19468 and 19643), SWEPCO was authorized to acquire, finance, construct and operate a unit train repair facility ("Repair Facility") near Alliance, Nebraska. The Repair Facility is used for the maintenance and repair of railroad cars for the transportation of coal to SWEPCO's coal-fired electricity generation plants.

Pursuant to another Commission order dated February 22, 1979 (HCAR No. 20927), SWEPCO and PSO were authorized to enter into a Rail Car Maintenance Facility Agreement ("Facility Agreement"), which provides for PSO's participation in the cost, use and option to purchase a portion of the Repair Facility. The Facility Agreement provides for: (1) The payment by each company of the direct labor and

materials costs of maintaining its rail cars; (2) the sharing of indirect costs according to the ratio of each company's direct labor costs to total direct labor costs; (3) the sharing of costs of improvements to the Repair Facility according to the companies' agreement; (4) PSO having an option to purchase a portion of the Repair Facility when SWEPCO obtains legal title to the Repair Facility; and (5) SWEPCO retaining all tax benefits of its equitable ownership of the Repair Facility and PSO receiving a share of such tax benefits based on a weighted average cost ratio for each fiscal year. On August 9, 1996, the lease allowing SWEPCO to use the Repair Facility expired, and the title reverted to SWEPCO. PSO exercised its option to purchase a portion of the Repair Facility, and is a minority owner of the Repair Facility.

CPL currently employs unit trains and rail cars to transport coal to certain of its coal-fired electricity generation plants from mines in Wyoming and Colorado. The rail car repair facility that CPL had used to repair its rail cars recently closed. CPL proposes to use the Repair Facility to repair its rail cars. Applicants state that CPL's unit trains can be run over the same tracks through Alliance, Nebraska as SWEPCO's and PSO's unit trains. Applicants also state that the Repair Facility can be expanded to furnish all of CPL's maintenance needs through the addition of extra workers without the need to construct additional plant space.

CPL proposes to participate with SWEPCO and PSO in the use and costs of the maintenance of the Repair Facility pursuant to a Revised Rail Car Maintenance Facility Agreement ("Revised Facility Agreement").

The allocation of direct and indirect costs under the Revised Facility Agreement will be parallel to the allocation under the Facility Agreement. The Applicants propose to share according to a formula the cost of lease payments on the Repair Facility, general operation and maintenance costs and all other costs capitalized according to generally accepted accounting principles (the "Indirect Costs"). The Applicants propose that Indirect Costs be shared among them on the basis of a cost ratio (the "Cost Ratio"), which is equal to the ratio of each Applicant's direct labor costs for its rail cars actually repaired or inspected at the Repair Facility to the total direct labor costs for all rail cars owned by the Applicants and repaired at the Repair Facility. The Cost Ratio will be determined on the last day of each calendar month. Each Applicant will pay the actual direct costs of inspection and maintenance of

its own rail cars, including parts, maintenance, labor and other expenses capable of direct assignment to a specific rail car. All costs to the Applicants will be determined in accordance with rule 91 under the 1935 Act.

Also, as under the Facility Agreement, the cost of leasehold improvements to the Repair Facility will be allocated by agreement of the Applicants under the Revised Facility Agreement.

In the event leasehold improvements are made in the future, the Applicants will share the costs of such improvements on such terms and conditions as are agreed to by the Applicants at the time of such improvements and as are approved by further application to the Commission. In reaching such agreement, the Applicants will give full consideration to which Applicant's rail cars necessitated the improvements.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. 97-14765 Filed 6-5-97; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release 34-38703; International Series Release No. 1087; File No. 600-20]

### Self-Regulatory Organizations; International Securities Clearing Corporation; Notice of Filing of and Order Approving a Request for Extension of Temporary Registration as a Clearing Agency

May 30, 1997.

Notice is hereby given that on May 5, 1997, the International Securities Clearing Corporation ("ISCC") filed with the Securities and Exchange Commission ("Commission") an application pursuant to Section 19(a) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> to extend ISCC's temporary registration as a clearing agency.<sup>2</sup> The Commission is publishing this notice and order to solicit comments from interested persons and to extend ISCC's temporary registration as a clearing agency through February 28, 1998.

On May 12, 1989, the Commission granted, pursuant to Sections 17A and 19(a) of the Act<sup>3</sup> and rule 17Ab2-1(c) thereunder, the application of ISCC for

registration as a clearing agency on a temporary basis for a period of eighteen months.<sup>4</sup> As a part of ISCC's temporary registration, the Commission granted to ISCC a temporary exemption from compliance with Section 17A(b)(3)(C) of the Act,<sup>5</sup> which requires that the rules of a clearing agency assure the fair representation of its shareholders or members and participants in the selection of its directors and administration of its affairs. Since that time, the Commission has extended ISCC's temporary registration through May 31, 1997.<sup>6</sup>

One of the primary reasons for ISCC's registration as a clearing agency was to enable it to provide for the safe and efficient clearance and settlement of international securities transactions by providing links to centralized, efficient processing systems in the United States and to foreign financial institutions. ISCC serves this function through its Global Clearance Network service and through its settlement links with foreign clearing entities such as Euroclear.<sup>7</sup>

As a part of its temporary registration, ISCC was granted a temporary exemption from the fair representation requirements of Section 17A(b)(3)(C) due to ISCC's limited participant base.<sup>8</sup> In its May 5, 1997, letter, ISCC notes that it has filed a proposed rule change which it believes will enable ISCC to comply with the fair representation requirements. Because ISCC's rule filing is still undergoing Commission review, the Commission is extending ISCC's temporary registration from clearing agency registration and ISCC's temporary exemption from the fair representation requirements of Section 17A(b)(3)(C). If the Commission determines that ISCC provides fair representation for its participants as required by Section 17A(b)(3)(C) prior to the next renewal of its temporary

<sup>4</sup> Securities Exchange Act Release No. 26812 (May 12, 1989), 54 FR 21691.

<sup>5</sup> 15 U.S.C. 78q-1(b)(3)(C).

<sup>6</sup> Securities Exchange Act Release Nos. 28606 (November 16, 1990), 55 FR 47976; 30005 (November 27, 1991), 56 FR 63747; 33233 (November 22, 1993), 58 FR 63195; 36529 (November 29, 1995), 60 FR 62511; and 37986 (November 25, 1996), 61 FR 64184.

<sup>7</sup> Securities Exchange Act Release Nos. 29841 (October 18, 1991), 56 FR 55960 (order approving ISCC's Global Clearance Network service) and 32564 (June 30, 1993), 58 FR 36722 (order approving linkage with Euroclear).

<sup>8</sup> Currently, ISCC's board of directors is authorized for a maximum of twenty-two members. The twenty-two directors on the board of the National Securities Clearing Corporation, the sole shareholder of ISCC, serve as ISCC's board of directors. At the time of ISCC's initial temporary registration, ISCC stated that it would provide fair representation to its participants by the earlier of: (1) the time ISCC has twenty-five active participants or (2) 1992.

<sup>1</sup> 15 U.S.C. 78s(a).

<sup>2</sup> Letter from Julie Beyers, Associate Counsel, ISCC (May 5, 1997) ("Registration Letter").

<sup>3</sup> 15 U.S.C. 78q-1 and 78s(a).

registration, the Commission will consider ISCC's request to obtain permanent registration under the Act.

Interested persons are invited to submit written data, views, and arguments concerning the foregoing application. Such written data, views, and arguments will be considered by the Commission in granting registration or instituting proceedings to determine whether registration should be denied in accordance with Section 19(a)(1) of the Act.<sup>9</sup> 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 application and all written comments will be available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All submissions should refer to the File No. 600-20 and should be submitted by July 7, 1997.

It is therefore ordered, pursuant to Section 19(a) of the Act, that ISCC's registration as a clearing agency (File No. 600-20) be and hereby is temporarily approved through February 28, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-14763 Filed 6-5-97; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38702; File No. SR-CBOE-97-22]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Enhancements to the Electronic Order Routing System

May 30, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on May 15, 1997, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I and II below, which Items have been prepared by the CBOE. The Commission

is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE is seeking permanent approval of a pilot program involving certain enhancements to the Exchange's electronic order routing system ("ORS").<sup>2</sup>

#### 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 CBOE 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 III below. The CBOE 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

CBOE is seeking permanent approval of a pilot program concerning certain enhancements to ORS. On February 10, 1997, the Commission approved the pilot program until May 30, 1997 to allow CBOE the opportunity to evaluate the changes and determine whether to implement them on a permanent basis.<sup>3</sup> After over two months of evaluating the enhancements under the pilot program, the Exchange has determined to seek permanent approval of the changes.

The Exchange distributed a regulatory circular to its members describing the proposed changes, including certain enhancements to ORS, and certain limitations that continue to apply to the use of ORS.<sup>4</sup> Specifically, during the pilot program the enhancements have allowed the electronic routing and processing of contingency and discretionary orders, the recognition by ORS of firm and broker-dealer orders, the routing of firm and broker-dealer orders to the Public Automated Routing System workstations in the Standard &

Poor's 100 Index ("OEX") crowd, and the execution of certain contingency orders on the Exchange's Retail Automatic Execution System, as further explained below.

There are four possible destinations for an ORS order: (1) the Retail Automatic Execution System ("RAES"), (2) the Electronic Book ("EBOOK"), (3) the Public Automated Routing System ("PAR") and Floor Broker Routing, and (4) a firm's booth. Before instituting the pilot program, the Exchange completed systems enhancements to ORS, resulting in electronic routing and processing of contingency and discretionary orders and the acceptance of firm and broker-dealer orders as valid origin types. Specifically, the enhancements have allowed for the routing of the following types of contingency and discretionary orders: All or None orders (AON), Immediate or Cancel orders (IOC), Fill or Kill orders (FOK), Minimum Quantity orders (MIN), Stop orders (STP), Stop Loss orders (STP LOSS), Opening Only orders (OPG), Market on Close Orders (MOC), Closing Only orders (CLO), Market if Touched orders (MIT), Not held orders (NH), and With Discretion orders. Due to system and administrative limitations, ORS has continued to be unavailable for stop limit orders as well as spreads, straddles, combos, and other multi-part orders.

The Exchange notes that there have been a number of practical results from these systems enhancements for customers, for brokers, and for the Exchange. As a result of these changes, customer orders that are otherwise RAES eligible market and marketable limit orders tagged with AON, IOC, FOK, or MIN have been executed on RAES. For MIN orders, the total order quantity must be within the RAES volume. The Exchange believes the system enhancements have also had the effect of improving the efficiency of reporting and the accuracy of audit trails for firm and broker-dealer orders because these orders now have an ORS-id. In addition, the Exchange has enabled the system to actually route firm and broker-dealer orders electronically to the PAR workstations in OEX. In order to determine the affect of the routing of firm and broker-dealer orders, the Exchange has determined to allow the routing of such orders to PAR stations at the OEX trading stations. The Exchange believes that there is a possibility that the routing of broker-dealer and firm orders to the PAR stations could in busy times slow the processing of orders of public customers. The continued restriction of the system to route broker-dealer and

<sup>2</sup> The text of the proposed rule change is available for review at the Office of the Secretary, CBOE and in the Public Reference Room at the Commission.

<sup>3</sup> See Securities Exchange Act Release No 38261 (February 10, 1997), 62 FR 7080 (February 14, 1997)

<sup>4</sup> Notice of the effectiveness of the pilot program was presented to the CBOE membership in Regulatory Circular RG97-18 (February 7, 1997).

<sup>9</sup> 15 U.S.C. 78s(a)(1).

<sup>10</sup> 17 CFR 200.30-3(a)(16).

<sup>11</sup> 15 U.S.C. § 78s(b)(1).

firm orders to the PAR stations (other than in OEX) reflects the Exchange's desire to ensure the quickest access to its systems to the orders of public customers. The Exchange intends to study further whether it should enable the system to route such orders to equity and Standard and Poor's 500 Index ("SPX") crowds at some future date.

During the pilot program, the Exchange found that the system enhancements provided for more efficient processing of trades because they allow for electronic fill and cancel reporting to the originating customer destination. In addition, the fill reports automatically generate an electronic trade match entry. The system enhancements also have provided parameter controls so that different order types can be selectively crowd routed at the member firm's option. The flexibility also allows the firms to change the routing depending upon the market circumstances.

Because the system enhancements to the Exchange's ORS have allowed the electronic processing and routing of a greater number of order types and because the enhancements have provided greater flexibility for member firms in the routing of their orders, the Exchange believes the proposed rule change seeking permanent approval of the ORS system enhancements is consistent with and furthers the objectives of Section 6(b)(5) of the Act.<sup>5</sup> Specifically, the Exchange believes permanent approval of the enhancements would foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities, and would remove impediments to and perfect the mechanism of a free and open market in a manner consistent with the protection of investors and the public interest.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The CBOE does not believe that the proposed rule change will impose any inappropriate burden on competition.

#### *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. 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 at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-97-22 and should be submitted by June 27, 1997.

### **IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change**

The CBOE requests that the Commission approve the proposal on an accelerated basis pursuant to Section 19(b)(2) of the Act.<sup>6</sup> The CBOE states that the enhancements made to the order routing system have been operating on a pilot basis since February 4, 1997. The Exchange believes that the system enhancements to the ORS have been operating efficiently, and that it will further the protection of investors and the public interest to approve the pilot program on a permanent basis. The Exchange further notes that the proposed enhancements to ORS have already been subject to the full 21-day comment period pursuant to the February 10, 1997 notice.<sup>7</sup> Finally, the Exchange believes that the proposal does not present any novel or unique regulatory issues, and accordingly should be approved on an accelerated basis to ensure the uninterrupted continuation of the system changes made pursuant to the pilot program.

The Commission finds CBOE's proposed rule change consistent with the Act and the rules and regulations promulgated thereunder. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5),<sup>8</sup> in that it is designed, among other things, 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.<sup>9</sup>

As a general matter, the Commission encourages the exchanges to pursue enhancements to their electronic order routing systems that will result in efficient routing, execution, and processing of eligible orders, and at the same time maintain a fair and orderly market. The Commission believes that the enhancements to CBOE's ORS set forth herein, provide a reasonable response to this goal.

The Commission believes that the enhancements to ORS should help to benefit investors by providing an efficient means to promptly execute contingency orders that are otherwise RAES-eligible public customer orders. The Commission also believes it is reasonable that the enhancements allow for the recognition of firm and broker-dealer orders for electronic routing, execution, and processing.<sup>10</sup> The Commission notes that the Exchange has limited the access to the PAR workstations of broker-dealer and firm orders via the Exchange's ORS to OEX orders only. If the Exchange wishes to make PAR workstations in other trading crowds available to firm and broker-dealer orders entered through the Exchange's ORS, it may require a proposed rule change pursuant to Section 19(b) of the Act. The Commission believes that the Exchange should notify the Commission's Division of Market Regulation to determine if a 19(b) rule filing is necessary.

The Commission notes that the purpose of the pilot program was to demonstrate that the enhancements accomplished the intended purpose and did not impose unnecessary burdens on market participants. The Exchange represents that it has evaluated the enhancements for over a two month period and has not identified any problems with its operations, nor has the Exchange notified the Commission of any problems. Based on the representations of CBOE, the Commission believes that it is reasonable to permanently approve the Exchange's proposed enhancements to its order routing system, because there is no benefit to investors or the public

<sup>9</sup> In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. § 78c(f).

<sup>10</sup> The Commission notes that firm and broker-dealer orders are not, in any form, eligible for executions through RAES.

<sup>6</sup> 15 U.S.C. § 78s(b)(2).

<sup>7</sup> See *supra* note 3.

<sup>8</sup> 15 U.S.C. § 78f(b)(5).

<sup>5</sup> 15 U.S.C. § 78f(b)(5).

interest to continue the operation of the system enhancements on a pilot basis.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission believes it is appropriate to approve the proposed rule change on an accelerated basis so that the Exchange can continue to provide, on an uninterrupted basis, the enhancements to ORS described herein. The Exchange filed a proposed rule change seeking comment on the pilot program and no adverse comments were received.<sup>11</sup> The Commission again notes that the Exchange has evaluated the enhancements during the pilot and has not identified any problems with its operation, nor has the Exchange notified the Commission of any problems. For these reasons, the Commission believes that proposed rule change is appropriate and consistent with Sections 19(b)(2) and 6(b)(5) of the Act, and therefore, is approving the proposed rule change on an accelerated basis.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (Filed No. SR-CBOE-97-22) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-14764 Filed 6-5-97; 8:45 am]

BILLING CODE 8010-01-M

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Reports, Forms and Recordkeeping Requirements, Agency Information Collection Activity Under OMB Review

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of

information was published on September 23, 1996 FR 61 (49809).

**DATES:** Comments must be submitted on or before July 7, 1997.

**FOR FURTHER INFORMATION CONTACT:** Edward Kosek, NHTSA Information Collection Clearance Officer at (202) 366-2589.

#### SUPPLEMENTARY INFORMATION:

#### National Highway Traffic Safety Administration

*Title:* Evaluation Study of Odometer Tampering in Passenger Cars.

*OMB No.:* New.

*Type of Request:* Request for comment on a new proposed collection of information.

*Affected Public:* Dealers and distributors of motor vehicles: State motor vehicle departments.

*Abstract:* NHTSA is initiating a comprehensive study of odometer fraud in accordance with Congressional directive (House Report 103-190 of July 27, 1993). The study will consist of three primary components. The first component will be the development of first-time national estimates of the incidence rate of odometer fraud and the costs associated with odometer fraud. The second component of the study will be an evaluation of the efforts of the states to combat odometer fraud. This will include an assessment of state compliance with 49 CFR Part 580, "Odometer Disclosure Requirements," which implemented the Truth in Mileage Act (Public Law 99-579). A review and assessment of other efforts undertaken at the state level to counter odometer tampering will also be made. The third component of the odometer fraud evaluation will be an assessment of the various Federal efforts carried out over the last several years to combat odometer and the effects of those efforts. Primarily, this will be a review of NHTSA's investigatory and related odometer enforcement activities. The results of the three-part evaluation study will provide a basis for developing recommendations for the future direction of odometer fraud programs at the Federal and State levels.

*Need:* The results of this evaluation will provide a basis for developing recommendations for the future direction of odometer fraud programs at the Federal and State levels.

*Estimated Annual Burden:* 4,168 hours.

**ADDRESSES:** Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725-17th Street, NW., Washington, DC 20503, Attention DOT Desk Officer.

*Comments are invited on:* whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on May 29, 1997.

**Phillip A. Leach,**

*Clearance Officer, United States Department of Transportation.*

[FR Doc. 97-14861 Filed 6-5-97; 8:45 am]

BILLING CODE 4910-62-P

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## DEPARTMENT OF TRANSPORTATION

### Aviation Proceedings, Agreements Filed During the Week of May 30, 1997

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days of date of filing.

*Docket Number:* OST-97-573

*Date Filed:* May 30, 1997

*Parties:* Members of the International Air Transport Association

*Subject:*

CSC/Reso/001—Part 1 dated April 18, 1997

Finally Adopted Resolutions r1-24 Minutes—CSC/Minutes/002 dated April 25, 1997

Intended effective date: on entry into force of MAP4

*Docket Number:* OST-97-2574

*Date Filed:* May 30, 1997

*Parties:* Members of the International Air Transport Association

*Subject:*

CSC/Reso/001—Part 2

Finally Adopted Resolutions r-17 (Attached is a description of the agreement. Minutes, contained in CSC/Minutes/002, are filed this date with Part 1 of the agreement.)

Intended effective date: October 1, 1997

r-1—023 r-3—602 r-5—621  
r-2—600a r-4—619 r-6—681  
r-7—695

**Paulette V. Twine,**

*Chief, Documentary Services.*

[FR Doc. 97-14863 Filed 6-5-97; 8:45 am]

BILLING CODE 4910-62-P

<sup>11</sup> See *supra* note 3.

<sup>12</sup> 15 U.S.C. § 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3 (a)(12).

**DEPARTMENT OF TRANSPORTATION****Notice of Application for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending May 30, 1997**

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et. seq.). The due date for Answers, Conforming Applications, or Motions to modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

*Docket Number:* OST-97-2558

*Date Filed:* May 27, 1997

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* June 24, 1997

*Description:* Application of Continental Micronesia, Inc., pursuant to 49 U.S.C. Section 41102 and Subpart Q of the Department's Rules of Practice, for renewal of Segments 3, 4 (for the Philippines), 5 and 6 of its Route 171 authority for a five-year period.

*Docket Number:* OST-97-2560

*Date Filed:* May 28, 1997

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* June 25, 1997

*Description:* Application of American Airlines, Inc., pursuant to 49 U.S.C. Section 41102, and Subpart Q of the Regulations, applies for renewal of segments 1, 2, and 3 of its certificate of public convenience and necessity for Route 560 (Dallas/Ft. Worth-Cancun/Puerto Vallarta/Guadalajara, Mexico), as reissued by Order 96-11-25, November 29, 1996.

*Docket Number:* OST-97-2568

*Date Filed:* May 30, 1997

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* June 27, 1997

*Description:* Application of Delta Air Lines, Inc., pursuant to 49 U.S.C. Sections 41102 and 41108, and Subpart Q of the Department's Regulations, applies for renewal of its certificate of public convenience and necessity for Route 178, segments 1 and 4, issued most recently by Order 92-10-58, served October 30, 1992, authorizing Delta to engage in foreign air transportation of persons, property and mail between the terminal points

Atlanta, Georgia, and the terminal point London, England.

Delta's authority to serve Atlanta-London under its certificate for Route 178 expires on November 29, 1997. Delta requests renewal of this certificate authority for an additional five year duration.

*Docket Number:* OST-97-2569

*Date Filed:* May 30, 1997

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* June 27, 1997

*Description:* Application of Delta Air Lines, Inc., pursuant to 49 U.S.C. Sections 41102 and 41108, and Subpart Q of the Department's Procedural Regulations, applies for renewal of its certificate of public convenience and necessity for Route 562, segments 3, 4 and 6, which authorizes Delta to provide scheduled foreign air transportation of persons, property and mail between the terminal point Los Angeles, California, and the terminal point Mazatlan, Mexico (segment 3); between the terminal point Los Angeles, California, and the terminal point Puerto Vallarta, Mexico (segment 4); and between the terminal point Orlando, Florida, and the terminal point Mexico City, Mexico (segment 6). Delta's certificate for Route 562 was most recently reissued by Order 96-11-25, and amended by Order 97-4-27. The authority for segments 3, 4 and 6 expires on November 29, Delta requests renewal of this certificate authority for a five year duration.

**Paulette V. Twine,**

*Chief, Documentary Services.*

[FR Doc. 97-14862 Filed 6-5-97; 8:45 am]

**BILLING CODE 4910-62-P**

**DEPARTMENT OF TRANSPORTATION**

**[Docket 37554]**

**Notice of Order Adjusting the Standard Foreign Fare Level Index**

Section 41509(e) of Title 49 of the United States Code requires that the Department, as successor to the Civil Aeronautics Board, establish a Standard Foreign Fare Level (SFFL) by adjusting the SFFL base periodically by percentage changes in actual operating costs per available seat-mile (ASM). Order 80-2-69 established the first interim SFFL, and Order 97-03-45 established the currently effective two-month SFFL applicable through May 31, 1997.

In establishing the SFFL for the two-month period beginning June 1, 1997,

we have projected non-fuel costs based on the year ended December 31, 1996 data, and have determined fuel prices on the basis of the latest available experienced monthly fuel cost levels as reported to the Department.

By Order 97-6-3 fares may be increased by the following adjustment factors over the October 1979 level:

Atlantic—1.4244

Latin America—1.4414

Pacific—1.5566

*For further information contact:* Keith A. Shangraw (202) 366-2439.

By the Department of Transportation: June 3, 1997.

**Charles A. Hunnicutt,**

*Assistant Secretary for Aviation and International Affairs.*

[FR Doc. 97-14864 Filed 6-5-97; 8:45 am]

**BILLING CODE 4910-62-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****Notice of National Parks Overflights Working Group Meetings**

**ACTION:** Notice.

**SUMMARY:** The National Park Service (NPS) and Federal Aviation Administration (FAA) announce the dates for the National Parks Overflights Working Group (NPOWG) meetings. The NPOWG will meet June 11, 12 and 13; July 8 and 9; an August 4 and 5. The June and July meetings are open to the public, with certain restrictions explained in this notice. This notice serves to inform the public of the meeting dates for the working group.

**DATES AND LOCATIONS:** The National Parks Overflights Working Group will meet June 11 (beginning at 1:00 p.m.) June 12, and 13; July 8 and 9 (beginning at 9 a.m.); and August 4 and 5 (beginning at 9 a.m.), 1997. The June and July meetings will be held in Washington, DC at locations to be determined. The August meeting, which is now planned as a closed meeting, will be held in Denver, Colorado.

**FOR FURTHER INFORMATION CONTACT:** Carla Mattix, Office of the Solicitor, U.S. Department of the Interior, 1849 C St., NW, Washington, DC 20240, telephone: (202) 208-7957, or Linda Williams, Office of Rulemaking, Federal Aviation Administration, 800 Independence Ave., Washington, DC 20591, telephone: (202) 267-9685.

**SUPPLEMENTARY INFORMATION:**

**Background**

By notice in the **Federal Register** on May 22, 1997, the NPS and FAA

announced the formation of the NPOWG. The working group is established to recommend a notice of proposed rulemaking which would define the process to reduce or prevent the adverse effects of commercial sightseeing flights over the National Parks where deemed necessary. The working group held its first sessions on May 20 and 21, 1997, in Washington, DC.

The overflights working group is composed of nine members representing a balance of air tour operators, both fixed and rotary wing; general aviation users; other commercial aviation interests; national tour associations; environmental groups; and Native Americans. Co-chairs for the working group have been selected by the Department of Transportation (DOT) and the Department of Interior (DOI). DOT and DOI representatives will act as advisors to the membership, but will not be active members of the working group. A facilitator provides focus for the group.

The working group will terminate 100 days from the date of its initial meeting. The group will make its final recommendations to the ARAC and NPS Advisory Board at the end of that 100 days. The ARAC and NPS Advisory Board will review the recommendations of the working group and report to the NPS and FAA. Progress or status reports from the working group are expected every 21 days. NPS and FAA anticipate that the final product of the NPOWG will be a recommended notice of proposed rulemaking.

#### Meeting Location and Protocol

Because the meeting location has not been selected as of the date of this notice, persons interested in attending the June or July meetings should contact a person listed under **FOR FURTHER INFORMATION CONTACT**. Readers are also reminded that the June meeting will begin at 1:00 on the 11th and end at noon on the 13th.

The June and July meetings are open to the public. In keeping with the organizational protocols developed by the working group, the following rules apply: Only working group members (or their alternates when filling in for a member) have the privilege of sitting at the negotiating table and of speaking from the floor during the negotiations without working group approval, except: any member may call upon another individual to elaborate on a relevant point, the NPS and FAA advisors to the working group have the full right to the floor and may raise and address appropriate points, and any person attending working group

meetings may address the working group if time permits and may file statements with the working group for its consideration.

The final report of the NPOWG will be made available to the public when it is reported to the Advisory Board and ARAC. In addition, both agencies envision that public meetings will be held following the publication of a notice of proposed rulemaking on the issues regarding overflights of the national parks.

Issued in Washington, DC on June 2, 1997.

**Ida M. Klepper,**

*Acting Director of Rulemaking.*

[FR Doc. 97-14780 Filed 6-2-97; 8:45 am]

BILLING CODE 4910-13-M

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Docket No. AB-103 (Sub-No. 12X)]

#### The Kansas City Southern Railway Company—Abandonment Exemption—in Webster, Bienville, Natchitoches and Winn Parishes, LA

The Kansas City Southern Railway Company (KCS) has filed a notice of exemption under 49 CFR 1152 subpart F—*Exempt Abandonments* to abandon a 61.62-mile line of railroad between milepost 83.02 at or near Sibley, and milepost 144.64 at or near Carla, in Webster, Bienville, Natchitoches and Winn Parishes, LA. The line traverses United States Postal Service Zip Codes 71039, 71045, 71002, 71070 and 71410.

KCS has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected

employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 6, 1997, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,<sup>1</sup> formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),<sup>2</sup> and trail use/rail banking requests under 49 CFR 1152.29<sup>3</sup> must be filed by June 16, 1997. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by June 26, 1997, with: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to applicant's representative: Thomas F. McFarland, Jr., McFarland & Herman, 20 North Wacker Drive, Suite 1330, Chicago, IL 60606-2902.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

KCS has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by June 11, 1997. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565-1545. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), KCS shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If

<sup>1</sup> The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C. 2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

<sup>2</sup> Each offer of financial assistance must be accompanied by the filing fee, which currently is set at \$900. See 49 CFR 1002.2(f)(25).

<sup>3</sup> The Board will accept late-filed trail use requests as long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate an agreement.

consummation has not been effected by KCS's filing of a notice of consummation by June 6, 1998, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Decided: June 2, 1997.

By the Board, David M. Konschnik,  
Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 97-14836 Filed 6-5-97; 8:45 am]

BILLING CODE 4915-00-P

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### Proposed Collection; Comment Request

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the OCC is soliciting comments concerning the revision of an information collection formerly titled Preliminary Survey of Nonbanked Status and now retitled Survey of Financial Activities and Attitudes.

**DATES:** Written comments should be submitted by August 5, 1997.

**ADDRESSES:** Direct all written comments to the Communications Division, Attention: 1557-0209, Third Floor, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219. In addition, comments may be sent by facsimile transmission to (202) 874-5274, or by

electronic mail to  
REGS.COMMENTS@OCC.TREAS.GOV.

#### FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the collection may be obtained by contacting Jessie Gates or Dionne Walsh, (202) 874-5090, Legislative and Regulatory Activities Division (1557-0209), Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

#### SUPPLEMENTARY INFORMATION:

*Title:* Survey of Financial Activities and Attitudes.

*OMB Number:* 1557-0209.

*Form Number:* Not Applicable.

*Abstract:* The OCC encourages national banks to provide fair access to financial services for all. Last fall, the OCC initiated a major project to learn more about why millions of households have no banking relationships (nonbanked), and whether some banks have found ways of profitably serving them.

As the first part of this initiative, the OCC prepared the Preliminary Survey of Nonbanked Status. The OCC now plans to conduct a Survey of Financial Activities and Attitudes (Final Survey) to learn more about how nonbanked households conduct their financial activities and what factors may keep them from using banking services.

The OCC will conduct the Final Survey through a contractor, in several urban locations, and in English and Spanish. The Final Survey will involve both personal contacts and telephone interviews.

The Final Survey will provide the OCC, as well as national banks and the general public, with information on diversity within the nonbanked population; how nonbanked households currently conduct their financial activities; their experience with, and interest in, banking services; and the financial service costs they incur.

The OCC will use this information to better assess national bank efforts to serve nonbanked households. Further,

the OCC and the industry will use this information to identify effective methods for better serving nonbanked households and to identify barriers to financial services they face. The OCC also will use the results of the Final Survey as background information in its policymaking process.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Individuals or households.

*Number of Respondents:* 1,000 respondents.

*Total Annual Responses:* 1,000 responses.

*Frequency of Response:* One time only.

*Total Annual Burden:* 500 hours.

*Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: June 2, 1997.

**Karen Solomon,**

*Director, Legislative and Regulatory Activities Division.*

[FR Doc. 97-14774 Filed 6-5-97; 8:45 am]

BILLING CODE 4810-33-P

# Corrections

Federal Register

Vol. 62, No. 109

Friday, June 6, 1997

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Availability of Appealable Decisions

##### Correction

In notice document 97-9709 beginning on page 18582 in the issue of Wednesday, April 16, 1997, make the following corrections:

1. On page 18583, in the second column, the *Sedona District* section should read "*Sedona District: Red Rock News*, published weekly Wednesday and Friday in Sedona, Coconino County, Arizona."

2. On page 18583, in the second column, the *The Arizona Daily Star* section should read "*The Arizona Daily Star*, published daily, Monday-Sunday, in Tucson, Pima County, Arizona."

3. On page 18583, in the second column, the *Douglas District* section should read "*Douglas District: Daily Dispatch*, published daily Tuesday-

Friday, and Sunday in Douglas, Cochise County, Arizona."

4. On page 18583, in the second column, the *Nogales District* section should read "*Nogales District: Nogales International*, published weekly on Tuesday and Friday in Nogales, Santa Cruz County, Arizona."

5. On page 18583, in the second column, the *Safford District* section should read "*Safford District: Eastern Arizona Courier*, published weekly on Wednesday, in Safford, Graham County, Arizona."

6. On page 18585, in the first column, the Dated Line should read "April 3, 1997."

BILLING CODE 1505-01-D

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

[PP 0E3853/R2223; FRL-5358-6]

RIN 2070-AC78

#### Hexaconazole; Pesticide Tolerance

##### Correction

In rule document 96-8946 beginning on page 15895 in the issue of Wednesday, April 10, 1996, make the following correction:

#### § 180.488 [Corrected]

On page 15896, in the third column, in § 180.488, in the seventh line,

"[insert date 3 years after the signature date]" should read "March 26, 1999".

BILLING CODE 1505-01-D

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Records Schedules; Availability and Request for Comments

#### Correction

In notice document 97-13686, beginning on page 28735, in the issue of Tuesday, May 27, 1997, make the following correction:

On page 28735, in the third column, in the **DATES:** section, in the second and third lines, "June 11, 1997" should read "July 11, 1997".

BILLING CODE 1505-01-D

## NATIONAL SCIENCE FOUNDATION

### Special Emphasis Panel in Materials Research; Notice of Meeting

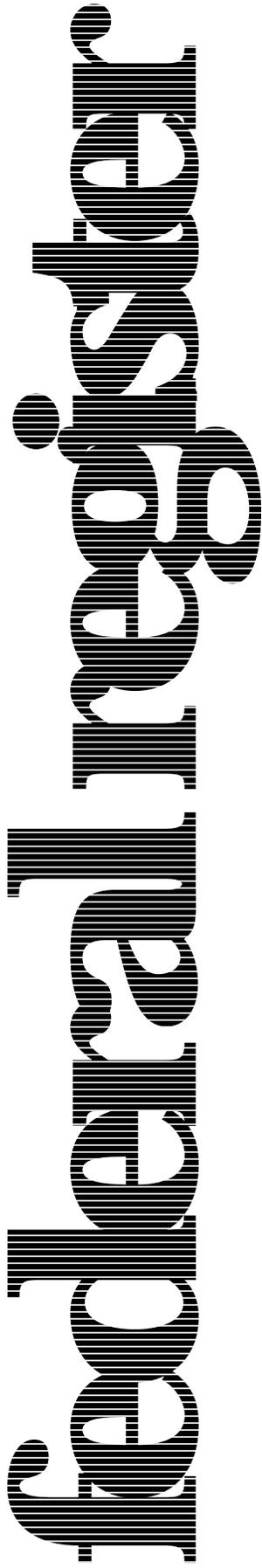
#### Correction

In notice document 97-11389, appearing on page 24141, in the issue of Friday, May 2, 1997, in the third column, the signature was omitted and should read as set forth below:

**M. Rebecca Winkler,**

*Committee Management Officer.*

BILLING CODE 1505-01-D



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Friday  
June 6, 1997

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**Part II**

**Environmental  
Protection Agency**

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40 CFR Parts 85 and 86  
New Motor Vehicles and New Motor  
Vehicle Engines Air Pollution Control:  
Voluntary Standards for Light-Duty  
Vehicles; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 85 and 86**

[AMS-FRL-5823-7]

RIN 2060-AF75

**Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: Voluntary Standards for Light-Duty Vehicles**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** Today EPA is finalizing the main regulatory framework for the National Low Emission Vehicle (National LEV) program. After EPA takes comment on and finalizes supplemental regulations, today's regulations would allow auto manufacturers to volunteer to comply with tailpipe standards for cars and light, light-duty trucks that are more stringent than EPA can mandate. Once a manufacturer opts into the program, the standards would be enforced in the same manner as any other federal motor vehicle pollution control requirement. Manufacturers would be willing to opt into this program if there is a binding commitment to it by the northeastern part of the country (the Ozone Transport Region (OTR) or the States of the Ozone Transport Commission (OTC States)).

If the program were to come into effect after EPA finalizes the supplemental regulations, it would achieve significant reductions in smog and other air pollution nationwide. It also would achieve the same emission reductions in the OTR as if each OTC State adopted a state motor vehicle program. Today's regulations, together with other Agency actions, also substantially harmonize federal and California motor vehicle standards and test procedures to enable manufacturers to design and test vehicles to one set of standards nationwide if they opt into National LEV.

With this final rule, EPA is providing the regulatory structure that is a necessary step towards completion of an on-going process initiated by the OTC States and the auto manufacturers to improve public health through the introduction of cleaner vehicles nationwide and in the Northeast. The process cannot be completed until the auto manufacturers and the OTC States both agree to be bound by the program. As a result of the hard work of these parties, agreement has been reached on the main regulatory framework of the National LEV program. This agreement

is reflected in today's rule. However, some additional issues must be resolved regarding the commitments the OTC States must make for the program to come into effect. EPA will resolve these issues when it adopts a supplemental final rule after further notice and comment. If National LEV is implemented, it will demonstrate how cooperative, partnership efforts can produce a smarter, cheaper program that reduces regulatory burden while increasing protection of the environment and public health.

**DATES:** This regulation is effective August 5, 1997. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 5, 1997. Sections 86.085-37(b)(1) introductory text, 86.1710-97(a), 86.1712-97, and 86.1776-97 contain information collection requirements that have not yet been approved by the Office of Management and Budget (OMB) and are not effective until OMB has approved them. EPA will publish a document announcing the effective date of these sections.

**ADDRESSES:** Materials relevant to this final rule have been placed in Public Docket No. A-95-26. The docket is located at the Air Docket Section, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460 (Telephone 202-260-7548; Fax 202-260-4400) in Room M-1500, Waterside Mall, and may be inspected weekdays between 8:00 a.m. and 5:30 p.m. A reasonable fee may be charged by EPA for copying docket materials.

**FOR FURTHER INFORMATION CONTACT:** Karl Simon, Office of Mobile Sources, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460. Telephone (202) 260-3623; Fax (202) 260-6011; e-mail [simon.karl@epamail.epa.gov](mailto:simon.karl@epamail.epa.gov).

**SUPPLEMENTARY INFORMATION:**

*Regulated entities.* Entities potentially regulated by this action are those that manufacture and sell new motor vehicles in the United States. Regulated categories and entities include:

Category	Examples of regulated entities
Industry .....	New motor vehicle manufacturers.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not

listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in § 86.1701-97 of the rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**I. Obtaining Electronic Copies of the Regulatory Documents**

The Preamble, Regulations, and Response to Comments documents are also available electronically from the EPA internet site and via dial-up modem on the Technology Transfer Network (TTN), which is an electronic bulletin board system (BBS) operated by EPA's Office of Air Quality Planning and Standards. Both services are free of charge, except for your existing cost of internet connectivity or the cost of the phone call to TTN. Users are able to access and download files on their first call using a personal computer per the following information. The official **Federal Register** version is made available on the day of publication on the primary internet sites listed below. The EPA Office of Mobile Sources also publishes these notices on the secondary internet sites listed below and on TTN.

*Internet*

*World Wide Web:* <http://www.epa.gov/docs/fedrgstr/EPA-AIR/> (either select desired date or use Search feature) or <http://www.epa.gov/OMSWWW/> (look in What's New or under the specific rulemaking topic)

*Gopher:* [gopher.epa.gov](http://gopher.epa.gov) Follow menus: Rules: EnviroSubset:Air or [gopher.epa.gov](http://gopher.epa.gov) Follow menus: Offices:Air:OMS

*FTP:* [ftp.epa.gov](ftp://ftp.epa.gov) Directory: [pub/gopher/fedrgstr/EPA-AIR/](ftp://ftp.epa.gov/pub/gopher/fedrgstr/EPA-AIR/) or [ftp.epa.gov/pub/gopher/OMS/](ftp://ftp.epa.gov/pub/gopher/OMS/)  
*TTN BBS:* 919-541-5742 (1,200-14,400 bps, no parity, eight data bits, one stop bit) Off-line: Mondays from 8:00-12:00 Noon ET Voice helpline: 919-541-5384

A user who has not called TTN previously will first be required to answer some basic informational questions for registration purposes. After completing the registration process, proceed through the following menu choices from the Top Menu to access information on this rulemaking.  
 <T> GATEWAY TO TTN TECHNICAL AREAS (Bulletin Boards)  
 <M> OMS—Mobile Sources Information  
 <K> Rulemaking & Reporting  
 <1> Light Duty

<10> File area #10 OTC Low-Emissions Vehicle & National LEV

At this point, the system will list all available files in the chosen category in reverse chronological order with brief descriptions. To download a file, type the letter "D" and hit your Enter key. Then select a transfer protocol that is supported by the terminal software on your own computer, and pick the appropriate command in your own software to receive the file using that same protocol. After getting the files you want with your computer, you can quit the TTN BBS with the <G>oodbye command. If you are unfamiliar with handling compressed (i.e. ZIP'ed) files, go to the TTN top menu, System Utilities (Command: 1) for information and the necessary program to download in order to unZIP the files of interest after downloading to your computer.

Please note that due to differences between the software used to develop the document and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

## II. Outline and List of Acronyms and Abbreviations

### A. Outline

This final rule preamble is organized into the following sections:

- I. Obtaining Electronic Copies of the Regulatory Documents
- II. Outline and List of Acronyms and Abbreviations
  - A. Outline
  - B. List of Acronyms and Abbreviations
- III. Introduction and Background
  - A. Introduction
  - B. Benefits of the National LEV Program
  - C. Background
    1. Current Federal Motor Vehicle Emissions Control Program
    2. California Low Emission Vehicle Program
    3. OTC Efforts to Reduce Motor Vehicle Emissions in the OTR
    4. Public Process
  - D. National LEV Program
    1. Agreement—A Necessary Predicate for the National LEV Program
    2. Description of National LEV Program
- IV. Provisions of the National LEV Program
  - A. Program Structure
    1. Opt-In to National LEV and In-Effect Finding
    2. Opt-Out from National LEV
      - a. Conditions Allowing Opt-Out
        - (1) OTC States' Failure to Meet or Keep Their Commitments
        - (2) EPA Changes to Stable Standards
        - (i) Designation of Stable Standards
        - (ii) Changes to Stable Standards
      - b. Opt-Out Procedures
      - c. Effective Date of Opt-Out
      - d. Programs in Effect as a Result of Opt-Out
      - e. Opt-Out by States
    3. Duration of Program

- B. National LEV Voluntary Tailpipe and Related Standards and Phase-In
  1. Exhaust Emission Standards for Categories of NLEVs
    - a. Certification Standards
    - b. In-Use Standards
  2. Non-methane Organic Gases Fleet Average Standards
    - a. Compliance With the NMOG Standards
    - b. Tracking Vehicles for Fleet Average NMOG Compliance
    - c. OTC State Government ATV Purchases
    - d. Reporting Requirements
  3. Fleet Average NMOG Credit Program
    - a. Fleet Average NMOG Credit Program Requirements
    - b. Early Reduction Credits
    - c. Enforcement of Fleet Average NMOG Credit Program
    - d. Reporting for Fleet Average NMOG Credit Program
  4. Limits on Sale of Tier 1 Vehicles and TLEVs
  5. Tailpipe Emissions Testing
    - a. Federal Test Procedure
    - b. Compliance Test Fuel
    - c. NMOG vs. NMHC
    - d. Reactivity Adjustment Factors
  6. On-Board Diagnostics Systems Requirements
  7. In-Use Fuel
  8. Hybrid Electric Vehicles
  - C. Low Volume and Small Volume Manufacturers
  - D. Legal Authority
  - E. Enforceability and Prohibited Acts
- V. National LEV Will Produce Creditable Emissions Reductions
  - A. Emissions Reductions From National LEV
  - B. Enforceability of National LEV
  - C. Finding National LEV in Effect
  - D. SIP Credits
- VI. Other Applicable Federal Requirements and Harmonization With California Requirements
  - A. Introduction
  - B. Harmonization of Federal and California Standards
    1. Onboard Refueling Vapor Recovery and Evaporative Emissions
    2. Cold CO
    3. Certification Short Test
    4. High Altitude Requirements
  - C. Federal Compliance Requirements
    1. Selective Enforcement Auditing and Quality Audit Programs
    2. Imports
    3. In-Use and Warranty Requirements
- VII. Structure of National LEV Regulations
- VIII. Technical Correction to Maintenance Instructions
- IX. Administrative Requirements
  - A. Administrative Designation
  - B. Regulatory Flexibility Act
  - C. Unfunded Mandates Reform Act
  - D. Congressional Review of Agency Rulemaking
  - E. Reporting and Recordkeeping Requirements
- X. Statutory Authority
- XI. Judicial Review

### B. List of Acronyms and Abbreviations

AAMA American Automobile Manufacturers Association

AIAM Association of International Automobile Manufacturers  
 APA Administrative Procedure Act  
 AQL Acceptable Quality Level  
 ATV(s) Advanced Technology Vehicle(s)  
 BBS Bulletin Board System  
 CAA Clean Air Act  
 CAAA Clean Air Act Amendments of 1990  
 CAL LEV California Low Emission Vehicle Program  
 CARB California Air Resources Board  
 CFR Code of Federal Regulations  
 CO Carbon Monoxide  
 CQA California Quality Audit  
 CST Certification Short Test  
 EPA U.S. Environmental Protection Agency  
 EPAct Energy Policy Act  
 FACA Federal Advisory Committee Act  
 FR Federal Register  
 FRM Final Rulemaking, Final Rule  
 FTP Federal Test Procedure  
 GSA General Services Administration  
 GVWR Gross Vehicle Weight Rating  
 HC(s) Hydrocarbon(s)  
 HCHO Formaldehyde  
 HEV(s) Hybrid Electric Vehicle(s)  
 HLDT(s) Heavy Light-Duty Truck(s)  
 IBR Incorporation by Reference  
 ICI(s) Independent Commercial Importer(s)  
 ICR Information Collection Request  
 I/M Inspection and Maintenance  
 ILEV(s) Inherently Low Emission Vehicle(s)  
 LDT(s) Light-Duty Truck(s)  
 LDV(s) Light-Duty Vehicle(s)  
 LEV(s) Low Emission Vehicle(s)  
 LLDT(s) Light Light-Duty Truck(s)  
 LVW Loaded Vehicle Weight  
 MIL Malfunction Indicator Light  
 MOU Memorandum of Understanding  
 MY Model Year  
 NAAQS National Ambient Air Quality Standards  
 National LEV National Low Emission Vehicle  
 NLEV National Low Emission Vehicle  
 NMHC Non-methane Hydrocarbons  
 NMOG Non-methane Organic Gases  
 NO<sub>x</sub> Oxides of Nitrogen  
 NPRM Notice of Proposed Rulemaking  
 NTR Northeast Trading Region  
 OBD On-Board Diagnostics  
 OBD II Second Phase On-Board Diagnostics  
 OMB Office of Management and Budget  
 ORVR On-Board Refueling Vapor Recovery  
 OTC Ozone Transport Commission  
 OTC LEV Ozone Transport Commission Low Emission Vehicle  
 OTR Ozone Transport Region  
 PM Particulate Matter  
 RAF(s) Reactivity Adjustment Factor(s)  
 RFA Regulatory Flexibility Analysis  
 RFG Reformulated Gasoline  
 RIA Regulatory Impact Analysis  
 SEA Selective Enforcement Audit  
 SFTP Supplemental Federal Test Procedure  
 SIA Service Information Availability  
 SIP State Implementation Plan  
 SNPRM Supplemental Notice of Proposed Rulemaking  
 The Act Clean Air Act  
 The Agency U.S. Environmental Protection Agency  
 THC Total Hydrocarbon  
 TLEV(s) Transitional Low Emission Vehicle(s)  
 TTN Technology Transfer Network

UDDS Urban Dynamometer Driving Cycle  
 ULEV(s) Ultra Low Emission Vehicle(s)  
 UMRA Unfunded Mandate Reform Act  
 VOC(s) Volatile Organic Compound(s)  
 ZEV(s) Zero Emission Vehicle(s)

### III. Introduction and Background

The U.S. Environmental Protection Agency (EPA) is adopting regulations for the National Low Emission Vehicle (National LEV) program in this final rule. EPA believes this is a cleaner, smarter, cheaper pollution control program for new motor vehicles. Under the National LEV program, auto manufacturers have the option of agreeing to comply with more stringent tailpipe emissions standards—standards that EPA could not impose without manufacturer agreement. Once manufacturers commit to the program, the standards will be enforceable in the same manner that other federal motor vehicle emissions control requirements are enforceable. Manufacturers have indicated their willingness to volunteer to meet these tighter emissions standards if EPA and the northeastern states (i.e., those in the Ozone Transport Commission (OTC) or the “OTC States”) agree to certain conditions, including providing manufacturers with regulatory stability, recognizing that establishing advanced technology vehicles (ATVs) in the Northeast is a shared responsibility (rather than the sole responsibility of auto manufacturers), and reducing regulatory burdens by harmonizing federal and California motor vehicle emissions standards.

The National LEV program is another step in an unprecedented, cooperative effort by the OTC States, auto manufacturers, environmentalists, fuel providers, EPA, and other interested parties to improve air quality. The OTC States and environmentalists provided the opportunity for this cooperative effort by pushing for adoption of the California Low Emission Vehicle (CAL LEV) program throughout the northeast Ozone Transport Region (OTR). Under EPA's leadership, the states, auto manufacturers, environmentalists, and other interested parties then embarked on a process marked by extensive public participation and a demonstrated willingness to work with each other and to solve problems jointly. This working relationship is particularly remarkable given the adversarial and litigious nature of previous interactions between the parties.

In today's final rule, EPA is establishing the regulatory framework for National LEV. Given statutory constraints, however, the National LEV program will only be implemented if it

is agreed to by the OTC States and the auto manufacturers. EPA does not have authority to force either the OTC States or the manufacturers to sign up to the program.

The OTC States and auto manufacturers have reached agreement on most issues raised by the National LEV program. Each side has sent EPA a Memorandum of Understanding (MOU) that it has initialed, indicating its agreement with the National LEV program as contained in that MOU. (These initialed documents are in the public docket for this rulemaking.) Although there are differences in the two Memoranda, they show that agreement has been reached between the OTC States and the auto manufacturers on the substantive issues addressed in this rule. With a few limited exceptions, those agreements are consistent with today's rule. EPA applauds the efforts of these parties, particularly the leadership shown by the OTC States and the auto manufacturers.

The OTC States and auto manufacturers have not reached agreement on a few remaining issues, in particular, those related to OTC State opt-in and commitment to the program. EPA did not take comment on and therefore cannot finalize these portions of the National LEV program in today's rule. These issues will need to be resolved and reflected in EPA regulations before the National LEV program can come into effect. Because the auto manufacturers and the OTC States have not resolved these issues, EPA will publish a Supplemental Notice of Proposed Rulemaking (SNPRM) to take comment on these issues before EPA resolves them in a supplemental final rule.

National LEV will provide environmental benefits by reducing air pollution nationwide. The program is designed to address air pollution problems, and will produce public health and environmental benefits both inside and outside the OTR. This will assist all states that were considering adopting the California LEV program to meet their obligations under the Clean Air Act (CAA or the Act).

EPA has determined that the National LEV program will result in emissions reductions in the OTR that are equivalent to or greater than the emissions reductions that would be achieved through OTC state-by-state adoption of the CAL LEV program. For a number of years, the OTC has been working to reduce motor vehicle emissions either by adoption of the CAL LEV program throughout the OTR or by adoption of the National LEV program. As a means to achieve such reductions,

National LEV continues to provide a preferable alternative to adoption of CAL LEV throughout the OTR. Not only will National LEV provide emissions reductions benefits to the OTC States, it will reduce states' costs of providing their citizens with healthy air by avoiding the costs of state programs that duplicate each others' and EPA's efforts. Although a recent court decision struck down one of the OTC States' regulatory options for regionwide adoption of CAL LEV programs, *Virginia v. EPA*, No. 95-1163 (D.C. Cir. March 11, 1997) (discussed in section III.C.3.), the auto manufacturers and OTC States have recently sent letters to EPA expressing their continued support for National LEV. (Letter from AAMA and AIAM to EPA, April 15, 1997; Letter from OTC to EPA, April 18, 1997; both letters are in docket no. A-95-26).

EPA is also providing important relief from certain regulatory requirements to the auto manufacturers. Rather than having a fleet of California vehicles that are designed and tested to California standards, and a separate fleet of federal vehicles that are designed and tested to federal standards, in most instances under National LEV manufacturers will certify vehicles to harmonized California and federal standards that will allow them to sell most vehicles nationwide. Not only will this reduce testing and design costs, it will allow more efficient distribution and marketing of vehicles nationwide.

The cooperative nature of the program by itself should provide environmental benefits sooner, and in a way that greatly reduces regulatory transaction costs, than would otherwise be the case. Focusing energy on implementing the program the parties helped jointly design is a better use of resources than continued disagreement over whether any program should be implemented at all.

#### A. Introduction

EPA is today adopting the regulatory structure for a voluntary, National LEV program. The National LEV program includes a set of exhaust emissions standards that will significantly reduce emissions of ozone-producing pollutants nationwide from new light-duty vehicles (LDVs) and light-duty trucks (LDTs) at or below 6000 lbs gross vehicle weight rating (GVWR) (light, light-duty trucks, or LLDTs). The program includes a manufacturer fleet average standard for non-methane organic gas (NMOG) applicable in the OTC States beginning in Model Year

(MY) 1997,<sup>1</sup> and applicable nationwide (except California) beginning in MY2001. Manufacturers are not required to meet the standards in this program unless they choose to opt into the program. However, if a manufacturer opts into the program and EPA finds that the program is in effect, then the manufacturer will be bound by the program's requirements. A manufacturer that opts into the program can opt out only in certain limited circumstances.

In addition to the national public health benefits that would result from National LEV, the program has been motivated largely by the OTC's efforts to reduce motor vehicle emissions either by adoption of the CAL LEV program throughout the OTR or by adoption of the National LEV program. One of the OTC States' efforts was a petition the OTC filed with EPA. On December 19, 1994, EPA approved this petition, which requested that EPA require all OTC States to adopt the CAL LEV program (called the Ozone Transport Commission Low Emission Vehicle (OTC LEV) program. 60 FR 4712 (January 24, 1995) (OTC LEV Decision)). In that rule, EPA found that the reduction of emissions from new motor vehicles throughout the OTR is necessary to mitigate the effects of air pollution transport in the region and to bring ozone nonattainment areas in the OTR into attainment (including maintenance) by the dates specified in the CAA, as amended in 1990. On the basis of this finding, EPA issued a finding that the State Implementation Plans (SIPs) of the OTC States are substantially inadequate. Under the OTC's recommended program, all new motor vehicles sold in the OTR beginning in MY1999 would be required to be certified by the California Air Resources Board (CARB) to any one of the California motor vehicle emissions standards (i.e., California Tier 1, Transitional Low Emission Vehicle (TLEV), Low Emission Vehicle (LEV), Ultra Low Emission Vehicle (ULEV), or Zero Emission Vehicle (ZEV)). Manufacturers could choose to sell any mix of California-certified vehicles to comply with annual fleet average NMOG standards, which become increasingly stringent over time. Pursuant to the OTC recommendation, individual states in the OTR could (but were not required to) adopt a ZEV mandate to the extent permitted by the CAA.

The OTC LEV decision was challenged by the Commonwealth of

Virginia and several motor vehicle manufacturers. The Court of Appeals held that EPA did not have authority to require the OTC States to adopt the CAL LEV program and vacated EPA's OTC LEV decision. *Virginia v. EPA*, No. 95-1163 (D.C. Cir. March 11, 1997).

The court decision striking EPA's OTC LEV decision changes some of the legal requirements for National LEV. When EPA proposed the National LEV program, it proposed criteria that the National LEV program would have to meet to be an acceptable LEV-equivalent program that would relieve OTC States of their obligation under the OTC LEV decision. EPA proposed that National LEV (1) would need to achieve emissions reductions equivalent to those that would be achieved by OTC LEV, and (2) would be an enforceable, stable program that was in effect. Because EPA no longer need find that National LEV is an acceptable LEV-equivalent program, EPA has reevaluated whether National LEV is legally required to meet the two criteria. EPA has determined that there is no longer a legal requirement for National LEV and OTC LEV to achieve equivalent emissions reductions. Nonetheless, for all parties to support National LEV, it must produce an acceptable quantity of emission reductions. Furthermore, for EPA to grant SIP credits, National LEV must be an enforceable, stable program.

In today's rule, EPA finds that National LEV will achieve reductions in new motor vehicle emissions in the OTR that are at least equivalent to the reductions that would be achieved through OTC state-by-state adoption of the CAL LEV program. EPA also finds that once manufacturers opt into the National LEV program, it is enforceable against the manufacturers. After EPA provides further notice to take comment on the type of OTC State commitments that would make the program lasting, the Agency intends to promulgate final provisions for OTC State commitments sufficient to adequately assure that National LEV will produce the intended emissions reductions for the intended duration of the program. Then, EPA will be able to find that National LEV is in effect when all auto manufacturers have opted into the program.

EPA provided numerous opportunities for public participation in the decision-making process leading to OTC LEV and National LEV, as described more fully in section III.C.4. EPA established a subcommittee of the Clean Air Act Advisory Committee pursuant to the Federal Advisory Committee Act (FACA) to evaluate issues relating to obtaining reductions in emissions from new motor vehicles.

The Subcommittee has also served as a public forum to discuss voluntary, 49-state motor vehicle emissions standards and provided comments to EPA on the National LEV program.

#### *B. Benefits of the National LEV Program*

The National LEV program will result in significant environmental and public health benefits nationwide if the OTC States and auto manufacturers agree to implement it. The program promulgated today represents a significant step towards the goal of reducing smog throughout the United States. The National LEV program will also achieve reductions in emissions of other pollutants, including particulate matter (PM), benzene, and formaldehyde.

Ground-level ozone, the principal harmful component in smog, is produced by a complex set of chemical reactions involving volatile organic compounds (VOCs) and oxides of nitrogen (NO<sub>x</sub>) in the presence of sunlight. Ground-level ozone causes health problems, including damaged lung tissue, reduced lung function, and lungs that are sensitized to other irritants. Scientific evidence indicates that the ambient levels of ozone affect healthy adults and children, as well as people with impaired respiratory systems, such as asthmatics. A reduction in lung function during periods of moderate exercise has been found following exposure to ozone for six to seven hours at concentrations at or near the current standard. This decrease in lung function may be accompanied by symptoms such as chest pain, coughing, nausea, and pulmonary congestion. Studies, to date, indicate that the acute health effects of exposure to ozone at the level of the current ozone NAAQS (such as coughing, chest pain, and shortness of breath) are reversible in most people when the exposure stops. However, the extent of such reversibility depends on factors such as the length of exposure and individual activity level. With repeated exposure to ozone over time, many of these symptoms attenuate but some indicators of cell damage suggest continued lung inflammation. Ground-level ozone is also responsible for significant agricultural crop yield losses each year. Studies also indicate that the current ambient levels of ozone are responsible for damage to both terrestrial and aquatic ecosystems, including acidification of surface waters, reduction in fish populations, damage to forests and wildlife, soil degradation, and reduced visibility.

The primary NAAQS for various pollutants, including ozone, are set by EPA on the basis of air quality criteria

<sup>1</sup> As discussed in note 17 below, EPA is using MY 1997 as a placeholder for the actual start date of National LEV.

and allowing an adequate margin of safety, at a level that the Agency determines is necessary to protect public health. EPA then classifies areas across the country based on whether they attain these standards. Areas that do not meet these standards are deemed "nonattainment" areas and rated based on the severity of their air quality problem. There are 66 ozone nonattainment areas throughout the United States, including several areas classified as "serious" or "severe" for ozone. Houston and the upper Midwest, in particular, experience high levels of ground-level ozone pollution. The implementation of the National LEV program nationwide in MY2001 will advance the goal of emissions reductions in those areas. Motor vehicles are a significant contributor to smog because of their emissions of VOCs and NO<sub>x</sub>. A vehicle certified to the National LEV standards will, over its lifetime, emit 400 pounds less pollution than a Tier 1 vehicle. Implementation of National LEV is expected to achieve nationwide reductions of NO<sub>x</sub> emissions of 400 tons/day in 2005 and 1250 tons/day in 2015, and nationwide reductions in NMOG emissions of 279 tons/day in 2005 and 778 tons/day in 2015.

In evaluating the OTC petition, EPA analyzed the level of emissions reductions throughout the OTR necessary to attain (or maintain) the NAAQS for ozone, given the serious transport issue. EPA concluded, based on its analysis in the context of the OTC LEV decision, that NO<sub>x</sub> reductions of 50 percent to 75 percent from 1990 levels from every portion of the OTR lying to the south, southwest, west, and northwest of each serious or severe OTR nonattainment area, and VOC reductions of 5 percent to 75 percent from the portion of the OTR in or near (and upwind of) each serious and severe OTR nonattainment area, are necessary to bring each such area into attainment by the applicable date.

EPA has projected that, without a program that achieves reductions in the Northeastern United States equivalent to those achieved by OTC state-by-state adoption of CAL LEV, on-highway vehicles will account for approximately 38 percent of NO<sub>x</sub> emissions and 22 percent of anthropogenic VOC emissions in 2005. As described in the OTC LEV decision, EPA's modeling analyses support the conclusion that no combination of potentially broadly practicable control measures in the OTR would be sufficient to achieve the necessary level of emissions reductions without more stringent new motor vehicle emission standards. Thus, EPA

determined that all of the emissions reductions in the OTR associated with implementing the OTC LEV program, or a LEV-equivalent program, are necessary. While the court decision overturned the OTC LEV decision requiring adoption of OTC LEV, the court did not overturn EPA's underlying assessment of the need for significant additional emissions reductions in the region.

More stringent motor vehicle standards outside the OTR, such as those contained in today's rule, will help the OTR achieve necessary reductions, in addition to producing benefits in States outside the OTR. EPA has determined that the National LEV program promulgated today would provide at least equivalent emissions reductions of VOCs and NO<sub>x</sub> in the OTR as would OTC state-by-state adoption of CAL LEV programs, and would do so in a more efficient and cost-effective manner, for several reasons.<sup>2</sup> First, the National LEV program provides for the introduction of TLEVs in the OTR in MY1997, two years earlier than EPA had required under the OTC LEV program.<sup>3</sup> Second, since the National LEV program will apply nationwide (except for California) in MY2001, vehicles purchased outside the OTR that move into the region will be up to 70 percent cleaner than incoming vehicles (i.e., Tier 1 vehicles) would have been under the OTC LEV program. EPA estimated that if migration into the OTR of non-LEV vehicles were taken into account in estimating benefits of OTC LEV, this would result in a 16 ton/day increase in VOC emissions and a 28 ton/day increase in NO<sub>x</sub> emissions in 2005 compared to EPA's estimates of highway vehicle emissions in the OTR without factoring in migration. The National LEV program, when implemented nationwide in MY2001, will greatly reduce this migration effect. Even more significant, without the OTC LEV SIP call, a substantial number of the OTC States are now unlikely to adopt state CAL LEV programs effective for the relevant timeframe, which dramatically increases the relative benefits of

<sup>2</sup>Since EPA's modeling was completed, circumstances have changed that have set back the potential realistic start dates both for National LEV and for OTC state-by-state implementation of CAL LEV. EPA's modeling shows that the programs as designed (i.e., National LEV starting in MY1997 and CAL LEV throughout the OTR implemented by MY1999) would produce equivalent emission reductions. See section V.A. In the SNPRM, EPA will discuss the relative emission reduction effects of delayed start dates.

<sup>3</sup>Although it is unrealistic to start National LEV with MY1997 (see discussion in n. 17), EPA believes it is possible for National LEV to start sooner than most OTC States could start state LEV programs.

National LEV over an approach that relies on OTC state-by-state adoption of CAL LEV.

The National LEV program is also expected to achieve pollution reduction benefits from motor vehicles beyond those associated with ozone pollution, including benefits from control of PM, benzene, and formaldehyde. All states, not just those in the OTR, will realize these air quality benefits.

PM is the generic term for a broad class of chemically and physically diverse substances that exist as discrete particles over a wide range of sizes. PM emissions have been associated with numerous serious health effects, including upper and lower respiratory illnesses such as pneumonia, chronic obstructive pulmonary disease, chronic bronchitis, aggravation of the respiratory system in children with pre-existing illnesses, and premature mortality in sensitive individuals (such as those with cardiovascular diseases). In addition, studies have shown that PM emissions episodes can result in a short-term decrease in lung function in small children. PM emissions also contribute to impairment of visibility, acidic deposition, and potential modification of the climate.

The National LEV program will require diesel LDVs and LLDTs to meet PM standards that are more stringent than the comparable Tier 1 standards. As discussed more fully in the Regulatory Impact Analysis (RIA)<sup>4</sup> for this rulemaking, EPA's modeling shows that implementation of the National LEV program will result in a 28.6 ton/day reduction in particulates less than 10 microns in diameter (PM-10) in 2005, compared to expected PM emissions when current Tier 1 standards apply outside the OTC and OTC state-by-state adoption of CAL LEV is fully implemented within the OTC. Furthermore, in western areas (such as Denver) with a PM pollution problem caused by nitrates, the NO<sub>x</sub> reductions achieved by the National LEV program will provide additional PM emissions benefits.

National LEV also will decrease emissions of two carcinogens: benzene and formaldehyde. As discussed more fully in the RIA for this rulemaking, EPA's modeling demonstrates that implementation of the National LEV program will reduce emissions of benzene by seven tons/day and formaldehyde by four tons/day nationwide in 2005. EPA has classified benzene as a Group A known human carcinogen, based on studies on workers

<sup>4</sup>Available in the public docket for review; see ADDRESSES.

showing that long-term exposure to high levels of benzene causes cancer. Exposure to benzene emissions has also been associated with non-cancer health effects, including blood disorders, adverse effects on the immune system, and damage to reproductive organs. EPA has classified formaldehyde as a probable human carcinogen, based on animal studies showing that long-term exposure to, and inhalation of, formaldehyde is associated with certain types of tumors. In addition, exposure to formaldehyde is associated with non-cancer health effects, including irritation of the eyes, nose, throat, and lower airway, at low levels of exposure, and adverse effects on the liver and kidneys. Unlike the current federal Tier 1 program, the National LEV program includes standards for formaldehyde emissions from motor vehicles.

EPA believes that the National LEV program is particularly promising because it would provide these nationwide health and environmental benefits while reducing some aspects of the auto manufacturers' regulatory burden and compliance costs. Currently, manufacturers typically design, test, and produce two different types of vehicles (California and federal), each of which must meet different standards according to different test procedures. One of the goals of the National LEV program is to use a single test procedure and standard for each particular type of emission control requirement. Because of this harmonization with California's program,<sup>5</sup> implementation of the National LEV program will streamline the process for certifying a vehicle for sale, reduce auto manufacturers' design and testing costs, and provide other efficiencies in the marketing of automobiles.<sup>6</sup>

EPA also believes the National LEV program is a preferable alternative to

<sup>5</sup>In addition to using the same tailpipe standards as California, EPA is working with CARB to make changes to other EPA standards and test procedures that will further harmonize the federal and California motor vehicle emission control programs. EPA expects that CARB will reassess its regulations shortly to further this harmonization. Even if National LEV becomes effective, California will continue to have its own program. Manufacturers could decide to sell some vehicles (such as ULEVs or ZEVs) in California (or California and the OTR), but not nationwide.

<sup>6</sup>EPA received a letter from the Government of Canada (available in the public docket for review), indicating that government's interest in adopting national motor vehicle emissions standards that are the same as those contained in any national low emission vehicle program adopted in the United States. Such harmonization of motor vehicle emission control standards in the United States and Canada would provide even greater efficiencies to the auto manufacturers and would broaden the geographical range of the emissions benefits of such a program, including the specific benefit of reduced downwind pollution transport.

OTC state-by-state adoption of CAL LEV because it will use fewer regulatory and legislative resources than would OTC state-by-state adoption of CAL LEV, since the implementation of the National LEV program is premised on agreement reached by the OTC States, the auto manufacturers, and EPA. The OTC States, the auto manufacturers, and EPA, with input from environmental and public health groups, and other interested parties, have made significant efforts that resulted in a broad outline for a viable, cost-effective national low emission vehicle program. EPA believes that cooperation among the various interested parties is the best way to achieve significant emissions reductions and to design a practical, enforceable, and efficient program. It allows the OTC States, EPA, auto manufacturers, other affected industry groups, environmental groups and other interested parties to spend resources making the program work instead of fighting each other on a state-by-state basis over adoption of CAL LEV programs. It also eliminates the need for any state, besides California, to spend any resources on enforcement of its own motor vehicle emissions control program since enforcement responsibilities will remain with EPA and California. The National LEV program is a promising example of how cooperative efforts can advance the goal of cleaner air.

EPA has also analyzed the costs of the National LEV program. EPA used the detailed assessment of the cost of LEVs produced by CARB in 1994 and updated in April, 1996. CARB estimated the incremental cost of \$96 per car for LEVs only in California.<sup>7</sup> EPA believes that the incremental cost for National LEV will be considerably lower than the CARB estimate for a variety of reasons. First, automotive pollution control technology will continue to advance, leading to better controls at lower costs over time. For example, in the two years between CARB's technology

<sup>7</sup>A November, 1996 CARB Staff Report on Low Emission Vehicle and Zero-Emission Vehicle Program Review modified CARB's vehicle cost estimates. CARB now estimates the incremental costs of LEVs at approximately \$120. EPA's cost analysis for the National LEV program, which has included the data in CARB's staff reports on the CAL LEV program, looks at costs of vehicles in California and then estimates National LEV program costs based on nationwide sales volumes. Two principal reasons for vehicle price differentials between California and National LEV vehicles are economy of scale in production volumes and allocation of costs among the number of vehicles being produced, with such costs distributed over an appropriate number of years. EPA's cost estimates rely in part on the start date of the National LEV program, which will be addressed in the upcoming SNPRM. See n. 17 below. Once the actual start date is determined, EPA will recalculate its estimates for vehicle costs using up-to-date cost information.

assessments, Honda announced the introduction of new LEV technology that will add little or no cost to vehicles. Second, the National LEV program includes numerous provisions to harmonize federal and California motor vehicle requirements. The resulting cost-savings for auto manufacturers and dealers (in areas such as vehicle design, certification testing, mechanic training and inventory control) will be significant and offset at least a portion of the costs for LEVs. Third, the nationwide production of LEVs will result in economies of scale for the manufacturers. Fourth, CARB's own cost estimates have generally been shown to be higher than actual price differences. For example, CARB estimates price increases for TLEVs at \$61, but informal surveys of TLEV prices in California and New York have generally shown no price differentials between comparable TLEV and Tier 1 vehicles. Finally, auto industry experience has consistently demonstrated rapid price decreases in successive model years for newly-introduced technology. Analysis discussed in the RIA yields an annual incremental cost estimate of \$950 million for National LEV when compared to current federal regulatory obligations, or of \$600 million for National LEV when compared to CAL LEV throughout the OTR and current regulations in the rest of the country. EPA believes that these costs would actually be lower, as discussed above. The total expenditure for new cars in the United States in 1993 was approximately \$225 billion.

### C. Background

To provide a context for, and background to, the National LEV Program, it is necessary to discuss briefly the federal and California motor vehicle programs and the OTC's efforts to have the CAL LEV program adopted throughout the OTR. Additional background information is provided in the Notice of Proposed Rulemaking (NPRM) detailing the National LEV program on October 10, 1995 (60 FR 52734, 52738-52740). EPA provided extensive and numerous opportunities for public involvement in that decision and in developing the framework for a national voluntary low emission vehicle program.

#### 1. Current Federal Motor Vehicle Emissions Control Program

The CAA prohibits the introduction into commerce of a new motor vehicle that is not covered by a certificate of conformity issued by EPA. To obtain such a certificate for a vehicle or engine

family, manufacturers must demonstrate compliance with all federal emissions control standards and requirements that apply to new motor vehicles for that class or category of vehicles for the relevant model year. The exhaust emission standards and procedures that currently apply to new LDVs and LDTs, known as the Tier 1 standards, were promulgated on June 5, 1991 (See 56 FR 25724; the standards themselves are codified at 40 CFR 86.094-8 and 86.094-9). The Tier 1 program includes standards for non-methane hydrocarbon (NMHC), oxides of nitrogen (NO<sub>x</sub>), carbon monoxide (CO) and particulate matter (PM), all measured over the Federal Test Procedure (FTP) and applicable for the full statutory useful life of the vehicle. For MY1996 and thereafter, all LDVs and the LLDTs must comply with the Tier 1 standards. The federal motor vehicle program also includes other standards and requirements that apply to new motor vehicles, such as evaporative emissions, cold temperature CO, on-board refueling vapor recovery, and on-board diagnostic equipment.

Under section 207 of the Act, manufacturers must warrant the emissions performance of their new, certified motor vehicles for a portion of the vehicle's full useful life. EPA enforces the federal standards through its Selective Enforcement Audit (SEA) program (assembly line testing) and through in-use compliance testing and recall programs.

## 2. California Low Emission Vehicle Program

Section 209 of the CAA generally preempts states from adopting and enforcing standards relating to emissions from new motor vehicles and new motor vehicle engines.<sup>8</sup> However, the Act provides two exceptions. One allows EPA to waive preemption for the State of California, permitting that state to adopt and enforce its own motor vehicle emissions control program.<sup>9</sup> The second exception allows states other than California to adopt and enforce California's standards, if certain specified conditions are met.<sup>10</sup>

In 1990, California adopted the LEV program, containing three basic components. First, manufacturers must certify new motor vehicles to one of the following five emissions categories: California Tier 1, TLEVs, LEVs, ULEVs, and ZEVs. Second, manufacturers must comply with an overall fleet average NMOG standard. This requirement

began in MY1994 and becomes more stringent over time. The third element is a ZEV production mandate, which requires manufacturers to include a certain percentage of ZEVs in their LDV fleet for sale in California. Initially, the ZEV mandate would have begun in MY1998, when two percent of a manufacturer's LDV fleet was required to be ZEVs. This would have increased to five percent in MY2001 through MY2002, then ten percent in MY2003. However, at a March 28, 1996, hearing CARB approved changes that eliminate all of the ZEV mandates except for the ten percent requirement beginning in MY2003. EPA granted California a waiver of preemption for its LEV program in January 1993. See 58 FR 4166 (January 13, 1993).

The States of New York, Massachusetts, New Jersey, Connecticut, Rhode Island, and Vermont, all of which are members of the OTR, have adopted all or portions of the California LEV program pursuant to section 177 of the Act. Massachusetts and New York are currently implementing their LEV programs. Connecticut, New Jersey and Rhode Island have also adopted the California LEV program, excluding the ZEV production mandate, effective in MY1998 for Connecticut and MY1999 for the other two states. In addition, Vermont has adopted the California LEV program effective in MY1999, which includes a ZEV sales target, that would apply only if certain criteria are met. As a result of automobile manufacturers' challenges to the New York and Massachusetts LEV programs, federal district and appellate court decisions have upheld these programs.<sup>11</sup>

## 3. OTC Efforts To Reduce Motor Vehicle Emissions in the OTR

Since it was convened in 1991, the OTC has worked on addressing the contribution of motor vehicles to the northeast ozone problem. It has identified two methods of controlling new motor vehicle emissions—state-by-state adoption of the CAL LEV program and National LEV. The auto manufacturers have said they prefer National LEV. As part of the process of achieving state-by-state adoption of CAL LEV throughout the OTR, the OTC

sought and obtained from EPA a SIP call requiring each OTC State to adopt CAL LEV unless the State could show that the program was not necessary for the State to meet certain of its Clean Air Act obligations or unless there was an equivalent national motor vehicle program. Although a recent court decision struck down this SIP call and thus removed one of the mechanisms for the OTC to achieve the goal of state-by-state adoption of the CAL LEV program, the OTC States remain free to pursue this goal through other means.

A summary of the OTC LEV decision is provided here. Interested parties are referred to the OTC LEV decision SNPRM and Final Rulemaking (FRM) for additional information. See 59 FR 48664 (September 22, 1994); and 60 FR 4712 (January 24, 1995).

In February, 1994, the OTC formally recommended, pursuant to section 184(c) of the CAA, that EPA require all OTC States to adopt an OTC LEV program in their SIPs. The OTC's recommended LEV program would have required that, beginning in MY1999, all new LDVs and LLDTs sold or otherwise introduced into commerce in the OTR be certified to California LEV program standards. In addition, manufacturers would be required to meet California's fleet average NMOG standard for such vehicles. The OTC recommended that member states be allowed, but not required, to adopt California's ZEV mandate, unless EPA determined that the CAA required a state to adopt the ZEV mandate in order to adopt the NMOG average part of the LEV program. In addition, the OTC stated that it expected EPA to evaluate alternatives to OTC LEV.

On December 19, 1994, EPA approved the OTC recommendation. EPA found that the emissions reductions resulting from OTC LEV or a LEV-equivalent program are necessary for ozone nonattainment areas in the OTR to achieve attainment (and maintenance) by the applicable deadline, and that the OTC LEV program is consistent with the CAA. See 60 FR 4712 (January 24, 1995). Based on that approval, EPA issued to each OTC State a finding that its SIP is substantially inadequate to meet certain requirements insofar as the SIP would not currently achieve those necessary emissions reductions. EPA found that states could satisfy the finding of SIP inadequacy by adopting OTC LEV or by submitting a "shortfall" SIP.<sup>12</sup> The States were required to

<sup>11</sup> *Motor Vehicle Manufacturers Association v. New York State Department of Environmental Conservation*, 79 F.3d 1298 (2d Cir. 1996); *American Automobile Manufacturers Association (AAMA) v. Commissioner, Massachusetts Department of Environmental Protection*, 31 F.3d 18 (1st Cir. 1994); *Motor Vehicle Manufacturers Association v. New York State Department of Environmental Conservation*, 17 F.3d 521 (2nd Cir. 1994); *MVMA v. NYSDEC*, 869 F. Supp. 1012 (N.D.N.Y. Oct. 24, 1994); and *AAMA v. Greenbaum*, No. 93-10799-MA (D. Mass. Oct. 27, 1993).

<sup>12</sup> As described in the OTC LEV decision, a "shortfall" SIP program must contain adopted measures that make up the shortfall between (1) the emission reductions necessary to prevent adverse

<sup>8</sup> Clean Air Act section 209(a), 42 U.S.C. 7543(a).

<sup>9</sup> Clean Air Act section 209(b), 42 U.S.C. 7543(b).

<sup>10</sup> Clean Air Act section 177, 42 U.S.C. 7507.

submit a SIP revision on or before February 15, 1996, to cure this inadequacy.

In the OTC LEV decision, EPA also said that the SIP inadequacy would be satisfied if EPA were to determine through rulemaking that a federal 49-state motor vehicle emission control program was an acceptable LEV-equivalent program and that such program was in effect. Thus, if EPA were to find that auto manufacturers had opted into a LEV-equivalent federal motor vehicle emissions control program deemed acceptable by EPA through rulemaking action, then states would be relieved of the obligation under the OTC LEV decision to adopt the OTC LEV program in their SIPs. EPA had proposed that National LEV would be such a program, provided that the OTC States and auto manufacturers made sufficient commitments to it.

Only six states made submissions in response to the OTC LEV SIP call. New York and Massachusetts both submitted LEV programs that are currently in effect. Both programs include ZEV mandates. Connecticut, New Jersey, Rhode Island, and Vermont submitted OTC LEV programs in which OTC LEV is a "backstop" program. Manufacturers would not have to comply with those four states' programs if National LEV is an acceptable-LEV equivalent program and is in effect. New Jersey's program is conditioned further—it will not be implemented unless a minimum number of OTC States (excluding itself), represented by 40 percent of new vehicles registered in the OTR in MY1999, also implement the OTC LEV program not later than MY1999. Vermont also has a ZEV sales target, which would apply if certain criteria are met, independent of whether National LEV is in effect.

In a recent decision, the Court of Appeals struck down EPA's OTC LEV decision and SIP call. *Virginia v. EPA*, No. 95-1163 (D.C. Cir. March 11, 1997). The Court found that, while section 184 of the CAA gives EPA authority to require the OTC States to adopt specific pollution control measures upon the recommendation of the OTC, sections 177 and 202(b)(1)(c) of the CAA preclude EPA from requiring the OTC States to adopt the CAL LEV program prior to MY2004. The Court let stand EPA's underlying finding that the region needs substantial emissions reductions

to mitigate the effects of air pollution transport and to bring (and keep) nonattainment areas in the region into attainment for ozone. It also affirmed the right of each State to adopt the CAL LEV program if it so chooses.

The Court decision does not dramatically alter the need for or potential benefits of National LEV. Although National LEV's development has been closely tied to EPA's OTC LEV decision and SIP call, National LEV is not dependent on them. National LEV was developed as an alternative to state-by-state adoption of CAL LEV in the OTR. Although the Court decision may affect the number of OTC States that will actually adopt CAL LEV, it does not limit states' ability to adopt CAL LEV and thus does not solve the problems created for manufacturers when some states have CAL LEV and some states rely on the federal program. Although the states have the option of adopting CAL LEV on a state-by-state basis, National LEV may provide greater emission reductions to upwind states than state-by-state adoption of CAL LEV because some states may not adopt CAL LEV.

#### 4. Public Process

The Agency has employed a public process designed to provide maximum opportunity for public participation in an expedited decision-making process. A complete discussion of the history of this process can be found in the NPRM published on October 10, 1995 (60 FR 52734). In addition to the numerous public meetings and other opportunities for public comment described in that notice, EPA received numerous comments on the NPRM and held a widely attended public hearing on November 1, 1995. In developing today's rule, the Agency has fully considered all of the public comments timely filed in this rulemaking. EPA's responses to significant comments are contained either in today's rule or in the detailed Response to Comments document contained in the public docket. Where EPA notes that it is deferring resolution of certain issues raised in the NPRM, the response to comments on those issues is also deferred. In addition to relying on this rule and the Response to Comments document as the statement of basis and purpose for today's action, EPA is also relying on the detailed explanations in the NPRM where it references those explanations.

#### D. National LEV Program

##### 1. Agreement—A Necessary Predicate for the National LEV Program

The National LEV program is a voluntary program that cannot be implemented without the agreement of the auto manufacturers and the OTC States. EPA cannot require the auto manufacturers to meet the National LEV standards, absent the manufacturers' consent, because section 202(b)(1)(C) of the Clean Air Act prevents EPA itself from mandating new exhaust standards applicable before MY2004. The auto manufacturers have said that they will not agree to be bound by the National LEV program unless the OTC States accept National LEV as an alternative to OTC state adoption of CAL LEV programs under section 177. EPA does not have the authority to require the OTC States to accept the National LEV program. Thus, National LEV is dependent upon the auto manufacturers and the OTC States voluntarily committing to the program.<sup>13</sup>

The OTC States and auto manufacturers have been negotiating a voluntary, national program that would include committing to National LEV and to the introduction of ATVs in the OTR. They had hoped to memorialize their agreement in a comprehensive MOU to be signed by all OTC States and all auto manufacturers with sales in the United States. The OTC States (collectively) and the auto manufacturers (collectively) have each initialed MOUs reflecting their willingness to agree to a National LEV program. Although the MOUs are different in some respects, they show basic agreement on the national program contained in the regulations promulgated today. The ATV component (discussed in more detail in footnote 52 below) is not a part of EPA's regulations, but would be an agreement between the OTC States and the auto manufacturers that would be contained in an attachment to the MOU if that MOU is finalized.

Although the OTC States and the auto manufacturers have reached agreement on most issues and EPA today is promulgating the regulatory framework for National LEV, some issues are still unresolved. When EPA published the NPRM, it anticipated that the OTC States and the auto manufacturers would continue to make progress on these few remaining issues (mainly related to OTC State commitment to the

consequences on downwind nonattainment, as determined by EPA in the OTC LEV decision, and (2) the emission reductions that would be achieved by the measures mandated by the Clean Air Act and potentially broadly applicable measures, as identified by EPA in the OTC LEV decision. See 60 FR 4730 (January 24, 1995).

<sup>13</sup> See *Virginia v. EPA*, No. 95-1163 (D.C. Cir. March 11, 1997), slip. op. at 10, footnote 4. ("The program is voluntary because section 202 of the Clean Air Act forbids EPA from itself modifying motor vehicle emissions standards 'before the model year 2004.'")

National LEV program), and thus left these issues to be addressed in a later SNPRM which could be informed by the anticipated agreement. The OTC States and the auto manufacturers have not yet resolved these issues. Rather than lose the potential regional and national public health benefits of National LEV, EPA intends to publish an SNPRM to take comment on the remaining issues that must be finalized for the OTC States and the auto manufacturers to commit to the program.<sup>14</sup> EPA will then resolve these issues in a supplemental final rule.

EPA is hopeful that, after these remaining issues are resolved, the OTC States and the auto manufacturers will agree to National LEV. The program would have many benefits to the nation as a whole, the OTC States, and the auto manufacturers. A set of uniform, more stringent standards that apply in 49 states is a more environmentally beneficial and economically efficient approach to achieving emissions reductions from new motor vehicles than a "patchwork" of California standards in some states and federal standards in others. The National LEV program would achieve at least the same level of emissions reductions in the OTR as would the OTC state-by-state adoption of the CAL LEV program. The introduction of LEVs nationwide would help alleviate pollution transport problems in the OTR and in other states and would eliminate concerns about non-LEV vehicles being introduced into the OTR from states outside the region that have not adopted CAL LEV. In addition, a national program would impose less administrative burden on the OTC States and other states than would state-by-state adoption and enforcement of CAL LEV. Finally, a cooperative, partnership approach to program implementation should provide benefits beyond those achieved through a traditional command-and-control approach.

## 2. Description of National LEV Program

In today's final rule EPA is promulgating a set of voluntary National LEV standards to control exhaust emissions of air pollutants from new motor vehicles. These standards will apply when the OTC States and the

<sup>14</sup> Primarily, the SNPRM will address the OTC States' commitment to National LEV (the nature, the mechanisms and the timing of the commitments) and related issues. As a result of the bifurcation of the National LEV rulemaking process, issues that were noticed in the NPRM may not be decided finally until the final rule that follows the SNPRM. This rule and the Response to Comments note those issues that are not being decided finally in today's rule. The SNPRM will describe the issues on which EPA is taking further comment.

motor vehicle manufacturers commit to the National LEV program. The National LEV new tailpipe emission standards and related requirements will apply in addition to the applicable federal Tier 1 tailpipe standards and will not change for the duration of the program.<sup>15</sup> The National LEV standards and requirements include: (1) tailpipe emissions standards for NMOG, NO<sub>x</sub>, CO, formaldehyde (HCHO), and PM; (2) fleet average NMOG values; (3) allowance for the use of California Phase II reformulated gasoline (RFG) as the test fuel for the tailpipe standards; (4) certain California on-board diagnostic system requirements (OBD II), excluding anti-tampering provisions; and (5) averaging, banking and trading provisions.

In general, the National LEV standards and related requirements are patterned after California's more stringent tailpipe standards and fleet average NMOG standards. Under the National LEV program, manufacturers can certify LDVs and LLDTs to one of the following certification categories (listed in order of increasing stringency): Tier 1, TLEV, LEV, ULEV, or ZEV. Each certification category contains tailpipe emission standards for NMOG, CO, NO<sub>x</sub>, formaldehyde (HCHO), and PM. Manufacturers that opt into the National LEV program will be required to produce and deliver for sale a combination of vehicles that complies with an annual fleet average NMOG value. Sales of LDVs and LLDTs in the OTR will have to meet an increasingly stringent fleet average NMOG standard from MY1997<sup>16</sup> to MY2001. Beginning with MY2001, manufacturers will be required to comply with a nationwide (except California) fleet average NMOG standard for LDVs and LLDTs that is equivalent to the average NMOG emissions of a 100 percent LEV fleet. An averaging, banking and trading program comparable to California's can be used to meet the fleet average NMOG requirements.

As National LEV is voluntary, manufacturers will only have to comply with the National LEV standards if they choose to opt into the program. Once

<sup>15</sup> The CAA requires that all MY1996 and later LDVs and LLDTs meet the Tier 1 exhaust emission standards at the time of certification. As noted later in section IV, most of the Tier 1 emission standards have numerically equivalent or more stringent analogues in the National LEV standards. Thus, certification to the National LEV standards directly demonstrates compliance with most of the Tier 1 standards. Manufacturers must still demonstrate compliance with those remaining Tier 1 standards that lack National LEV analogues.

<sup>16</sup> As discussed in n. 17 below, EPA is using MY1997 as a placeholder for the actual start date of National LEV.

they opt in, however, manufacturers must stay in the National LEV program and comply with its standards. Manufacturers may opt out of National LEV only under certain circumstances which, if they occurred, would change the basic presumptions upon which the manufacturers opted into the program. Such conditions are an OTC State's failure to meet or keep its commitment regarding adoption of a State motor vehicle program under CAA section 177 or a change in one of the designated "Stable Standards" (as discussed below in section IV.A.2.a).

Any manufacturer that opts into the National LEV program will be fully subject to its requirements. Barring one of the limited and unlikely events that would allow manufacturers to opt out of the program, manufacturers will be required to meet the National LEV standards and requirements for all of the model years covered by the program. A manufacturer that fails to meet these requirements will be subject to the same enforcement measures as exist for violation of any federal motor vehicle emission standard promulgated under section 202(a) of the Act. Once manufacturers opt into National LEV, they will find administration and enforcement of its requirements indistinguishable from administration and enforcement of the rest of the federal motor vehicle emissions program.

Manufacturers that opt into the National LEV program will have to comply with the specified tailpipe emissions and related standards beginning in MY1997<sup>17</sup> for LDVs and LDTs offered for sale in the OTR, and beginning in MY2001 for those same vehicle categories offered for sale in the rest of the country, except California. The National LEV standards will continue to apply until the first model year for which manufacturers must meet a mandatory federal program that is at least as stringent as the National LEV program. By statute, EPA can not promulgate mandatory exhaust standards more stringent than Tier 1 standards ("Tier 2 standards") applicable before MY2004, so the National LEV standards will apply at least through MY2003.

Vehicles in the National LEV program must comply with all other federal

<sup>17</sup> Throughout this rule, EPA is using MY 1997 as a placeholder for the start date of National LEV. MY1997 is the start date in the MOUs initialled by the auto manufacturers and the OTC States. EPA believes that MY1997 is an unrealistic start date given the court decision vacating EPA's OTC LEV decision and given the likely timing of final agreement on National LEV. In the upcoming SNPRM, EPA will take comment on the appropriate start date for National LEV.

requirements applicable to LDVs and LLDTs for the appropriate model year, including emissions standards and requirements, test procedures, and compliance and enforcement provisions. However, as part of EPA's effort to reinvent environmental regulations by reducing regulatory burden without sacrificing environmental benefits, EPA is also harmonizing, to the greatest extent possible, federal and California standards and test procedures. Thus, today's rule includes changes to current federal regulations designed to harmonize certain federal and California standards and test procedures, and sections elsewhere in this preamble summarize harmonization efforts in other rules. This should reduce the regulatory burden on manufacturers by facilitating the design, certification, and production of the same vehicles to meet both federal and California requirements.

#### **IV. Provisions of the National LEV Program**

The National LEV regulations establish the structure and requirements of a voluntary program to reduce tailpipe emissions from motor vehicles, as summarized in the above section III.D.2. The following sections lay out the provisions of the program in more detail. First, EPA describes the structure of the voluntary program, explaining how manufacturers opt into the program, under what limited conditions they could opt out of the program, and the program's duration. The next section lays out the National LEV standards and requirements that manufacturers would be opting into. These include the tailpipe emissions standards for individual vehicles, the fleet-wide average emissions standards, and the averaging, banking and trading program through which the fleet-wide standards would be implemented. Finally, EPA discusses the legal authority for the voluntary National LEV program and the enforceability of these provisions.

##### *A. Program Structure*

This section discusses basic structural elements of the National LEV program: the process and timing for manufacturers to opt into the program and for EPA to find that the program is "in effect"; the conditions allowing, process for, and ramifications of, a manufacturer's decision to opt out of the program; and the duration of the program.

##### **1. Opt-In to National LEV and In-Effect Finding**

The opt-in provisions are designed to provide a simple mechanism that allows EPA to determine readily when a manufacturer has opted in and become legally subject to the National LEV program requirements. A motor vehicle manufacturer would opt into the program by submitting a written notification that unambiguously and unconditionally states that the manufacturer is opting into the program, subject only to the condition that EPA finds the program to be in effect.

Today's regulations set forth various requirements for opt-in notifications. The opt-in notification must state that the manufacturer will not challenge EPA's authority to establish the National LEV program and to enforce it once a manufacturer has unconditionally opted into the program. Parties that choose to opt into a program that they have volunteered to establish should agree that they will not challenge the program later, particularly in the context of an enforcement action brought by EPA due to a party's failure to comply with the program requirements. The regulations require the manufacturers' notifications to contain specified language renouncing such legal challenges. The opt-in notification also must be signed by a person or entity within the corporation with authority to bind the corporation to its choice. The signatory must hold the position of Vice President for Environmental Affairs, or a position of equivalent authority.

The opt-in will become binding upon EPA's receipt of the notification or, if it is conditioned on EPA making an in-effect finding, upon the satisfaction of that condition. Under today's rule, any conditional opt-ins would become fully binding when EPA finds that National LEV is in effect. Once EPA has promulgated the few outstanding provisions of the National LEV program related to the OTC State commitments and begun accepting manufacturer's opt-ins and OTC State commitments to the program, EPA can make the finding that the program is in effect without any additional rulemaking if all the manufacturers listed in the regulations have opted into the program. Upon EPA making an in-effect finding, National LEV will be fully enforceable.

It is possible that the final regulations EPA intends to issue after taking further comment on OTC State commitments to National LEV (for which EPA will provide further notice and opportunity to comment) may result in changes or additions to the opt-in provisions promulgated today. For example, at this

time, EPA is not establishing deadlines either for auto manufacturers to opt into the program or for EPA to find that the program is "in effect". Rather than making a final decision on these issues today, EPA expects to set such deadlines as part of the final regulations it intends to issue after taking further comment on OTC State commitments and related issues.

##### **2. Opt-Out From National LEV**

For the National LEV program to be useful and beneficial, it should continue in effect for a substantial period of time stretching into the next decade. States seek certainty regarding emissions benefits over time, while motor vehicle manufacturers seek certainty regarding emission standards to plan future production. Also, to give states SIP credits for National LEV, EPA must find that the emissions reductions will be enforceable over the intended duration of the program. All of these objectives require that the program be stable over time, and the opt-out provisions are structured to support this goal.

Once manufacturers have voluntarily chosen to opt into the program and any permissible conditions of their opt-in have been met, they can opt out of the program only under a few specified circumstances, or "offramps." These offramps are limited to: (1) an OTC State's failure to meet or keep its commitment regarding adoption or retention of a state motor vehicle program under section 177; or (2) EPA modification of certain specified standards or requirements over the manufacturers' objection.

If a manufacturer were to opt out of the National LEV program, when that opt-out became effective the manufacturer would become subject to all standards that would apply if National LEV did not exist. The federal Tier 1 tailpipe emissions and related standards would apply, as would any applicable state standards promulgated under section 177. In the SNPRM on OTC State commitments, EPA will take comment on what state section 177 standards would be applicable, in light of the requirements of section 177 and how the OTC States and manufacturers have addressed this issue in their initialed MOUs. All vehicles certified under the National LEV standards, however, would have to continue to comply with those standards, which would have been incorporated as conditions of the certificate under which those vehicles were sold. In addition, each manufacturer would be held responsible for any debits it held at the time it opted out.

a. *Conditions allowing opt-out.* (1) OTC states' failure to meet or keep their commitments. The first condition allowing manufacturers to opt out is a failure of any OTC State to meet its commitment regarding adoption or retention of a section 177 program that does not allow compliance with National LEV as a full alternative to compliance with the state program. Since National LEV is intended to provide an alternative to OTC state-by-state adoption of CAL LEV, manufacturers should not be bound to stay in the National LEV program if an OTC State requires them to comply with a section 177 program contrary to the terms of the final agreement. This off-ramp not only gives manufacturers recourse if an OTC State does not fulfill its part of the bargain, but also encourages the OTC States to fulfill their commitments by setting a serious penalty for breach of their commitments.

Unfortunately, EPA is unable to finalize this section of the National LEV regulations now.<sup>18</sup> When EPA proposed National LEV, the manufacturers and the OTC States had not yet reached agreement on the exact content and form of such an OTC State commitment. Details that had yet to be resolved concerned what the OTC States would commit to do regarding adoption or retention of the section 177 programs (both LEV and ZEV requirements), the timing of any agreed upon actions, and possible instruments for such state commitments (which might be some combination of SIP revisions, consent decrees, legislative resolutions, letters from the State Attorneys General, Executive Orders from the Governor, letters from the Governor to EPA, or an

MOU with the manufacturers). EPA had expected that the OTC States and auto manufacturers would have reached agreement on these issues by this time, and had planned to issue an SNPRM taking comment on the whether and how the National LEV regulations would reflect the OTC States' and auto manufacturers' agreement on these issues. The SNPRM would have taken comment on the stability and enforceability of the program in light of the nature of those commitments. Unfortunately, the auto manufacturers and the OTC States have not yet reached agreement on these issues.

Before the National LEV program can go into effect, EPA will need to resolve the OTC State commitment issues mentioned above. EPA will issue an SNPRM taking comment on these additional issues and then promulgate a final rule to complete the National LEV rulemaking that was initiated by the NPRM.

(2) EPA Changes to Stable Standards. With certain exceptions, manufacturers will also be able to opt out if EPA changes a motor vehicle requirement that it has designated a "Stable Standard." The Stable Standards, which are listed in Table 1, are divided into two categories: Core Stable Standards and Non-Core Stable Standards. Core Stable Standards generally are the National LEV standards that EPA could not impose absent the consent of the manufacturers. Non-Core Stable Standards are other federal motor vehicle standards that EPA does not anticipate changing for the duration of National LEV. For both Core and Non-Core Stable Standards, EPA can make changes to which manufacturers do not object. For Non-Core Stable Standards,

EPA can also make changes that do not increase the stringency of the standard or that harmonize the standard with the comparable California standard. EPA can make other changes to any of the Stable Standards, but such changes would allow the manufacturers to opt out of National LEV.

The primary purpose of this provision is to provide manufacturers certainty that the voluntary standards that EPA does not have authority to mandate (absent manufacturers' consent) are not changed without their consent. The additional stability of the other motor vehicle standards that EPA is providing by designating them Non-Core Stable Standards should provide manufacturers with additional incentive to opt into National LEV. Today's rule follows the same basic approach set out in the proposal, but incorporates several refinements, as discussed below. This section lists the Stable Standards, explains the rationale for including each requirement as a Stable Standard, and explains what types of changes EPA can make without giving manufacturers the opportunity to opt out of National LEV.

(i) Designation of Stable Standards. EPA has refined the approach to the Stable Standards in the proposal by subdividing them into two categories: Core Stable Standards and Non-Core Stable Standards. Core Stable Standards generally are standards specific to the National LEV program (and certain related requirements). Non-Core Stable Standards generally are other motor vehicle pollution control requirements that the Agency does not anticipate changing for the duration of the National LEV program. The list of Core and Non-Core Stable Standards is provided in Table 1.

TABLE 1.—DESIGNATION OF CORE AND NON-CORE STABLE STANDARDS

Type	Stable standard
Core Stable Standards .....	TLEV, LEV, ULEV, and ZEV tailpipe emission standards ("LEV standards"). Fleet average NMOG standards and related banking and trading provisions. Federal Test Procedure (FTP) (as used for determining compliance with the LEV tailpipe standards, i.e., "conventional" or "on-cycle" FTP). Certification test fuel specifications (as used for determining compliance with the LEV standards). Low volume manufacturer provisions. Limitations on the sale of TLEV and Tier 1 vehicles in the NTR.
Non-Core Stable Standards	"Off-cycle" emissions standards. Supplemental Federal Test Procedures (SFTP) (as used for determining compliance with these off-cycle emission standards). On-board diagnostic (OBD-II) requirements. Cold temperature carbon monoxide (Cold CO) requirements. Evaporative emissions control requirements. Onboard refueling vapor recovery requirements. Reactivity adjustment factors (RAFs) (used to determine compliance with LEV standards).

<sup>18</sup> Today's regulations do not provide for an opt-out based on this condition. EPA expects to propose to add this condition, as discussed below.

The Core Stable Standards include:

- The TLEV, LEV, ULEV and ZEV tailpipe standards (the "LEV standards"),
  - The fleet average NMOG standards, and
  - The limitation on the sales of TLEVs and Tier 1 vehicles in the NTR.
- These requirements are all standards that EPA could not itself require manufacturers to meet prior to MY2004 (absent manufacturer consent) because section 202(b)(1)(C) of the Act prohibits EPA from unilaterally imposing numerical standards as stringent as these prior to MY2004. Since EPA could not impose these standards unilaterally, EPA does not believe it should have authority to change these standards unilaterally. Designating these numerical standards as Core Stable Standards protects the manufacturers' reasonable expectations in opting into the voluntary standards by providing an offramp should EPA change those standards without their consent.

The Core Stable Standards also include:

- The specifications for the "conventional" or "on-cycle" FTP, as revised,
- The certification test fuel for testing compliance with LEV standards,
- The NMOG fleet average banking and trading program, and
- The low-volume manufacturer requirements.

These requirements are designated as Core Stable Standards because changes to these requirements may affect the ability of manufacturers to meet the LEV standards or the NMOG fleet average standards, or because these requirements are directly related to those standards. (Changes to the reactivity adjustment factors (RAFTs) might also affect the ability of manufacturers to meet the LEV and NMOG fleet average standards, but these are designated Non-Core Stable Standards, for the reasons discussed below.)

The on-cycle FTP, the certification test fuel, and the NMOG fleet average banking and trading program are the means through which compliance with the numerical standards will be determined. The on-cycle FTP and the test fuel directly impact the ability of manufacturers to meet the LEV standards because changes to program elements like the FTP drive cycle, road simulation hardware, or the blending parameters of the fuel, may translate into changes in the emission test scores of vehicles. These test scores are themselves the basis for pass/fail decisions with respect to the LEV standards. The NMOG fleet average

banking and trading program will allow banking and trading of credits to give manufacturers flexibility in meeting the fleet average NMOG standard. The banking and trading program is part of the way that manufacturers will demonstrate compliance with the NMOG fleet average standard. Changing this program could adversely affect a manufacturer's ability to comply with the fleet average standard. Given the voluntary nature of the LEV standards and the NMOG fleet average standard, EPA believes that manufacturers are entitled to certainty not only with respect to the standards, but also with respect to the means by which the manufacturers' compliance with those standards will be determined.

The final Core Stable Standard, the low volume manufacturer provisions (including the definition of low volume manufacturer and the relaxed phase-in schedule), directly determines the stringency of the NMOG fleet average standards. The phase-in schedule provides manufacturers meeting the low volume definition higher (less stringent) NMOG fleet average standards for the initial years of the National LEV program.

The Non-Core Stable Standards include:

- OBD II requirements,
- Cold temperature CO requirements (through MY2000),<sup>19</sup>
- Evaporative emissions requirements, and
- Onboard refueling and vapor recovery requirements.

As described in more detail in the proposal and in the Response to Comments document for this rule, EPA reviewed each of these requirements and determined that it was highly unlikely that EPA would need to change these requirements for the duration of the National LEV program (or prior to MY2001, for cold CO requirements). With the exception of cold CO (which EPA has a statutory obligation to revisit for MY2001), EPA does not have statutory obligation to revise or re-evaluate these standards for the expected duration of the National LEV program. EPA's conclusion that these standards will not need to be changed for the expected duration of National LEV (prior to MY2001 for cold CO) is based on when these requirements were promulgated by EPA, how long it would take to gather information to determine

that a new control level was appropriate, and EPA's knowledge of technology development necessary to meet these requirements.

The Non-Core Stable Standards also include the recently promulgated "off-cycle" FTP standards and test procedure (Supplemental Federal Test Procedure or SFTP). 61 FR 54852 (October 22, 1996). The "off-cycle" FTP standards and SFTP (described in more detail in section IV.B.5.a) were developed to test emissions resulting from typical driving patterns that were not included in the test procedure that EPA and CARB have used historically (the "on-cycle" FTP). Currently, the only off-cycle standards are based on Tier 1 technology. Given the lengthy testing and evaluation process that resulted in the off-cycle standards and the time required to populate the fleet with vehicles complying with the new standards and then to evaluate them for any necessary revision of the standard, EPA does not foresee the need for or the ability to revise the off-cycle standards and SFTP for Tier 1 vehicles for the expected duration of the National LEV program. As discussed later in section IV.B.5.a, EPA anticipates that CARB will adopt more stringent off-cycle standards for LEVs and ULEVs. Today's rule is structured so that EPA can follow that change for National LEV certification without allowing manufacturers to opt out of National LEV. EPA intends to take comment on additional SFTP issues in the SNPRM.

Finally, EPA has designated reactivity adjustment factors (RAFTs) as Non-Core Stable Standards. RAFTs are used to adjust vehicle emission test results to reflect differences in the impact on ozone formation between alternative-fueled vehicles and a vehicle fueled with conventional gasoline. (See discussion below in section IV.B.5.d.) Including RAFTs in the National LEV program puts two competing policy concerns before the Agency. RAFTs play a role in setting the overall ability of manufacturers to meet the TLEV, LEV and ULEV tailpipe standards, which is an important issue for the auto manufacturers in deciding whether to opt into National LEV. One of the principles of National LEV has been that EPA should not have unilateral authority to change the tailpipe standards and related requirements because they are voluntary standards. Following this principle, RAFTs should be part of the Core Stable Standards. EPA is concerned, however, that locking in the RAFTs for the duration of National LEV places more weight on them than is warranted by the current scientific evidence. CARB set RAFTs based on the

<sup>19</sup> Section 202(j)(2) of the Act requires the Administrator to assess the need for further reductions in cold CO emissions from MY2001 and later model year vehicles. Therefore, unlike the other Stable Standards, EPA can change cold CO standards for MY2001 and later model year vehicles without triggering an off-ramp.

best scientific evidence available, but recognized the need for further investigation. California will be analyzing its current RAFs and possibly revising the values. California has already set up a scientific review panel, and the current RAFs apply only through MY2000. California's recognition that its RAFs may need to be modified weighs against casting the RAFs in concrete in National LEV and supports placing them in the Non-Core Stable Standards. EPA believes an appropriate compromise between the need for stability and the evolving nature of RAFs is to include RAFs in the Non-Core Stable Standards, but include a cap of 1.0 for all California Phase 2 RFG RAFs.

Placing RAFs in the Non-Core Stable Standards means that, to harmonize the California and federal requirements, EPA can modify any RAF value that California decides to change. This provides the Agency with the necessary flexibility to address any uncertainty associated with RAFs, but at the same time does not allow EPA to change RAFs unilaterally without triggering an offramp. The limitation on changes to the California Phase 2 RFG RAFs provides assurances to the manufacturers that the stringency of the National LEV program will not change dramatically for the gasoline-powered vehicles—the vast majority of vehicle types covered by the program. The cap of 1.0 was selected because it sets the maximum stringency from a change in RAFs for California Phase 2 RFG at what the numerical emission levels would be without RAFs. If California sets a RAF greater than 1.0 for California Phase 2 RFG, EPA could amend the National LEV regulations to provide for a RAF of 1.0 (without triggering an offramp). EPA may make any harmonizing changes to RAFs for alternatively-fueled vehicles if California modifies the existing RAFs, but this is expected to have a minimal impact on the program overall due to the percentage of the national fleet that is expected to be alternative-fueled vehicles.

(ii) Changes to Stable Standards. EPA can make certain types of changes to Stable Standards without giving manufacturers the ability to opt out of National LEV. EPA can make changes to which manufacturers do not object. In addition, EPA can make any of the following types of changes to Non-Core Stable Standards without triggering an off-ramp:

- Changes that do not increase the stringency of the standard,
- Changes that harmonize the standard with the comparable California standard, and

- Changes applicable after MY2006.

First, a manufacturer cannot opt out of National LEV based on a change to any Core Stable Standard unless the manufacturer has provided written comment during rulemaking on that change stating that it is sufficient to trigger a National LEV offramp. EPA believes this is appropriate because it is not necessary to provide an offramp opportunity for a change to which the manufacturer has no objection. This is the only type of change EPA can make to a Core Stable Standard without allowing manufacturers to opt out of National LEV.

Second, EPA can make technical changes and other revisions that do not increase the overall stringency of a Non-Core Stable Standard, without triggering an offramp. EPA commonly amends its emission control program regulations to address technical and administrative concerns raised by program implementation without affecting overall stringency. Allowing manufacturers to opt out of the program for such changes would endanger the stability of the National LEV program. EPA anticipates that the flexibility to make technical changes that do not impact on stringency will be appropriate for each of the designated Non-Core Stable Standards. However, such amendments are more likely for regulations like those of the off-cycle emission program, or the evaporative emissions and onboard refueling vapor recovery program (ORVR), which are recently promulgated, under review as part of ongoing EPA streamlining efforts, or both.

Third, EPA may change any Non-Core Stable Standard to harmonize with the comparable California standard or requirement, even if the revision would increase the stringency of the standard or requirement, without triggering an offramp. This policy is consistent with the goal of harmonizing the federal and California programs. The ability to harmonize with California without triggering an offramp will be critical in particular for the off-cycle standards and SFTP (discussed in detail in section IV.B.5.a below), the OBD program, and RAFs. The ability to harmonize with California without triggering an off-ramp provides a useful safety valve that helps improve the stability of National LEV. If changes to an existing standard would produce significant environmental benefits as a result of currently unanticipated technological or other developments, based on California's past approach to motor vehicle regulation and its continuing need for air quality improvements, EPA believes California is likely to make

those changes. EPA can then achieve the same environmental gains by amending its regulations to harmonize with California.

Fourth, EPA can make changes to the Non-Core Stable Standards without triggering an offramp if the change is effective after MY2006. By MY2006, EPA expects that federal Tier 2 tailpipe standards will be adopted and effective, and that the National LEV standards will be replaced by the Tier 2 standards. In the event that the National LEV program continues beyond MY2006, EPA cannot predict with a reasonable degree of accuracy whether it expects to make revisions to the Non-Core Stable Standards for an unlimited period after that date. For this reason, EPA does not believe it would be appropriate to continue the offramp opportunity for changes to Non-Core Stable Standards indefinitely. EPA chose MY2006 as the end date for the Non-Core Stable Standards offramp to provide manufacturers with increased regulatory stability for the maximum intended duration of the National LEV program.

Finally, EPA can make changes to, or promulgate, any federal motor vehicle requirements that are not designated in today's regulations as Stable Standards, without triggering an offramp opportunity. For example, EPA believes it is essential to guarantee attainment of the stringency of the requirements already in force (as opposed to increasing the stringency of these current requirements) without providing manufacturers the opportunity to opt out of the National LEV program. Thus, the emissions durability program and defeat device requirements, which are designed to ensure that vehicles actually comply with the emissions standards over their useful lives, are not Stable Standards. See the Response to Comments document for this rule and the NPRM (60 FR 52744 (col. 3)). Similarly, an offramp would not be triggered by EPA's adoption of a new requirement for motor vehicles, such as any air toxics regulations.

*b. Opt-Out Procedures.* As proposed, to opt out of the National LEV program, a manufacturer would follow the same notification procedure used to opt in, additionally specifying the condition allowing opt-out and providing supporting evidence for the applicability of that condition. A manufacturer also would have to exercise its opt-out option within the time limits discussed below.

Manufacturers generally would have to decide whether to exercise their opt-out option within 180 days of the occurrence of the condition triggering

opt-out.<sup>20</sup> If one manufacturer sends EPA an opt-out notification, however, the time limit for other manufacturers to opt out is extended by 30 days beyond the 180 day period. For opt-outs based on an EPA change to a Stable Standard, EPA would have an opportunity to prevent the opt-out from coming into effect by withdrawing the change to the Stable Standard before the effective date of the opt-out (discussed below).

Setting a time limit for opt-out provides an important measure of certainty and program stability by ensuring that if manufacturers declined to opt out of the program despite the occurrence of an offramp, all parties could rely on the program to continue. Manufacturers opposed this approach, expressing concern that regardless of whether a manufacturer individually believes the triggering event sufficient to opt out, manufacturers are likely to opt out upon the occurrence of any offramp for fear that one or more of their competitors will opt out. Since manufacturers believe they might be at a significant competitive disadvantage if they were subject to National LEV while other manufacturers were not, all manufacturers would have to opt out to protect themselves against that eventuality.

By allowing manufacturers an extended time period to opt out if another manufacturer opts out, EPA is removing the incentive for any manufacturer to exercise a protective opt-out. Instead, manufacturers can wait to see if any other manufacturer opts out and then decide at that time whether they want to exit the program. If no manufacturer opts out within the specified time period, the program would remain in place. The extended time for opt-out enhances program stability by removing an incentive for manufacturers to opt out. Moreover, it neither creates a new opportunity to opt out of the program nor reduces program stability, because it only arises if an opt-out has already occurred.

For opt-outs based on an EPA change to a Stable Standard, EPA has further enhanced program stability by providing an opportunity for EPA to withdraw a change to a Stable Standard if such a change in fact results in an opt-out. If EPA retracts a change on which an opt-out is based, this would invalidate the offramp and prevent the opt-out from coming into effect. EPA would have to withdraw the change before the effective date of the opt-out

(discussed below). The need for such a withdrawal might arise in a couple of possible circumstances. In objecting to a proposed change to a Stable Standard, manufacturers only have to indicate that they believe the change is sufficient to allow an opt-out; it would not make sense to try to force manufacturers to make a final decision as to whether they would actually opt-out before the change is even finalized. Thus, a manufacturer's objection to a proposed change would not necessarily indicate that the manufacturer would opt out of National LEV based on the change, and EPA might decide it is reasonable to go ahead with the change despite an objection. Also, EPA may have reason to believe that it has adequately modified a proposed change to accommodate objections, but a manufacturer might still choose to opt out. Providing EPA an opportunity to withdraw the change enhances program stability by protecting against such possibilities.

Within sixty days of an opt-out notification, EPA is required to determine whether or not the alleged condition allowing opt-out has occurred and therefore whether the opt-out is valid. If the basis for an opt-out were a change to a Stable Standard, EPA could find that the opt-out is valid provided that EPA did not withdraw the change before the effective date of the opt-out. If EPA withdrew the change in time, concurrently with the withdrawal EPA could then find that the opt-out was not valid. The determination of whether the opt-out was valid would not be subject to notice and comment, but it would be a nationally applicable final agency action, subject to judicial review under section 307(b) of the Act. EPA intends to publish any such determination in the **Federal Register**. If EPA were to agree that an opt-out was valid, that determination would be a final agency action authorizing the opt-out. Thus, even if the reviewing court subsequently overturned EPA's decision, the manufacturer could not be held liable for its failure to comply with the National LEV requirements prior to the court's decision.

If EPA were to determine that an opt-out was invalid and the manufacturer decided to challenge that determination in court, the manufacturer would be on notice that its failure to comply with National LEV in the interim would be at the manufacturer's own risk. During the pendency of the manufacturer's action challenging EPA's determination, the manufacturer would be able to certify Tier 1 vehicles lawfully.<sup>21</sup> If the

reviewing court ultimately agreed with EPA's determination that the opt-out was invalid, however, then the manufacturer was always subject to the National LEV requirements and would be liable in an enforcement action to the extent that it violated National LEV regulations during the pendency of the court action. For example, a manufacturer would be liable for any exceedance of the NMOG fleet average requirement during the pendency of the court action.<sup>22</sup> If the reviewing court ultimately agreed with the manufacturer that the opt-out was valid, then the manufacturer would not be held to National LEV program requirements from the effective date of its opt-out notification.

An EPA determination of the validity of an opt-out will allow for quick judicial resolution of any dispute over an opt-out and provide compliance guidance in the interim. Occurrence of an opt-out is likely to call into question whether the National LEV program will continue, which in part will depend on the validity of that opt-out. All parties involved (i.e., EPA, the states, the manufacturer opting out, and the other manufacturers) would need both of those issues resolved as soon as possible.

Providing for EPA to make a determination regarding the validity of an opt-out ensures that any dispute over an opt-out can be resolved in the United States Court of Appeals for the District of Columbia. Judicial review would be based on the Agency's administrative record. Publication of EPA's determination in the **Federal Register** would start a 60-day period for filing a petition for review of EPA's action under section 307(b), thereby facilitating

as one of the five vehicle emissions categories. However, sale of Tier 1 vehicles and TLEVs in the OTR from MY2001 on is limited to those engine families that are certified and offered for sale in California in the same model year, and sales of these vehicles industry-wide in the NTR must not exceed a cap of five percent, as discussed below in section IV.B.4. In the event of a contested opt-out, manufacturers would not have to comply with these limitations while the disposition of the opt-out remained unresolved, although manufacturers would ultimately be liable for violation of some provisions if a court were to find the opt-out invalid.

<sup>22</sup> The manufacturer would also remain liable for violation of the limitation on sales of Tier 1 vehicles and TLEVs where the same engine families were not certified and offered for sale in California. However, the manufacturer would not be liable for any exceedance of the five percent cap and the manufacturer's vehicles would not be counted towards the industry-wide cap. This exemption is driven by a practical implementation concern. In a situation where one manufacturer had opted out of National LEV, it would be very difficult to determine other manufacturers' liability under the five percent cap in any equitable manner if the cap applied to the manufacturer that had opted out.

<sup>20</sup> Where the offramp is an EPA change to a Stable Standard, a manufacturer would have to exercise its opt-out option within 180 days of EPA's publication of the change in the **Federal Register**.

<sup>21</sup> The National LEV regulations generally allow manufacturers to certify vehicles to Tier 1 standards

early identification and faster resolution of opt-out challenges. This approach provides greater certainty to both the OTC States and manufacturers regarding the status of the National LEV requirements in the interim. An EPA determination that an opt-out is valid provides the manufacturer with a safe harbor, which allows it to stop complying with National LEV without legal risk. Even if the opt-out is successfully challenged, the manufacturer will not be liable for noncompliance with National LEV during the period prior to the court's decision. Also, OTC States are made aware that EPA believes that the opt-out is valid, and those states without a CAL LEV program as a backstop will have more incentive to adopt CAL LEV in a timely manner if the state wishes to continue to control emissions from motor vehicles. If EPA determines an opt-out is invalid, the manufacturer will know the risk it would run by ceasing compliance.

If EPA were not required to make a determination on the validity of an opt-out, the only ways to challenge an opt-out would be through a declaratory judgment action or an enforcement action brought in the district court. It is unclear whether a court would grant a motion for a declaratory judgment on this issue. An enforcement action might take several years to ripen, assuming that an action could not be brought until the manufacturer violated the fleet average NMOG requirement and then failed to make up the debits within the following model year. Moreover, a district court opinion would probably be appealed to the court of appeals. Overall, this approach could easily entail anywhere from two to five years of uncertainty regarding whether the opt out was valid, and whether National LEV would remain in effect. In addition, litigation in the district courts is resource intensive, potentially involving extensive discovery, and may produce inconsistent results across different courts. In the absence of an EPA determination, there is an additional disadvantage for a manufacturer. To find out whether an opt out is valid, the manufacturer probably would have to stop complying with National LEV and put itself at risk for penalties in enforcement actions, prior to obtaining a judicial ruling on the validity of the opt-out.

c. **Effective Date of Opt-Out.** Once EPA or the reviewing court determines that an opt-out is valid, the effective date of the opt-out will depend on the condition authorizing the opt-out, unless a manufacturer specifies a later effective date than provided in the

regulations. First, if an OTC State were to adopt a state motor vehicle program under CAA section 177 in a way that violated a commitment the state had made, an opt-out would be effective for the next model year.<sup>23</sup> The "next" model year is the model year named for the calendar year following the calendar year in which the state violated the commitment. For example, if an OTC State violated a commitment in 1999, the manufacturer's opt-out would be effective for MY2000. Second, if EPA were to modify one of the Core Stable Standards over the objection of a manufacturer, an opt-out would be effective starting the model year that includes January 1 of the second calendar year following the calendar year in which the manufacturer opted out. (E.g., if a manufacturer opted out on July 1, 1999, the opt-out would be effective starting with MY2001). However, if the first model year in which manufacturers would have to comply with the changed Core Stable Standard is earlier, the opt-out would be effective as of that earlier date. Third, if EPA were to modify one of the Non-Core Stable Standards in a way that would provide an offramp, the opt-out would be effective for the first model year to which the modified standard applied. However, for opt-outs based on changes to either a Core or Non-Core Stable Standard, if EPA withdraws the change to the Stable Standard before the date that the opt-out would have become effective, the opt-out will not become effective. This approach balances achieving emissions reductions, minimizing burden on manufacturers, and providing incentives for the OTC States and EPA to keep their commitments.<sup>24</sup>

Making opt-out effective the next model year after an OTC State violates a commitment regarding a section 177 program is consistent with the basic agreement underlying the National LEV program; it also increases the program's stability. National LEV is founded on the concept of a voluntary agreement between the OTC States and the automobile manufacturers. The heart of this agreement will be that the manufacturers will comply with National LEV, in exchange for the OTC

States not requiring compliance with a CAL LEV program. Due to the inherent legal constraints on attempting to bind a sovereign state to future action, the manufacturers are limited in their ability to assure through mechanisms enforceable in court that the OTC States could not subsequently require compliance with a CAL LEV program. Thus, it is important that the structure of the National LEV program provide strong practical incentives to the OTC States to fulfill their commitments under the agreement and provide recourse to the manufacturers if the OTC States violate the agreement. Allowing manufacturers to opt out effective the next model year after an OTC State violates a commitment regarding a section 177 program provides a strong disincentive for a state to take such an action. Assuming that a CAL LEV program is not in place as a backstop in some OTC States, those states without backstops would receive Tier 1 vehicles for over two years, given section 177's lead-time requirements, and all states in the OTR would face higher levels of emissions from migration and transport. This somewhat severe result is appropriate as an incentive to fulfill one of the key commitments underlying the National LEV program. Manufacturers are entitled to opt out of National LEV quickly, once the fundamental basis of the agreement has been violated.

The timing of the effective dates of opt-outs based on EPA changes to Core or Non-Core Stable Standards is designed to be consistent with elements of the fundamental agreement underlying the National LEV program while enhancing the stability of the program. Manufacturers commented that EPA's original proposal would not give them sufficient time to evaluate the consequences of a change in a Stable Standard. They also argued they would be less likely to opt out initially upon such a change, if they could opt out later if they subsequently found the consequences of the change too burdensome. EPA believes that an unlimited time for opt-out introduces far too much uncertainty into the National LEV program. Thus, the approach adopted in this rule gives manufacturers more time to decide whether to opt out, providing 180 rather than 60 days, but not unlimited time. The approach also enhances program stability by providing EPA an opportunity to withdraw any change on which manufacturers have based an opt-out, and thereby to remove the offramp.

The slightly different effective dates for opt-outs based on changes to Core and Non-Core Stable Standards

<sup>23</sup> This decision regarding violation of OTC State commitments is not incorporated in the regulations that EPA is promulgating today, but will be reflected in a later rule that finalizes the OTC State commitment provisions of the program.

<sup>24</sup> In the supplemental notice of proposed rulemaking, EPA may propose to refine or modify this approach in light of the proposed provisions of OTC state commitments. In particular, today's final rule does not address the possibility of providing leadtime before manufacturers become subject to any backstop ZEV mandates.

recognize that these two sets of Stable Standards play different roles in relation to the National LEV program. For changes to the Core Stable Standards, it is appropriate to make an opt-out effective quickly, either as soon as EPA has had the opportunity to withdraw its change but has declined to do so, or even sooner if manufacturers would actually have to comply with the change before that date. The Core Stable Standards are the standards the manufacturers have volunteered to meet that EPA could not have imposed. These are the National LEV exhaust emissions standards, the fleet average NMOG standards, the banking and trading provisions that implement these standards, and certain other related requirements. The Core Stable Standards are discussed more fully in sections IV.A.2.a.(2) and IV.B. of this rule. If EPA were to modify any of these requirements over the manufacturers' objections, National LEV would require the manufacturers to comply with something that EPA did not have the authority to mandate and that the manufacturer had never volunteered to meet. Thus, the effective date for opt-outs based on changes to Core Stable Standards ensures that manufacturers can exit the program as soon as EPA has had the chance to prevent the opt-out by revoking the change, and even sooner, if necessary to avoid forcing compliance with a requirement that EPA could not have imposed absent National LEV. This protects the reasonable expectations of the manufacturers volunteering for the National LEV program. It also provides an additional incentive for EPA not to make changes to Core Stable Standards that might allow an opt-out because the opt-out could become effective in a time-frame shorter than the time required for OTC States without backstops to adopt and implement a CAL LEV program.

For opt-outs based on changes to Non-Core Stable Standards, EPA is finalizing the proposed approach of delaying the effective date of an opt-out until the first model year that manufacturers must comply with the changed standard. Here too, EPA would have the opportunity to withdraw the change prior to the effective date of the opt-out. This approach protects emissions reductions without increasing manufacturers' burdens or reducing program stability. EPA has designated certain standards as Non-Core Stable Standards to give the manufacturers some assurance regarding the stability of the federal motor vehicle requirements as an additional incentive to volunteer for the National LEV program. Although stability of the Non-

Core Stable Standards is one component of the National LEV program, it is not the central exchange on which a voluntary agreement would be founded. To the extent that a change in a Non-Core Stable Standard would not apply until some future date, delaying the effective date of an opt-out until that date would protect the OTC States from increased emissions caused by an event outside of their control and would give those states without a backstop some time to adopt a CAL LEV program. Yet the manufacturers would not be burdened by this approach because as soon as they were subject to the revised standard they would no longer have to comply with National LEV. The only incentive for EPA to increase the stringency of a Non-Core Stable Standard over a manufacturer's objection, other than to harmonize with California, would be if the overall emission reductions produced were greater than the emission reductions from National LEV. Thus, while delaying the opt-out effective date provides somewhat less of a disincentive for EPA to trigger an offramp, this is appropriate, given that EPA would only take such action if it would produce greater emissions reductions than would National LEV.

*d. Programs in Effect as a Result of Opt-Out.* If a manufacturer were to opt out of the National LEV program, when that opt-out became effective the manufacturer would be subject to all standards that would apply if National LEV did not exist. The federal Tier 1 tailpipe emissions and related standards would apply, as would any applicable state standards promulgated and in effect under CAA section 177. EPA will address this issue further in the SNPRM on OTC State commitments.

*e. Opt-Out By States.* EPA received a couple of comments from oil industry representatives asserting that all individual states should have the opportunity to opt out of National LEV. EPA believes that an approach allowing individual states to reject National LEV (except to exercise section 177 rights) would be unnecessary, impracticable, costly, and counter-productive to the goal of achieving clean air nationwide. EPA also notes that no state requested such a right, even though all states had the opportunity to comment on National LEV during the public comment period and EPA has conducted extensive outreach efforts to communicate with states about this program.

First, EPA believes that states will not want to opt out because they will receive important benefits from National LEV. As described above in section III.B, numerous areas around the country

need reductions in smog-forming pollutants and particulate matter. Even those areas that do not have smog or PM problems will benefit from reductions in emissions of carcinogens and other toxic air pollutants.

Second, the commenter that suggested an opt-out process for states was motivated by concerns that National LEV might require new, costly fuel controls. As described more fully below in section IV.B.7., today's regulations clarify that National LEV vehicles will not require new fuel controls.

Third, giving a state the right to opt out of National LEV would allow a state to *require* manufacturers to produce dirtier vehicles than the manufacturers want to produce—something the CAA prohibits both states and the federal government from doing, and that would be a perverse policy. Under the CAA, a manufacturer has always had the legal option of producing a vehicle that is cleaner than required—something the manufacturer might do because it believes that the public favors cleaner cars or because it is more cost-effective to manufacture vehicles that meet both California and federal standards. The commenter that suggested a state opt-out has not explained how such an option is allowed by the CAA, nor has it shown sufficient policy justification for limiting a manufacturer's right to make cleaner cars.

Fourth, establishing a mechanism to allow individual states to reject air quality benefits by "opting out" of a national motor vehicle program would run counter to the Congressionally-established national approach to regulating motor vehicles. The CAA provides that manufacturers would need to meet, at most, two sets of motor vehicle standards nationwide. Congress recognized the substantial difficulties and costs incurred by building and certifying vehicles to meet a multiplicity of different standards and the burdens distribution of those vehicles to different states would place on vehicle distribution and sales networks. Manufacturers are free to build vehicles with tighter emissions controls than required by law, and states and federal agencies have no ability to stop manufacturers from doing so.

Finally, if there were a legal mechanism to allow an individual state to opt out of National LEV, such opt-outs could substantially increase costs for manufacturers, dealers, and ultimately consumers both in opt-out states and others. If an individual state could reject National LEV and require manufacturers to build to looser standards, even if those vehicles were less expensive to produce, there is no

guarantee that manufacturers would supply such vehicles at lower prices in that state. EPA understands that as a national industry, the automotive industry largely redistributes any difference in costs among states so that the same model costs about the same in all states. Moreover, such dirtier vehicles might actually cost more to produce and distribute, given that building vehicles to a different standard would require specialized manufacture and distribution of vehicles. The manufacturers support National LEV as a more cost-effective approach to achieve emission reductions, but cost-savings from nationwide standards could be eroded by requiring a third set of standards in a few states. If manufacturers did not redistribute those higher costs across all of their vehicles, a state that had opted out of National LEV might actually experience higher costs for new motor vehicles. Thus, implementation of National LEV as a 49-state program is the legal and cost-effective approach to achieving cleaner air through cleaner new motor vehicles.

### 3. Duration of Program

This rule uses MY1997 as a placeholder for the start date of the program. As explained above (see n. 17), EPA believes that MY1997 is not a reasonable start date and will take comment in the SNPRM on the appropriate start date.<sup>25</sup>

Under today's rule, the National LEV program will continue until EPA promulgates a mandatory national tailpipe program that is at least equivalent in stringency to the National LEV program. If EPA promulgates such a mandatory tailpipe program, then the National LEV program will end in the first model year that the mandatory program is at least as stringent as a fleetwide basis as National LEV.

EPA proposed that the National LEV program would stay in place through MY2003 and possibly through MY2005, depending on whether, by a specified date, EPA had signed a final rule establishing new, mandatory tailpipe standards ("Tier 2 standards") at least as stringent as National LEV. Under the proposed regulations, if EPA did not issue the specified regulations on time, then National LEV would end in MY2003. In that event, manufacturers

<sup>25</sup> Auto manufacturers had requested several adjustments to the National LEV program to address concerns regarding compliance for MY1997, given the abbreviated time frame for program start up. As discussed above (see n. 17) EPA is using MY1997 as a placeholder for the actual start date of the program, even though EPA now believes that start date is not realistic. Rather than include special provisions for MY1997, EPA will take comment in the SNPRM on the appropriate start date.

would be required to meet federal Tier 1 standards starting in MY2004 in any state where California or OTC LEV standards were not in effect. EPA also took comment on various other possible approaches, including having the National LEV program extend until the first model year in which manufacturers must meet new, mandatory tailpipe standards at least as stringent as National LEV.

EPA received several comments expressing serious concern regarding the proposal that would allow the National LEV program to end after MY2003 if EPA did not promulgate Tier 2 regulations that were more stringent than National LEV. These commenters noted that the proposal would provide insufficient assurance of future emissions reductions and would hinder State efforts to reduce ozone pollution.

EPA agrees with these comments and has decided not to adopt the proposed approach. EPA believes it is unacceptable to set up a program that has the country take a step backward environmentally if the Agency fails to act by a future deadline. The proposed approach could cause a reversion to Tier 1 standards beginning in MY2004, which would cause considerable emission increases throughout the country.

The final regulations require that the National LEV program stay in effect until a mandatory federal program is in effect that is equivalent or more stringent. This approach will provide greater assurance that vehicles manufactured in or after MY2004 will not create greater pollution than those manufactured prior to MY2004. It will therefore reduce the considerable uncertainty that the proposed approach would have created regarding emissions from vehicles after MY2004.

Though some commenters believe that the proposed approach would provide EPA with greater incentive to promulgate standards by December 15, 2000, incentive is not the same as assurance. Promulgation of Tier 2 standards by December 15, 2000, is not a certainty. Section 202(i) of the Act requires several actions by EPA prior to promulgation of Tier 2 standards. EPA must, for example, complete a report to Congress and must make specific determinations discussed in section 202(i). EPA has not taken these actions at this time. Until such time as those determinations are made, there can be no certainty that Tier 2 standards will actually be promulgated, or that such standards will be equivalent or more stringent than National LEV standards. Moreover, the proposed approach would stake the continued reduction of

motor vehicle emissions on the prospect of EPA completing its Tier 2 process by December 15, 2000. Although EPA intends to continue to work diligently on its Tier 2 process, there are too many possible occurrences that are out of EPA's control for EPA to guarantee completion of the process by that date. Therefore, to allow for more certainty in the National LEV program, EPA is promulgating regulations that allow the program to continue until the first model year in which an equivalent or more stringent federal program is implemented and applicable to new LDVs and LLDTs.

Some commenters favored the proposed approach because they assumed that the OTC States' commitments regarding State adoption of section 177 programs would last for the duration of National LEV. These commenters wanted a more definite end to the OTC State commitments than would be provided by having the OTC State commitments last for the duration of National LEV as contained in this rule. EPA believes the best way to accommodate this concern is to set a separate end date for the OTC State commitments. EPA will take comment on the appropriate end date for OTC State commitments in the SNPRM.

### B. National LEV Voluntary Tailpipe and Related Standards and Phase-In

Today's final rule adopts the proposed National LEV exhaust emission standards for LDVs and LLDTs.<sup>26</sup> The standards are closely patterned after the California LEV emission standards, and they include exhaust emission standards applicable to individual vehicles as well as a set of fleet average NMOG standards.

Once manufacturers have opted into the National LEV program and EPA has found the program to be in effect, manufacturers will be required to certify each LDV and LLDT engine family to one of five "vehicle emission categories," each of which has a unique set of emission standards (described below). The five vehicle emission categories, in order of increasing stringency, are the federal Tier 1 standards, TLEVs, LEVs, ULEVs, and ZEVs. The Tier 1 category includes the

<sup>26</sup> The federal definitions of "light-duty vehicle" and "light light-duty truck" (40 CFR 86.094-2) correspond exactly to the California definitions of "passenger car" and "light-duty truck," respectively. In addition, the federal light-duty truck and California light-duty truck categories are each divided into two subcategories based on identical ranges of loaded vehicle weight. The alignment of these definitions allows the California emission standards to be applied directly to the corresponding federal vehicle certification categories.

federal standards for exhaust emissions of NMHC, CO, NO<sub>x</sub>, and PM. The four remaining categories (the "LEV" categories) include standards for the same pollutants, as well as for formaldehyde.

In addition to meeting the exhaust standards for each emission category, manufacturers must also comply with fleet average NMOG standards (described more fully in section IV.B.3., below). Separate standards apply to the LDVs and LLDTs, and compliance is based on the number of vehicles produced and offered for sale in each of the five emission categories, together with the NMOG standard for that category. NMOG averages first take effect in the OTC States in MY1997,<sup>27</sup> and they decline (become more stringent) until stabilizing for MY2001 and beyond. Beginning in MY2001, manufacturers must demonstrate compliance with the same NMOG fleet averages both in the OTC States and in the 37 States outside the OTC States and California. Manufacturers are allowed, but not required, to introduce TLEVs, LEVs, ULEVs, and ZEVs outside the OTR and California prior to MY2001. However, only vehicles subject to the National LEV program sold in the OTR will be counted towards a manufacturer's fleet average NMOG calculation during the phase-in period in the OTR.

The exhaust emission standards and fleet average NMOG requirements, as well as other regulatory elements of the National LEV program, are contained in a new Code of Federal Regulations (CFR) subpart (subpart R of title 40, part 86).

#### 1. Exhaust Emission Standards for Categories of NLEVs

This section discusses the exhaust emission standards that NLEVs must meet. In addition to the voluntary National LEV exhaust standards that are derived from the California LEV program, manufacturers of NLEVs must also demonstrate compliance with a few mandatory federal exhaust standards that have no counterpart in the

California LEV program.<sup>28</sup> Both types of standards are discussed here.

a. Certification Standards. This final rule establishes separate sets of emission standards for LDVs and for LLDTs. Current federal regulations divide the LDT vehicle category into two subcategories, each of which is further divided into subcategories. LLDTs are those LDTs less than or equal to 6000 lbs GVWR, and heavy light-duty trucks (HLDTs) are those LDTs greater than 6000 lbs but less than or equal to 8500 lbs GVWR. The National LEV program contains standards only for the LLDTs, therefore the HLDT category will continue to be certified to the applicable Tier 1 standards. Emission standards that apply to LLDTs are divided into two sets. One set, which is identical to the standards for LDVs, applies to LLDTs up through 3750 lbs loaded vehicle weight (LVW), and another slightly less stringent set applies to LLDTs between 3750 and 5750 lbs LVW. Also consistent with current federal and California regulations, separate sets of standards are promulgated for the vehicle's intermediate useful life (five years or 50,000 miles, whichever occurs first) and full useful life (10 years or 100,000 miles, whichever occurs first).

As noted above, there are five vehicle emission categories for vehicles under the voluntary National LEV program, ranging in stringency from the current federal Tier 1 vehicles to ZEVs. The Tier 1 standards have already been codified

<sup>28</sup> Participation in the voluntary National LEV program does not relieve manufacturers of their obligation to meet the mandatory federal exhaust emission standards. The core of the mandatory federal exhaust standards are the set of Tier 1 standards, plus selected pre-Tier 1 ("Tier 0") standards that Congress let stand in the 1990 CAA Amendments. Most of these mandatory federal standards have analogues in the National LEV standards, and for each of these, the voluntary National LEV standard is of equal or greater stringency. Certification of a vehicle to the voluntary standards therefore also demonstrates compliance with the analogous mandatory standards. (For testing purposes, the National LEV standard may be described as "replacing" the analogous federal standard, although the federal standard technically still applies.) For those few federal exhaust standards that have no National LEV counterpart (discussed below), manufacturers must also demonstrate compliance of NLEVs with those standards.

in the current federal regulations with a phase-in schedule that required 100 percent of MY1996 LDVs and LLDTs to meet the Tier 1 standards. The TLEV, LEV, ULEV and ZEV certification standards for LDVs and LLDTs up through 3750 lbs LVW are shown in Table 2 and those for LLDTs from 3750 to 5750 lbs LVW are shown in Table 3. As noted below, the particulate standards adopted specifically for National LEV apply only to diesel vehicles. Non-diesel vehicles will be subject to the federal Tier 1 PM standards, as described below.

The federal exhaust standards with no California counterparts are (1) the Tier 0 total hydrocarbon (THC) standard for all vehicles, (2) the Tier 1 50,000-mile PM standard, and (3) the 100,000-mile PM standard for non-diesel vehicles. The California program contains neither a THC standard nor a 50,000-mile PM standard, and the California 100,000-mile PM standard applies only to diesel vehicles. All NLEVs must comply with the federal THC emissions standard. EPA has adopted the California 100,000-mile diesel PM standard for NLEVs, but, to meet the requirements of the mandatory federal program, diesel NLEVs must also certify to the Tier 1 50,000-mile PM standard. Non-diesel NLEVs must meet the federal Tier 1 50,000-mile and 100,000-mile PM standards.

Compliance with the Tier 0 THC standard should not result in testing beyond that required for LEV standards. The current federal program provides for a reduced data reporting burden, including the use of engineering justifications, in certain cases where compliance with a mandatory standard for a given vehicle or emission control technology is clear cut. Such is the case for current-technology gasoline vehicles when demonstrating compliance with the Tier 1 PM standards and for most current technology vehicles whose Tier 1 NMHC values demonstrate compliance with the THC standards. The Agency anticipates that manufacturers will reduce their compliance burden by taking advantage of these same data reporting options when certifying NLEVs.

<sup>27</sup> MY1997 is used in this rule as a placeholder for the actual start date. See n. 17 above.

TABLE 2.—NATIONAL LEV INTERMEDIATE AND FULL USEFUL LIFE STANDARDS (G/MI) FOR LDVs AND LLDTS TO 3750 LBS LVW

Vehicle useful life (miles)	Vehicle emission category	NMOG	CO	NO <sub>x</sub>	HCHO	PM <sup>1</sup> (diesel only)
50,000	TLEV	0.125	3.4	0.4	0.015	
	LEV	0.075	3.4	0.2	0.015	
	ULEV	0.040	1.7	0.2	0.008	
100,000	TLEV	0.156	4.2	0.6	0.018	0.08
	LEV	0.090	4.2	0.3	0.018	0.08
	ULEV	0.055	2.1	0.3	0.011	0.04

<sup>1</sup> See the discussion in this section IV.B.1.a regarding the applicability of PM standards.

TABLE 3.—NATIONAL LEV INTERMEDIATE AND FULL USEFUL LIFE STANDARDS (G/MI) FOR LLDTS FROM 3751 LBS LVW TO 5750 Lbs LVW

Vehicle useful life (miles)	Vehicle emission category	NMOG	CO	NO <sub>x</sub>	HCHO	PM <sup>1</sup> (diesel only)
50,000	TLEV	0.160	4.4	0.7	0.018	
	LEV	0.100	4.4	0.4	0.018	
	ULEV	0.050	2.2	0.4	0.009	
100,000	TLEV	0.200	5.5	0.9	0.023	0.08
	LEV	0.130	5.5	0.5	0.023	0.08
	ULEV	0.070	2.8	0.5	0.013	0.04

<sup>1</sup> See the discussion in this section IV.B.1.a regarding the applicability of PM standards.

The voluntary standards also include two-tiered NMOG standards for flexible-fuel and dual-fuel vehicles, based on California's approach to standards for these vehicle types.<sup>29</sup> Flexible- and dual-fuel vehicles have to certify to the applicable standards both on the alternative fuel and on gasoline. When certifying on an alternative fuel, these vehicles have to meet the intermediate and full useful life emission standards for TLEVs, LEVs or ULEVs laid out above.<sup>30</sup>

When certifying on gasoline, flexible-fuel and dual-fuel vehicles have to meet the next higher (less stringent) category of NMOG emission standards than the standards to which the vehicle was certified on an alternative fuel. However, except for NMOG, the vehicle must meet the same emissions standards (NO<sub>x</sub>, CO, etc.) when operated on gasoline as it did when operated on the alternative fuel. For example, a flexible-fuel vehicle that certifies to ULEV standards on an alternative fuel would have to certify to the LEV NMOG standard and ULEV CO, NO<sub>x</sub>, PM, and HCHO standards when operated on gasoline. The same principle holds true

for determining applicable in-use standards for flexible-fuel and dual-fuel vehicles. This approach allows manufacturers to optimize the emission control system for the alternative fuel rather than for gasoline, and encourages rather than discourages the development of alternative fuel technologies. Consistent with California, flexible-fuel and dual-fuel vehicles will be counted toward the NMOG fleet average standard on the basis of their NMOG certification levels on the alternative fuel, not on gasoline. There is, however, no requirement under the National LEV program that such vehicles operate on alternative fuels in-use.

*b. In-Use Standards.* As proposed in the NPRM, the National LEV program explicitly adopts California's intermediate in-use standards, which are slightly less stringent than the certification standards. These standards, which apply to in-use testing for a period of model years following introduction of the certification standards, are set at less stringent levels than the certification standards to allow manufacturers to gain in-use experience

with vehicles certified to LEV or ULEV standards. EPA is adopting these standards consistent with the current California requirements, which include recently adopted revisions. (See the Response to Comments document for further discussion of these revisions, section II.D.1.) The in-use standards apply through MY1999 for LEVs and through MY2002 for ULEVs, and include both intermediate useful life (50,000 miles) and full useful life (100,000 miles) standards (full useful life in-use standards apply starting with MY1999). In-use standards for LDVs and LLDTs to 3750 lbs LVW are shown in Table 4 and those applicable to LLDTs from 3751 to 5750 lbs LVW are shown in Table 5. As indicated in the tables, compliance with in-use standards beyond the intermediate useful life is not required for LEVs and ULEVs until after MY1998. These in-use standards for vehicles certified under the National LEV program apply to vehicles sold both within and outside the OTR. Some of the complexity in the tables below results from changes in the in-use formaldehyde standards that occur starting with MY2001.

<sup>29</sup> Flexible-fuel vehicles are those that can operate on either of two different fuels or any combination of those fuels, while dual-fuel vehicles can operate

on either of two different fuels but not on combinations of those fuels.

<sup>30</sup> Consistent with California's methodology, the measured NMOG mass emissions are adjusted by a

RAF for the given type of alternative fuel before being compared to the applicable emission standard. Determination of the applicable RAF is discussed later in section IV.B.5.d.

TABLE 4.—NATIONAL LEV IN-USE STANDARDS (G/MI) FOR LDVs AND LLDTs TO 3750 LBS LVW<sup>1</sup>

Vehicle emission category	Model year	Useful life (miles)	NMOG	CO	NO <sub>x</sub>	HCHO
LEV .....	1997–1999	50,000	0.100	3.4	0.3	0.015
	1999	100,000	0.125	4.2	0.4	0.018
ULEV .....	1997–1998	50,000	0.058	2.6	0.3	0.012
	1999–2000	50,000	0.055	2.1	0.3	0.012
	2001–2002	50,000	0.055	2.1	0.3	0.008
	1999–2002	100,000	0.075	3.4	0.4	0.011

<sup>1</sup> MY1997 is used in this rule as a placeholder for the actual start date. See footnote no. 17.

TABLE 5.—NATIONAL LEV IN-USE STANDARDS (G/MI) FOR LLDTs FROM 3751 LBS LVW TO 5750 LVW<sup>1</sup>

Vehicle emission category	Model year	Useful life (miles)	NMOG	CO	NO <sub>x</sub>	HCHO
LEV .....	1997–1998	50,000	0.128	4.4	0.5	0.018
	1999	50,000	0.130	4.4	0.5	0.018
	1999	100,000	0.160	5.5	0.7	0.018
ULEV .....	1997–1998	50,000	0.075	3.3	0.5	0.014
	1999–2002	50,000	0.070	2.8	0.5	0.014
	1999–2002	100,000	0.100	4.4	0.7	0.014

<sup>1</sup> MY1997 is used in this rule as a placeholder for the actual start date. See footnote no. 17.

2. Non-methane Organic Gases Fleet Average Standards

a. Compliance with the NMOG Standards. Under the National LEV program, manufacturers will be required to meet an increasingly stringent fleet average NMOG standard. Today's action adopts the fleet average NMOG standards and schedule for LDVs and LLDTs as proposed in the NPRM. The fleet average NMOG values (Table 6)

will apply, on a manufacturer-by-manufacturer basis, to vehicles sold in the OTR from MY1997 until the end of the National LEV program.<sup>31</sup> The NMOG values will also apply to vehicles sold in every state outside the OTR, except California, beginning with MY2001. (Low volume manufacturers, as defined in this rule, will be exempt until MY2001, as discussed more fully in section IV.C. below.) The decreasing

fleet average standards were derived by multiplying certification emission levels for various categories of vehicles by achievable implementation rates for each vehicle category. The NMOG standards are equivalent to the sale of 40 percent TLEVs in MY1997–MY1998, 40 percent TLEVs and 30 percent LEVs in MY1999, 40 percent TLEVs and 60 percent LEVs in MY2000, and 100 percent LEVs in MY2001.

TABLE 6.—FLEET AVERAGE NMOG EXHAUST EMISSION STANDARDS (G/MI) FOR LDVs AND LLDTs SOLD IN THE OTR<sup>1</sup>

Vehicle type	Model year	Fleet average NMOG
LDV and LLDT (0–3750 LVW) .....	1997 .....	0.200
	1998 .....	0.200
	1999 .....	0.148
	2000 .....	0.095
	2001 and later .....	0.075
	LLDT (3751–5750 LVW) .....	1997 .....
1998 .....		0.256
1999 .....		0.190
2000 .....		0.124
2001 and later .....		0.100

<sup>1</sup> MY1997 is used in this rule as a placeholder for the actual start date. See footnote no. 17.

Manufacturers will be required to meet separate NMOG averages for each of two vehicle groups; i.e., a fleet average will be calculated for LDVs and LLDTs from 0–3750 LVW, and for LLDTs from 3751–5750 LVW. Also, as discussed below, manufacturers will have to meet NMOG averages for each of these groups in the two separate regions: states within the OTR (Northeast Trading Region or NTR), and

states (except California) outside the OTR (37 States). Prior to MY2001, compliance with the fleet average NMOG requirements is required only in the OTR. However, a manufacturer choosing to bank credits for use in the 37 States beginning in MY2001 will have to demonstrate that its fleet average NMOG is more stringent than the NMOG value for Tier 1 vehicles in the 37 States for these early years.<sup>32</sup>

Beginning in MY2001, manufacturers will have to meet the fleet average NMOG standards separately in each of the two regions.

Manufacturers will be able to comply with the fleet average NMOG standards by selling any combination of vehicles certified to the Tier 1, TLEV, LEV,

<sup>31</sup> MY1997 is used in this rule as a placeholder for the actual start date. See n. 17 above.

<sup>32</sup> For purposes of demonstrating compliance with the fleet average NMOG standards, the NMOG

value for Tier 1 LDVs and LLDTs 0–3750 lbs LVW is 0.25 grams/mile, and for LLDTs 3751–5750 lbs LVW is 0.32 grams/mile.

ULEV, or ZEV levels, such that the overall LDV and LLDT fleets in each region meet the required fleet average values. A sales-weighted fleet average will be calculated based on the intermediate useful life (five years, 50,000 mile) certification NMOG standards of the vehicle categories. A manufacturer will multiply the NMOG emission standard for each certification category by the number of that type of vehicle that the manufacturer sold in that region, add these products to the Hybrid Electric Vehicle (HEV) contribution factor (discussed in section IV.B.8.), and then divide by the total number of vehicles sold in that region by the manufacturer.

*b. Tracking Vehicles for Fleet Average NMOG Compliance.* Because vehicles sold to locations in California and other countries, including Canada and Mexico, are excluded from the National LEV program, and because fleet average NMOG calculations are specific to each of the two regions, as described further in the following section, manufacturers are required to obtain data on the location of vehicle sales to demonstrate accurate fleet average NMOG calculations. However, to ease the burden on manufacturers of tracking vehicles to the end user, manufacturers need only track vehicles to the location where the completed vehicle or truck is purchased, otherwise known as the point of first sale. In most cases, this will be the sale from the manufacturer to the dealer. In cases where the end user purchases the completed vehicle directly from the manufacturer, the location of the end user is the point of first sale. Vehicle sales data pertaining to vehicles already shipped to a point of first sale is also known as first delivery information.

In the NPRM, EPA proposed to have manufacturers track vehicles to the location where the completed vehicle or truck is purchased, but mistakenly called this "point of first *retail* sale" (emphasis added). EPA did not intend to require, however, to have vehicles tracked to the end user, which is the general level of tracking triggered by point of first retail sale requirements. The term "point of first retail sale" derives from requirements applicable to the heavy-duty engine market. Heavy duty engine manufacturers often sell engines to truck builders, who in turn may sell their completed trucks to consumers or dealers located anywhere. This dispersion of the engines even after the first sale makes it necessary for manufacturers to track engines to the point of first retail sale in order to make a reasonable estimate of the engine's final location. However, in the light-

duty market, manufacturers sell almost all of their production to dealerships, who in turn sell most vehicles to users located in the general area of the dealership. The practical constraints on dispersion of vehicles after the first sale make tracking light-duty vehicles and trucks to the point of first retail sale unnecessary, as EPA recognized in establishing trading requirements for phase-in of Tier 1 vehicles. Thus, today's action clarifies the vehicle tracking requirement and corrects the proposed language now to require manufacturers to track National LEV vehicles to the point of first sale.

EPA recognizes that dealers occasionally trade vehicles to obtain particular makes or models, but the Agency does not believe that this trading will have any significant effect on the air quality benefits of the National LEV program. Trading vehicles between dealerships occurs largely over limited geographic distances, which means that most trades will redistribute vehicles within the same region. EPA believes that inter-regional trades would have a de minimis effect on vehicle mixes and resulting air quality.

EPA is making an additional minor change in the regulations to clarify an inconsistency in the proposal. The proposed regulations applied the National LEV requirements to vehicles that manufacturers "produce and deliver for sale," which is the language used in the California regulations. However, under both the proposed and final rules, for purposes of determining compliance with the National LEV requirements, manufacturers must track vehicles to the point of first sale (point of first retail sale in the proposal). Practically, this means that the proposed and final National LEV requirements apply to the vehicles actually sold by manufacturers, rather than the vehicles delivered for sale, which may be different. As discussed above, for the Agency to enforce the National LEV requirements on a region-specific basis, it is necessary to track vehicles to where they are first sold. The point at which vehicles are delivered for sale is more difficult to identify and may give a less accurate indication of the vehicles' final destination. Given that the tracking requirement will be used to determine compliance, EPA is modifying the applicability of the National LEV requirements to reflect that this is the controlling requirement. Thus, in the final rule, EPA is applying the National LEV requirements to the vehicles actually sold by manufacturers, which are the same vehicles used for demonstrating compliance with those requirements.

*c. OTC State Government ATV Purchases.* Manufacturers may not include in their fleet average NMOG calculations ATVs bought in the OTR by state governments. EPA is including this limitation at the request of the OTC States and auto manufacturers. The OTC States and manufacturers intend the limitation to allow the OTC States to promote ATV purchases pursuant to the ATV component they had negotiated, without allowing manufacturers to offset these purchases with increased sales of higher-emitting vehicles. For the purpose of National LEV, an ATV is defined as any vehicle certified by CARB or EPA that is either: (1) A dual-fuel, flexible-fuel, or dedicated alternatively fueled vehicle certified as a TLEV, LEV, or ULEV when operated on the alternative fuel; (2) certified as a ULEV or Inherently Low Emission Vehicle (ILEV) (irrespective of whether conventionally or alternatively fueled); or (3) a dedicated or hybrid electric vehicle.

This exclusion of OTC State government purchases of ATVs from the fleet average NMOG value applies to any ATV purchases by OTC State governments that the governments have properly reported to the manufacturers. For the limitations to apply, the governments must report their purchases of these vehicles to the respective manufacturers no later than February 1 of the calendar year following the end of a given model year. Reporting should consist of a letter from the government official responsible for the purchases to the manufacturer representative listed in that manufacturer's application for certification. The letter should list the number of vehicles purchased, vehicle makes and models, and the associated engine families. If necessary, EPA can provide OTC State governments the name and address of the manufacturer representative upon request. Reporting OTC State governments should also send a copy of this letter to EPA, to the name and address stated in section 40 CFR 86.1710-97(g)(4), so that EPA can include these data in verifying manufacturers' compliance with the fleet average NMOG standards. Failure of the government entities to report these data correctly would allow manufacturers to include these vehicles in their fleet average NMOG values.

EPA has determined that Federal government ATV purchases will not be excluded from manufacturers' NMOG fleet average values. This requirement would be too burdensome to meet effectively because the location of Federal vehicle purchases often do not correspond to the vehicles' main service

area. The General Services Administration (GSA) coordinates Federal vehicle purchases. Federal agencies order vehicles from GSA and have them shipped to or picked up from specified regions. In turn, these vehicles are frequently re-distributed elsewhere based on that particular agency's needs. Thus, it would be difficult, if not impossible, to devise a system to have Federal entities track and report the number of ATVs being used in the OTR. In addition, EPA does not believe that allowing manufacturers to include ATVs purchased by the federal government would raise any problem of double-counting under the Energy Policy Act (EPAAct). The EPAAct requirements are not directed towards manufacturers. Thus, a manufacturer that counts a vehicle purchased under EPAAct towards meeting its National LEV fleet average NMOG requirement would not be receiving any additional credit for compliance with EPAAct as well.

d. Reporting Requirements. EPA is including in today's rule several provisions designed to simplify reporting requirements. Under certain conditions, a manufacturer whose entire fleet, apart from California vehicles, is certified to LEV or cleaner standards may not need to calculate separate NMOG fleet averages for each trading region and may use production data in lieu of sales data for determining compliance. Manufacturers may also simplify their reporting under National LEV by combining the information required here with their annual production reports.

A manufacturer whose entire fleet for the 49 states is certified to LEV or cleaner standards would not need to calculate separate fleet average NMOG values for each region or track vehicles to specific regions to evaluate compliance with the NMOG fleet average requirement. Because each individual vehicle is certified at or below the fleet average NMOG value, any mix of vehicles sold in either region would necessarily meet the applicable fleet average NMOG requirement. The manufacturer could simply show compliance with the fleet average NMOG requirement by showing that each engine family was certified to a standard equivalent to or more stringent than the fleet average NMOG requirement. If a manufacturer decides to use this reduced reporting requirement, then EPA will designate that manufacturer's fleet average NMOG values for the affected model years, for each region, as equal to the applicable fleet average NMOG standards for such model year. Such a manufacturer would not be able to generate credits because

region-specific tracking is necessary to calculate the credits generated for a specific region, based on the number of vehicles sold in that region.

Region-specific tracking is also used to calculate total number of vehicles sold in the OTR for assessing industry-wide compliance with the five percent cap on sales of Tier 1 vehicles and TLEVs, which is described in section IV.B.4. below. EPA believes that a reasonable estimate of the manufacturer's total sales in the OTR will be adequate to allow the Agency to assess industry-wide compliance with the five percent cap. EPA will estimate the manufacturer's sales in the OTR by calculating the average percentage of the manufacturer's total fleet that was sold in the OTR over the last two years for which the manufacturer reported OTR sales, and then applying this percent to the manufacturer's total sales in the 49 states for that model year.

A manufacturer may also combine the currently required production report<sup>33</sup> with the National LEV report in a single submission. Manufacturers taking advantage of this option would have to report at the time the production report is due, which is typically 30 days after the end of the model year. This is sooner than EPA has allowed for the National LEV report, which is not due until May 1 of the calendar year following the model year. EPA is giving manufacturers this extra time to file the National LEV report to allow manufacturers to include in their report any credit trading activity that occurs after the end of the model year.

Manufacturers that are not generating or using credits probably will not need the additional reporting time. The option of combining the reports leaves the choice up to each manufacturer to decide for itself whether filing an earlier combined report makes sense. EPA believes that these simplified compliance provisions allow manufacturers to reduce their compliance burdens without diminishing program stringency or EPA's ability to ensure compliance.

### 3. Fleet Average NMOG Credit Program

a. Fleet Average NMOG Credit Program Requirements. An important part of today's National LEV rulemaking is the set of provisions allowing manufacturers to use a market-based approach to meet the fleet average NMOG requirements through averaging, banking, and trading NMOG credits and debits. Both this overall approach and most of the specifics of program implementation are modeled on California's trading program. The few

differences between the National LEV and California requirements are mainly due to the need to have separate compliance determinations in the OTC States and the 37 States, or are driven by EPA's legal authority.

As proposed, fleet average NMOG credits and debits will be calculated in the same manner as under the California regulations. Credits and debits will be calculated in units of g/mi as the difference between the required fleet average NMOG standard and the fleet average NMOG value achieved by the manufacturer, multiplied by the total number of vehicles the manufacturer sold in a given model year in each of the applicable regions, including ZEVs and HEVs. A manufacturer will generate credits in a given model year if its fleet average NMOG value is lower than the fleet average NMOG standard for that model year. Debits will be incurred when a manufacturer produces a fleet average NMOG value above the fleet average standard required for that model year. A manufacturer's balance for the model year will equal the sum of all outstanding credits and debits.

As under the California regulations, the separate fleet average NMOG standards for the two different vehicle classes require manufacturers to calculate separate fleet average NMOG values for each class. Class A represents the LDVs and LLDTs 0-3750 lbs LVW, and Class B represents the LLDTs 3751-5750 lbs LVW. Once calculated, fleet average credits and debits are not specific to these classes.

The National LEV program does, however, include geographic limits on both calculation of fleet average NMOG values and offset of debits with credits, as proposed in the NPRM. Prior to MY2001, the fleet average NMOG standard will apply only to vehicles sold within the OTC States.<sup>34</sup> To ensure that the voluntary program continues to produce acceptable emissions reductions in the OTR, from MY2001 on, credit and debit averaging will be conducted in two separate regions: the NTR, and the remaining 37 States, excluding both California and the NTR. The NMOG average, credits, and debits

<sup>34</sup> For administrative convenience, EPA will include the entire Commonwealth of Virginia in the OTR trading region (designated as the Northeast Trading Region (NTR)) even though only northern Virginia is in the OTR. Inclusion in the trading region means that for purposes of assessing compliance with the fleet average NMOG standard and the other National LEV provisions, the entire Commonwealth of Virginia will be considered as a whole as part of the NTR. This inclusion is only for purposes of the National LEV program. EPA received no negative comments on the proposed inclusion of the entire state of Virginia in the trading region.

<sup>33</sup> See 40 CFR 86.085-37(b).

for a regional fleet will be based on vehicles sold in each region, and each regional fleet average will have to meet the applicable NMOG standard independently.

Therefore, manufacturers will be required to calculate four separate fleet average NMOG values for four separate averaging sets: Class A in the NTR, Class A in the 37 States, Class B in the NTR, and Class B in the 37 States. Each manufacturer will have a separate balance for each of the two regions, which will be calculated by summing all of the manufacturers' credits and debits within that region.<sup>35</sup> Only credits remaining after calculating the manufacturer's balance for the region will be available for trading, and they may be traded only in that region.

As under the California regulations, the National LEV standards provide that manufacturers may incur a debit balance in a given region and model year, but the manufacturer must equalize any emission debits by the reporting deadline after the end of the following model year. Manufacturers will be able to offset debits by (1) using credits generated by that manufacturer in a previous year (discounted if appropriate), (2) earning an equal amount of emission credits the year after incurring the debit, or (3) presenting to EPA an equal amount of credits acquired from another manufacturer. However, a manufacturer will have to use any available credits from a region to offset any debits from the same region in the model year those debits were generated. A manufacturer may not carry over to the next model year both credits and debits for the same region or transfer those credits to another manufacturer. A manufacturer that fails to equalize debits within the required time period will be deemed to be in violation as of that date. The deadline for equalizing debits is the due date for the annual report for the model year following the model year in which the debits were generated.

As proposed, the voluntary standards also incorporate the California approach for discounting unused credits over time. Unused credits that are available at the end of the second, third and fourth model year after the model year in which the credits were generated will be discounted to 50 percent, 25 percent, and 0 percent of the original value of the credits, respectively. For example, if a manufacturer generated 200 credits in the OTR in MY1999, those credits

<sup>35</sup> Credits or debits earned or incurred in the National LEV program would not be interchangeable with credits or debits earned or incurred in California because the National LEV and California LEV programs are separate.

would retain their full value in MY2000. However, in MY2001, the credits would be discounted by 50 percent, so the manufacturer would hold only 100 credits. In MY2002, the manufacturer would hold 50 credits, and in MY2003, the credits would have no value.

As with other emission credits or allowances recognized under the Act, credits would not be the holder's property, but instead would be a limited authorization to emit the designated amount of emissions. Nothing in the regulations or any other provision of law should be construed to limit EPA's authority to terminate or limit this authorization through a rulemaking.

*b. Early Reduction Credits.*

Manufacturers may also generate credits in the 37 States prior to MY2001 for use in the 37 States, as EPA proposed in the NPRM. This will provide manufacturers added flexibility as well as create an incentive for them to introduce cleaner vehicles into this region before MY2001, thus providing air quality benefits sooner. Since these credits cannot be used or traded before MY2001, EPA will treat any credits earned in the 37 States before MY2001 as if earned in MY2001. It does not make sense to apply the normal discount rate to these credits before MY2001 because that would remove or sharply reduce the incentive for early introductions. This is also consistent with California's approach to allowing early generation of credits. However, these credits will be subject to the normal discount rate starting with MY2001, meaning they will retain their full value for MY2002 and will be discounted from then on. In addition, these early reduction credits will be subject to a one-time ten percent discount applied in MY2001, as discussed below.

EPA believes that there are substantial benefits to encouraging early introductions of cleaner vehicles, but remains concerned that giving full, undiscounted credits for all early reductions may generate some windfall credits. "Windfall" credits are credits given for emission reductions the manufacturer would have made even in the absence of a credit program. The purpose of giving credits for early reductions is to encourage manufacturers to make reductions that they would not have made but for the credit program. Because credits can be used to offset higher emissions in later years, if manufacturers are given credits for early reductions they would have made even without a credit program, then the credit program could have a detrimental effect on the environment.

There is some potential for windfall credits here because, in the absence of

early reduction credits, it is likely that there still would be some early introduction of National LEV vehicles in the 37 States. Under the California LEV program, windfall credits should not occur because there is no other regulatory or market incentive for manufacturers to introduce new technology early in California. Under National LEV, however, manufacturers would already be producing cleaner vehicles for California and the OTR. Distribution efficiencies would encourage some cross-border sales of National LEV vehicles in the states bordering the OTR, and manufacturers might certify some 50-state engine families due to economies of scale in production and distribution.<sup>36</sup> The potential influence of such economic factors is illustrated by the fact that manufacturers are currently producing numerous 50-state engine families without the chance to earn early credits.<sup>37</sup>

Despite the potential for some windfall credits, the 37 States will receive substantial benefits from early introductions of cleaner vehicles. Early introduction will benefit public health and help areas in the 37 States that currently exceed the ozone standard to come into attainment sooner through fleet turnover replacement of older, higher-emitting vehicles. Early reduction credits can be a powerful incentive for early introductions, and the National LEV program should take full advantage of this tool. Early reduction credits also benefit manufacturers by providing additional compliance flexibility. Further, while some windfall credits might be generated along with early reductions

<sup>36</sup> To the extent that 50-state vehicles or cross border sales are driven by the existence of National LEV requirements in the OTR, it could be argued that credits for such vehicles would not be windfall credits because the economic incentives for supplying such vehicles would stem from the National LEV program itself. Even if this were the case, giving manufacturers early reduction credits for such vehicles would still reduce the benefits of National LEV relative to its benefits absent early reduction credits, which would appropriately be considered windfall credits. Moreover, in the absence of National LEV, adoption of CAL LEV programs in at least some OTC States might well have driven many of the same production choices. Thus, to the extent that those 50-state vehicles would have been supplied to the 37 States with or without National LEV, early reduction credits for such vehicles would be windfalls.

<sup>37</sup> This quantity of 50-state vehicles does not necessarily have any relevance to estimating supply of such vehicles in the absence of early reduction credits, however. In the past, manufacturers have moved toward 50-state certification primarily because California and federal standards were not significantly different. However, the much larger differences between Tier 1 and LEV standards will reduce the incentives to certify 50-state vehicles under National LEV before MY2001.

that should be credited, such windfall credits could never be precisely quantified, given that the calculation would have to be based on predicting actions under circumstances that do not exist.

Balancing these factors, EPA has structured the National LEV program to provide a significant incentive for early introductions, while assuring some environmental benefit to offset any possible windfall credits. EPA believes it is appropriate to err on the side of environmental protectiveness here. Compensating for potential windfall credits will help ensure that the benefits of encouraging early introductions are not offset by increased emissions overall. Moreover, while manufacturers objected to any sort of adjustment to account for potential windfall credits, the opportunity to earn early reduction credits at all is not addressed in the MOUs initialed by the OTC States and manufacturers, and EPA does not believe that either party regards early reduction credits or limitations on such credits as important in their decisions whether to participate in the program.

It would be impossible to identify which early introductions would have occurred even in the absence of the credit incentive. Rather, the most straightforward way to address the possibility of windfall credits is to discount all early reduction credits by a set percentage. This discount rate must be low enough to retain the marginal incentive to generate early reduction credits. Recognizing that precision is impossible here, EPA has attempted to pick a discount rate that reflects some real environmental benefit, but does not so devalue early reduction credits as to discourage manufacturers from generating them. On the basis of these criteria, EPA has selected a ten percent discount rate to be applied on a one-time basis to all credits earned in the 37 States region before MY2001. The ten percent discount rate should not provide a significant disincentive to manufacturers generating credits and it is in line with comparable provisions in other EPA programs.<sup>38</sup> EPA believes that this figure appropriately balances the goals of preserving the expected emissions reductions from National LEV, with a margin of error to protect the environment, and encouraging early

<sup>38</sup> For example, the Open Market Trading Rule, 60 FR 39668 (August 3, 1995) and 60 FR 44290 (Aug. 25, 1995) proposed a ten percent discount rate for all generated credits. This NPRM has been turned into guidance that will be issued to the states. See also the heavy duty averaging, banking, and trading program, which requires that any debits be made up at a ratio of 1.2 to 1, equivalent to a 20 percent discount on the credits being applied to make up the debits. See 40 CFR 86.094-15.

introduction of cleaner National LEV vehicles into the 37 States.

Today's action also clarifies EPA's proposal to allow low volume manufacturers to generate credits in the OTR prior to MY2001, when they would first be required to meet the fleet average NMOG standards. In the NPRM, EPA stated that these manufacturers could generate and sell credits in the OTR. EPA is expanding this requirement to allow low volume manufacturers also to bank and then use these credits beginning in MY2001. These credits would be discounted in the same manner as credits generated in the OTR by the other manufacturers. Unlike the early reduction credits in the 37 States, these early reduction credits could be used prior to MY2001, if transferred to other manufacturers.

*c. Enforcement of Fleet Average NMOG Credit Program.* As described in the proposal (60 FR 52750), compliance for vehicles subject to the fleet average NMOG standards will be evaluated in two ways. First, compliance of an individual vehicle with its certified NMOG tailpipe emissions levels will be determined and enforced in the same manner as compliance with any other emission standard. Each vehicle must meet its certified emission standards as determined and enforced through certification, SEA, in-use testing, and, for certain vehicles, testing performed under some California assembly-line programs.<sup>39</sup> Second, manufacturers must show that they meet the applicable fleet average NMOG standards. Manufacturers can either report a fleet average NMOG level meeting the applicable fleet average NMOG standard or present to EPA enough credits to offset any debits by the reporting deadline after the end of the model year following the model year in which the debits were incurred.

The fleet average NMOG credit program will be implemented and enforced through the certificate of conformity, which the manufacturer will be required to obtain under 40 CFR 86.1721-97 for all vehicles prior to their introduction into commerce. The certificate for each vehicle will require the vehicle to meet the applicable National LEV tailpipe and related emission standards, and will be conditioned on the manufacturer demonstrating compliance with the applicable fleet average NMOG standard within the required time frame. If a manufacturer fails to meet this condition, the vehicles causing the fleet average NMOG violation will be

<sup>39</sup> See section VI.C.1. of this rulemaking for a discussion on the California Quality Audit Program.

considered not covered by the certificate applicable to the engine family. EPA will then assess penalties on an individual vehicle basis for sale of vehicles not covered by a certificate.

If a manufacturer does not equalize its debits within the specified time period, EPA will calculate the number of noncomplying vehicles by dividing the total amount of debits for the model year by the fleet average NMOG requirement applicable for the model year and averaging set in which the debits were first incurred. In the case where both averaging sets in a region are in deficit, any applicable credits would first be allocated to the averaging sets as determined by the manufacturer; then, the number of noncomplying vehicles would be calculated using the revised debit values. Each noncomplying vehicle will be deemed to be in violation of the condition on its certificate. EPA will determine these vehicles by designating vehicles in those engine families with the highest certification NMOG emission values first and continuing until a number of vehicles equal to the calculated number of noncomplying vehicles as determined above is reached. In the instance where only a portion of vehicles in a particular engine family would be deemed noncomplying vehicles, EPA will determine the actual noncomplying vehicles by counting backwards from the last vehicle produced in that engine family.<sup>40</sup> Manufacturers will be liable for penalties for each vehicle sold not covered by a certificate. This is a one-time violation and would not subject the manufacturer to further penalties related to the sale of those vehicles without a certificate for failing to meet the fleet average NMOG standard.<sup>41</sup> Because a violation has not occurred until a manufacturer fails to make up outstanding debits within the required time period, for purposes of assessing the time of the violation and the tolling of the Statute of Limitations, the violation occurs upon the due date for filing the annual report for the model

<sup>40</sup> For example, if the noncompliance calculation determined that only 100 vehicles of a 1000 vehicle engine family contributed to the debit situation, then EPA will designate the last 100 vehicles produced as the actual vehicles sold in violation of the condition of their certificates.

<sup>41</sup> Those vehicles, as any other vehicles, would still be subject to a federal recall action under section 207(c) of the CAA if EPA found they did not meet their certification standards in use, but that would be unrelated to the lack of coverage by a certificate at the time of sale. For purposes of any in-use enforcement action, the vehicles will be held to the certification standards stated in the certificate that would have covered the vehicles but for the violation of the condition on the certificate.

year after the model year in which the manufacturer generated the debits.

In the NPRM, EPA took comment on whether manufacturers should automatically be required to make up any outstanding debits, even if the manufacturer would also be subject to penalties in an enforcement action for failure to make up the debits within the required time period. Such an approach is exemplified in the acid rain trading program under Title IV of the Act. In general, EPA believes that enforcement of an emissions trading program should be structured to hold the environment harmless for any violations. A trading approach provides manufacturers additional flexibility and lower costs for compliance with a given standard. It is important that this flexibility does not undercut the expected environmental benefits.<sup>42</sup> EPA believes that requiring manufacturers to offset any debits, in addition to paying a penalty, is the best means of ensuring that the environmental benefits of an emissions trading program are maintained.

However, EPA believes an approach different from the proposed approach is appropriate here. While there will be strong incentives for manufacturers to make up outstanding debits, as discussed below, debits will not continue to roll over automatically until they are made up. Instead, EPA will assess whether a manufacturer met the fleet average NMOG requirement for each model year, based on whether the manufacturer offset its debits for the model year by the deadline.

There are several reasons why EPA believes this alternative approach is appropriate under the particular circumstances of National LEV. First, because National LEV is a voluntary program, EPA cannot impose provisions that would preclude the parties from agreeing to the program. The motor vehicle manufacturers have indicated that it would be unacceptable to continually roll over outstanding debits into the next year's balance, in addition to making them subject to penalties for failure to make up the debits on time. Second, EPA is confident that the National LEV program will meet the statutory requirements for emissions reductions from motor vehicles, even if manufacturers are not automatically required to make up debits, because National LEV will produce emissions reductions substantially beyond those required by title II of the CAA. Third, not rolling over debits will not affect the

relative quantity of emissions reductions from National LEV compared to those that would be produced by OTC state-by-state adoption of CAL LEV programs because CAL LEV also is not structured to require that manufacturers make up debits automatically.

Finally, EPA believes that its current enforcement authority provides strong incentives for manufacturers to remedy the environmental harm by making up debits. If the Agency determines that an enforcement action is appropriate, EPA would have some discretion in choosing the appropriate penalties. The sale of vehicles not covered by a certificate is a violation under CAA section 203(a). Section 205 authorizes penalties of up to \$25,000 per vehicle. The applicable penalties are listed in section 205(a) of the Act. Among the statutory penalty factors listed in section 205 is "action taken to remedy the violation," which EPA would take into account in determining the ultimate penalty to be assessed. The Agency also has broad injunctive relief authority under section 204, and other applicable injunctive relief provisions, which EPA would use if necessary to require that environmental harm be corrected.

Where a manufacturer has opted out of the program, the manufacturer will remain subject to an enforcement action for failure to make up any outstanding debits within the required time period. Such a manufacturer could make up debits through purchasing credits. If the manufacturer failed to make up the debits, but took other action to remedy the violation, EPA would take this into account in determining the ultimate penalty to be assessed, as discussed above. Failure to make up debits outstanding upon opt-out within the required time frame is a one-time violation.

EPA will also use the mechanism of conditioning the certificate to enforce the requirement that manufacturers not sell credits that they have not generated. If a manufacturer transferred invalid credits, the manufacturer would receive an equivalent number of debits, which the manufacturer would be required to offset by the reporting deadline for the same model year in which the invalid credits were generated. Failure to make up these debits within the required time period would be considered a violation of the condition on the certificate and nonconforming vehicles will not be covered by the certificate. EPA will identify the nonconforming vehicles in the same manner as described above.

When credits are transferred between manufacturers, EPA proposed generally to make both the provider and receiver of credits potentially liable for any

credit shortfall resulting from the trade. With today's action, EPA has determined that this is unnecessary in the context of the National LEV program. Instead, EPA will treat traded credits as presumptively valid, which is the approach California takes under its LEV program. Should the credit generator have erroneously sold credits that did not exist, the generator would be liable for making up the resulting deficits and, where appropriate, for violating the regulations governing generation and sale of credits. Where the credit generator provided valid credits, yet a credit shortfall occurred because the recipient held insufficient credits, no liability would attach to the generator. In instances of fraud, EPA retains the authority to enforce against any party to such fraud. EPA believes that the integrity of credit transactions will be sufficiently served by holding the party reporting a shortfall responsible for making up the deficit and retaining enforcement authority against parties improperly transferring credits.

This enforcement mechanism operates in a similar fashion to the comparable mechanism under the California LEV regulations. California focuses on the party reporting a shortfall of credits associated with its fleet average NMOG calculations. One difference in the California and National LEV fleet average NMOG enforcement schemes is that California provides for timely verification of credits while the National LEV program does not. This enables California generally to avoid instances where invalid credits are traded. The National LEV program accounts for this by not holding a credit recipient liable for purchasing invalid credits.

As stated in the discussion on multi-party liability for credit transactions in the Response to Comments document, EPA believes that an enforcement scheme that will charge a party for credits it sells and then generally will only look to the party reporting a shortfall is both fair and efficient in the circumstances of the National LEV program. This approach will create an incentive for credit generators to ensure that the credits they are trading are valid. Putting the burden on the credit generator places responsibility on the party that is best able to ensure the validity of credits through careful trading and record-keeping. This approach also enhances the viability of the market by reducing risks for credit buyers. The risk that credits might be invalidated and the buyer might be liable for a shortfall would create a disincentive for manufacturers to rely

<sup>42</sup> Even in the case where manufacturers make up debits after the deadline there is some cost to the environment from the additional delay in meeting the fleet average NMOG standard.

on credit purchases for compliance, particularly given the difficulty a buyer may have in independently validating credits. In cases where credits have changed hands more than once, enforcing against the credit generator removes any question between the various trading parties as to whose credits actually caused the debit situation and creates a simple enforcement scheme.

There are several aspects of National LEV that reduce the need for multi-party liability in this program. First, once EPA receives the annual compliance reports, it will be very simple to verify whether the credits were actually generated and assign responsibility for the shortfall. If EPA can easily assign responsibility and enforce against one party, there is less need to hold the other party potentially liable as well. Second, because verification is so straightforward, EPA expects few problems with sales of invalid credits. Giving buyers an incentive to help enforce the validity of credits adds relatively little under these circumstances, particularly given that access to production data would be necessary for validation and this is something manufacturers are unlikely to share with competitors. Third, the main benefit to retaining multi-party liability in the National LEV context would be to protect against a situation where one party sells invalid credits and then goes bankrupt, leaving no one liable for either penalties or compensation for the environmental harm. Given the stability of the motor vehicle manufacturing market, EPA believes this is a highly unlikely scenario. In this context, retaining multi-party liability simply to address such an eventuality is not worth the likely disincentive to trading. EPA does not believe, however, that this balancing of advantages and disadvantages would necessarily support the same decision for other differently situated trading programs.

*d. Reporting for Fleet Average NMOG Credit Program.* Manufacturers are required to prepare an annual report after the end of each model year to demonstrate compliance with the applicable fleet average NMOG standards. Manufacturers must submit the report no later than May 1 of the calendar year following the end of the given model year. Manufacturers must also report any credit transactions for the year as part of the annual report. EPA does not believe that more frequent reporting of trading actions, such as the California program requirement of immediate reporting of trades, is necessary or appropriate under the National LEV program. The only practical benefit to more frequent

reporting would be for a credit recipient to verify if credits had already been traded. But under the liability scheme described in today's action, the recipient would generally carry no liability if the credit generator sold it credits that were not available for sale. Thus, more frequent reporting is not necessary to protect the buyer or enforce against the generator in the event of a sale of invalid credits. EPA intends to develop an electronic reporting mechanism that is similar to California's format. The format for reporting fleet average NMOG data will be detailed in a Dear Manufacturer letter from EPA after the final regulations have been published.

The integrity of the proposed fleet average NMOG credit program depends on accurate record keeping and reporting by manufacturers, and effective tracking and auditing by EPA. If a manufacturer fails to maintain the required records, EPA may void the certificates for the affected vehicles ab initio. If a manufacturer violates reporting requirements, the manufacturer is subject to penalties of up to \$25,000 per day, as authorized by section 205 of the Clean Air Act.

In the NPRM, EPA proposed to allow manufacturers the opportunity for a hearing if the Agency decided to void a certificate as part of an enforcement action. EPA is including this language in the final rule, but is clarifying the scope of its application. A hearing would not be available for determination that certain vehicles were not covered by a certificate due to a violation of a condition of a certificate, such as an exceedance of the fleet average NMOG requirements. In this situation EPA is not suspending or revoking the certificate. Rather, EPA is applying a limitation included in granting the certificate to determine which vehicles the certificate covers. Moreover, if EPA brought an enforcement action against a manufacturer based on a determination that certain vehicles were not covered by a certificate when sold, such an action would provide the manufacturer an opportunity for a hearing at that juncture. However, if EPA voids a certificate ab initio, manufacturers would have an opportunity for a hearing on that action of voiding the certificate.

#### 4. Limits on Sale of Tier 1 Vehicles and TLEVs

As recommended by the OTC States and the manufacturers, today's rule contains two limits on the sale of TLEVs and Tier 1 vehicles in the OTC States after MY2000. First, the rule places a five percent cap on sales of Tier 1

vehicles and TLEVs in the NTR starting in MY2001. The industry-wide number of these LDVs and LLDTs sold in a model year in the NTR is limited to five percent of the total number of new National LEV motor vehicles sold in that model year in the NTR. Second, manufacturers may sell Tier 1 vehicles and TLEVs in the NTR after MY2000 only if the same engine families are certified and offered for sale in California as Tier 1 vehicles and TLEVs in the same model year. These requirements address concerns raised by some parties regarding whether National LEV would achieve NO<sub>x</sub> emissions equivalent to OTC LEV (and thus to OTC state-by-state adoption of CAL LEV programs). As discussed in greater detail in the NPRM (60 FR 52751(col.1)), the concern is that the higher fleet average NMOG standards under National LEV might allow manufacturers to sell relatively greater numbers of Tier 1 vehicles and TLEVs in the OTR than they could have sold under OTC state-by-state adoption of CAL LEV programs, which could have a disproportionate effect on NO<sub>x</sub> emissions. The final rule modifies the proposed limit on the sale of these vehicles in a few respects to simplify its administration.

As proposed, EPA would assess compliance with the five percent cap on the basis of the total sales of vehicles by all manufacturers in the NTR in a given model year.<sup>43</sup> If the industry-wide cap is exceeded, EPA would allocate responsibility for that exceedance among individual manufacturers whose sales of Tier 1 vehicles and TLEVs exceeded five percent of the number of vehicles in their individual NTR fleets. Each of these manufacturers would be responsible only for its pro rata share of the industry-wide exceedance, not for the amount by which it exceeded five percent of its own fleet. For example, assume the industry-wide five percent cap was exceeded by 20 vehicles, manufacturers A and B were the only ones who exceeded a manufacturer-specific five percent cap, manufacturer A exceeded five percent of its fleet by 100 vehicles, and manufacturer B exceeded five percent of its fleet by 300 vehicles. Manufacturer A would be responsible for five vehicles, while manufacturer B would be responsible for 15 vehicles.

Apart from the provision for industry-wide averaging to determine the total number of vehicles violating the five percent cap, this approach does not

<sup>43</sup>This total would not include vehicles sold by a manufacturer that had opted out of National LEV, regardless of whether EPA determined the opt-out to be valid.

otherwise provide for compliance through averaging, banking and trading. As discussed at length in the NPRM (60 FR 52751-52754), a trading system is extremely difficult to use to enforce an industry-wide violation. None of the commenters offered any suggestions as to a workable way to retain trading to meet the five percent cap agreed to by the OTC States and manufacturers. Nevertheless, the approach in the final rule maintains the most important aspect of flexibility for manufacturers in that it assesses compliance industry-wide and only holds individual manufacturers responsible for their pro rata share of the industry-wide exceedance.

Enforcement of the five percent cap will be delayed until the first full model year following a model year in which EPA notifies manufacturers that they have exceeded the industry-wide five percent cap. This ensures that manufacturers likely to sell Tier 1 vehicles and TLEVs in excess of five percent of their individual fleets will have warning that the industry as a whole may not be below the five percent cap. Those manufacturers will then be able to reduce their own percentage production of Tier 1 vehicles and TLEVs beginning in the following model year, which would be the first year in which EPA could enforce the five percent cap.

This delayed enforcement of the five percent cap substitutes for a trading approach by allowing manufacturers time to adjust their production after an industry-wide exceedance rather than protecting themselves prior to an industry-wide exceedance by purchasing credits. While this delayed enforcement approach has the potential to allow up to two years of exceedances of the five percent cap, EPA does not believe this is sufficient to affect the acceptability of emissions reductions from National LEV when compared to those that could be produced by OTC state-by-state adoption of CAL LEV programs. EPA believes that both the likelihood of an industry-wide exceedance and the emissions impact of such an exceedance, if it occurred, are very small. Moreover, the administrative burden of a trading program without delayed enforcement greatly outweighs the potential environmental benefits of the approach adopted here.

As proposed, low volume manufacturers are exempt from the five percent cap provisions. EPA recognizes that these manufacturers may lack the flexibility in their product line that would allow them to adjust the makeup of their fleet to meet this requirement. Also their small market share means that the potential contribution of

increased NO<sub>x</sub> emissions from these manufacturers would be insignificant.<sup>44</sup> Vehicles produced by low volume manufacturers will not be included in calculating the industry-wide total number of vehicles sold in the NTR or industry-wide compliance with the five percent cap.

Coupled with the five percent cap is a requirement that beginning in MY2001, manufacturers will be able to offer Tier 1 vehicles or TLEVs for sale in the NTR only if the same engine families are certified and offered for sale in California in the same model year.<sup>45</sup> This requirement applies to all manufacturers, including low volume manufacturers. This provision should reduce the likelihood that the industry will ever exceed the five percent cap by encouraging the same sales mix under National LEV and OTC state-by-state adoption of CAL LEV programs. To meet the tighter NMOG standards in California, manufacturers will need to produce a mix of engine families that includes relatively fewer Tier 1 vehicles and TLEVs but still meets consumer demand for a range of types of vehicles.<sup>46</sup> Because consumer demand for a given type of vehicle does not tend to vary widely by region, once limited to producing a certain number of Tier 1 and TLEV engine families for California, manufacturers are unlikely to sell a significantly different vehicle mix in the OTR. The National LEV provision for reduced reporting requirements for manufacturers with 100 percent LEV fleets provides an additional incentive for manufacturers not to produce any Tier 1 vehicles and TLEVs.

Both of these limits on sales of Tier 1 vehicles and TLEVs would be implemented and enforced in the same manner as the fleet average NMOG standards. The certificate for each Tier 1 vehicle and TLEV produced and offered for sale in the NTR in MY2001 and later model years would be conditioned on demonstrating compliance with the five percent cap provisions; it would also be conditioned on the manufacturer certifying and offering for sale the same engine families in California in the same model

<sup>44</sup> For example, in MY1994, low volume manufacturers accounted for less than 0.5 percent of the overall motor vehicle fleet.

<sup>45</sup> This requirement would not apply to a manufacturer supplying Tier 1 vehicles pursuant to an opt-out from National LEV that EPA had determined to be invalid during the period that the determination was undergoing legal challenge.

<sup>46</sup> The CARB fleet average NMOG standard for passenger cars for MY2001 is 0.070 g/mi, which is below the comparable NMOG standard for LEVs. Thus, a manufacturer will likely have to produce a fleet of mostly LEVs and ULEVs to meet this California requirement.

year. If a manufacturer failed to comply with these requirements, then each noncomplying vehicle would be deemed to be in violation of the certificate of conformity. For a violation of the five percent cap, the number of noncomplying vehicles would correspond to the manufacturer's pro rata share of the industry-wide exceedance. EPA would determine these noncomplying vehicles in the same manner as for violations of the fleet average NMOG standards, starting with vehicles in engine families with the highest certification NMOG values.

Manufacturers would not be required to prepare an annual report demonstrating compliance with the five percent cap provision because all relevant data will be provided to EPA under the requirements of the fleet average NMOG program. However, manufacturers would still be required to maintain accurate records and failure to do so could result in EPA voiding ab initio the certificates of the affected vehicles and imposing any other applicable penalties.

##### 5. Tailpipe Emissions Testing

This section discusses how exhaust emission standards will be measured for NLEVs during vehicle certification testing. To specify the exhaust emission standards that NLEVs must meet, it is necessary to specify the test procedure and fuel used to measure exhaust emissions. For the National LEV program, this is complicated by the fact that EPA has recently completed revisions to its test procedure used to measure exhaust emissions. 61 FR 54852 (October 22, 1996). CARB is also in the process of changing its test procedure. This section discusses how the National LEV program will be affected by the EPA and CARB changes to the FTP. This section also discusses the test fuel to be used for measuring National LEV exhaust emissions.

*a. Federal Test Procedure.* The FTP, as revised, is the vehicle test procedure that will be used by EPA and CARB to determine compliance of LDVs and LDTs with the conventional or "on-cycle" exhaust emission standards. EPA and CARB use the FTP to test vehicle emissions performance over a "typical" driving schedule, using a dynamometer to simulate actual road conditions. EPA recently revised the FTP to replicate actual driving patterns more accurately. In addition to requiring an equipment change to the existing FTP, the revisions add new "off-cycle" test sequences (Supplemental Federal Test Procedure or SFTP) and standards to control emissions under driving patterns not

tested under the old FTP.<sup>47</sup> This section discusses the revisions to the FTP and their ramifications for National LEV.

The FTP revisions have been under consideration for several years. As the Agency noted in the preamble to the National LEV proposal, EPA was pursuing changes to the FTP through a separate rulemaking under section 206(h) of the CAA, which requires EPA to "review and revise as necessary [the FTP] to insure that vehicles are tested under circumstances which reflect the actual current driving conditions under which motor vehicles are used. \* \* \*". After an extensive test program and review of available data, the Agency concluded in 1994 that modifications to the FTP were necessary. Shortcomings identified in the review included a poor representation of actual road load conditions by the standard FTP dynamometer and regimes of non-FTP or "off-cycle" driving whose absence from the existing FTP drive cycle (the Urban Dynamometer Driving Cycle or UDDS) had potentially significant emissions impacts.

EPA published a Revised FTP proposal on February 7, 1995 (60 FR 7404). Key elements of the proposal were an improved dynamometer specification, and new off-cycle requirements for aggressive driving and air conditioning emission standards, and a new Supplemental Federal Test Procedure (SFTP) for determining compliance with those standards. The only major change proposed for on-cycle compliance was the dynamometer revision (e.g., the UDDS itself was unmodified). The stringency of the proposed off-cycle emission standards was based on the technologies found in vehicles certified to the current, federal on-cycle (Tier 1) emission standards. A final rule implementing the SFTP was published on October 22, 1996. 61 FR 54852. EPA did not propose LEV-stringency off-cycle standards as part of its Revised FTP rulemaking or as part of the National LEV rulemaking.

EPA and CARB have coordinated closely their review of the FTP, their research efforts, and the development of their respective off-cycle policies. (The vehicle manufacturers have also contributed significant testing resources and technical analysis to the program.) CARB is likely to make changes identical to EPA's changes to the on-cycle test procedure. CARB also is likely to adopt off-cycle standards and requirements that it deems appropriate

for TLEVs, LEVs, and ULEVs. The American Automobile Manufacturers Association (AAMA), the Association of International Automobile Manufacturers (AIAM), and CARB have now reached an agreement regarding off-cycle emission standards for LEVs and ULEVs. The agreement to date is summarized in correspondence (available in the public docket for this rulemaking) between the auto manufacturers and CARB. That agreement centers upon establishing low-mileage (4,000 miles) emission standards to assure control of emissions from new motor vehicles using the off-cycle driving schedules, while relying on a revised FTP, as well as OBD II systems, to monitor deterioration of in-use emissions. The 4,000 mile standard for LEVs and ULEVs is believed to require controls significantly more stringent than would be required by applying the recently promulgated federal off-cycle standards. CARB released a public mailout on April 3, 1997, that details their proposed off-cycle emissions standards, and expects to submit a proposal to their Board in July of 1997. The auto manufacturers have concluded that the finalized CARB SFTP standards, if consistent with their agreement with CARB, are appropriate to extend to the National LEV program.

In the National LEV NPRM, EPA proposed to apply the Revised FTP (both on-cycle and off-cycle components), once it was finalized, to vehicles in the National LEV program. Further, the Agency stated its intent to harmonize National LEV requirements with any off-cycle FTP revisions that California subsequently adopts for its LEV program. The Agency received only one comment in response to the National LEV proposal on the interplay between the Revised FTP effort and the National LEV rule. That comment supported including the SFTP and the associated off-cycle emission standards in the Stable Standards.

EPA's treatment of the FTP in this final National LEV rule is consistent with the proposal. Changes to the light-duty test procedures promulgated in EPA's final Revised FTP rulemaking apply to NLEVs as well as to the rest of the light-duty fleet. Thus, the revised FTP will be used to determine compliance with the TLEV, LEV, and ULEV on-cycle exhaust standards set forth in IV.B.1. In addition, unless and until California adopts off-cycle standards for LEVs and ULEVs, all NLEV vehicles must meet the off-cycle exhaust standards recently adopted by EPA (40 CFR 86.000-8 and 40 CFR 86.000-9). EPA intends to take further comment in the SNPRM on what off-

cycle standards and phase-in should apply to all vehicle types in the National LEV program if California adopts off-cycle standards for LEVs and ULEVs. EPA intends to harmonize its off-cycle standards for LEVs and ULEVs with California once California adopts such standards. If the final CARB SFTP standards are consistent with the CARB/manufacturer agreement, EPA intends to propose to adopt the CARB 4,000 mile standard for LEVs and ULEVs under the NLEV program, which would probably make compliance with the recently promulgated federal off-cycle standards unnecessary for these vehicle types.

*b. Compliance Test Fuel.* EPA is today adopting the National LEV compliance fuel provisions as they were proposed. Manufacturers will determine their certification fuel specifications for exhaust testing of both petroleum and alternative fuel NLEVs according to California's certification fuel requirements. Those regulations currently include the option to certify gasoline TLEVs, LEVs, and ULEVs on either federal fuel or California Phase II reformulated gasoline. Tier 1 vehicles must continue to be certified on federal fuel. The approach to specifications for alternative fuels and the rationale for that approach are the same as given in the NPRM (50 FR 52755 (col. 3)).

Data presented by California and others during the adoption of California's LEV program emission standards show that the use of California Phase II gasoline will reduce vehicle emission levels during exhaust testing compared to testing using federal certification fuel, thus having a direct impact on the ability of manufacturers to meet the standards. In the NPRM, EPA stated a belief that it cannot allow the use of California Phase II gasoline to demonstrate compliance with Tier 1 standards because that would not demonstrate compliance with the mandatory federal standards, but solicited comment on this issue. EPA is finalizing its proposed requirement that federal fuel must be used to certify Tier 1 vehicles.

There are several logistical reasons to allow manufacturers to use California Phase II as a certification fuel in the National LEV program. Allowing use of the same certification fuel in the California and federal programs will reduce the manufacturers' cost of demonstrating compliance, while still ensuring that the CAA-mandated exhaust standards are met. Moreover, under OTC state adopted LEV programs, all the OTC States would be required to allow the use of California Phase II gasoline for emission compliance. Consequently, using California Phase II

<sup>47</sup> For purposes of this discussion, the FTP is the old on-cycle test procedure. The FTP, as revised, is the on-cycle test procedure with the new dynamometer. The SFTP is the test procedure for the off-cycle driving patterns.

gasoline for certification demonstrations in OTC States will not reduce the environmental benefits of National LEV relative to the benefits of OTC state-by-state adoption of CAL LEV programs.

The use of California Phase II gasoline for certification and compliance testing does not mean that in-use fuels will need to be changed to conform to the test fuel. In-use fuels, which are not being changed as a result of National LEV, are discussed later (section IV.B.7.).

*c. NMOG vs. NMHC.* Today's rule adopts California's NMOG measurement procedure to measure hydrocarbon (HC) emissions for the National LEV standards, as described in more detail in the NPRM (60 FR 52755). The measurement of oxygenated HC is more accurate under the NMOG procedures as compared to the current federal method. Moreover, vehicles that meet the TLEV, LEV, or ULEV NMOG standard will clearly be in compliance with the federal Tier 1 NMHC standard.

*d. Reactivity Adjustment Factors.* The National LEV program adopts California's approach of using RAFs to adjust vehicle emission test results to reflect differences in the impact on ozone formation between an alternative-fueled vehicle and a vehicle fueled with conventional gasoline. The reasons for using RAFs for alternative-fueled vehicles are described fully in the NPRM (60 FR 52756 (col. 1)). California has already developed RAFs for some fuel types—including California Phase II gasoline—and has a process in place to develop RAFs for fuels that do not yet have them. Additionally, California allows manufacturers to use this process to develop their own engine family-specific RAFs and RAFs for fuel types for which California has not yet developed them. In the National LEV program, the Agency will use the RAFs already adopted by California for alternative-fueled vehicles certifying to the National LEV standards, and intends to incorporate RAFs that California develops for other fuels, as California develops and adopts them. EPA will also allow manufacturers certifying to the National LEV standards to develop their own RAFs, subject to Agency approval, using the California process for RAF development.

EPA received comments both supporting and opposing the adoption of California's RAF provisions. The Agency has determined that the application of RAFs adopted in California for certification of vehicles to the National LEV standards on a nationwide basis, as proposed, is within the scope of EPA's authority under the CAA, and is reasonable and appropriate

to further the goal of harmonization of the federal and California motor vehicle emissions control programs. See the Response to Comments documents for further discussion.

#### 6. On-Board Diagnostics Systems Requirements

The National LEV program requires on-board emissions diagnostics systems that meet California's second phase OBD requirements (OBD II), except that compliance with the tampering protection provisions of the California OBD II regulations is not required. For reasons specified in the **Federal Register** notice of court decisions regarding Agency regulations,<sup>48</sup> the Agency has vacated and subsequently deleted OBD-related tampering protection requirements from the federal OBD regulations. In the National LEV proposal, EPA specifically excluded the anti-tampering provisions of the California OBD II requirements from the National LEV regulations. The Agency has maintained this approach in these final regulations. The incorporation of California OBD II into these regulations specifically excludes paragraph (d), the anti-tampering provisions (see Appendix XIII in 40 CFR part 86, paragraph (e)). Therefore National LEV carries no requirement that vehicles comply with the tampering protection provisions of the California OBD II regulations. With the exception of the additional provisions discussed in the following paragraph, the OBD requirements for National LEV program vehicles are finalized as they were proposed. For a discussion of the California OBD II requirements and the rationale for EPA's adoption of them, see the NPRM (60 FR 52755).

In response to comments received by EPA (see Response to Comments for additional detail), the Agency has added language to these final regulations specifying that all vehicles certified under this program must meet the requirements of sections 202(m) (4) and (5) of the CAA. Commenters asserted that, even if EPA were not to include the OBD II anti-tampering requirements with the National LEV regulations, EPA would, nevertheless, be in violation of CAA sections 202(m)(4) and 202(m)(5), should a vehicle be certified nationally that contained California's OBD II anti-tampering measures. As EPA is taking no action in this rulemaking that would change manufacturer obligations or options regarding the use of anti-tampering measures, EPA does not address this claim in this rulemaking. In a separate proceeding dealing with

California's request for a waiver of preemption for its OBD II program under section 209 of the Act, the Agency has considered the issue of whether a vehicle certified to all of California's OBD II requirements, including compliance with the tampering protection provisions of OBD II, is in violation of section 202 (m)(4) or (m)(5). (See Docket No. A-90-28, 61 FR 53371 (October 11, 1996)). However, EPA intends to ensure that no vehicle certified under the National LEV program violates sections 202(m) (4) or (5) of the Act. Thus, EPA has added language to the final regulations making clear that any manufacturer attempting to certify a vehicle under the National LEV program will not be permitted to do so if the vehicle violates sections 202(m) (4) or (5). Thus, if it is determined that California's tampering protection provisions violate sections 202(m) (4) or (5), vehicles with such equipment will not be permitted under the National LEV program.

EPA also received a comment stating that EPA's Service Information Availability (SIA) regulation (40 CFR 86.094-38(g)) will be circumvented by this rulemaking. However, the National LEV regulations do not circumvent EPA's SIA regulations. Such SIA regulations apply fully to all vehicles certified under the National LEV program, as is true for all part 86 regulations not specifically superseded by subpart R.

The commenter also stated that EPA should not allow states outside California to adopt California regulations, including OBD II. The CAA does not give EPA authority to prevent states from adopting California's regulations. To the contrary, the CAA specifically gives states the right to decide whether to adopt California's program. Under section 177, states have full authority to promulgate California emission standards and other procedures. Two states have had such regulations in effect for several years and four more have recently adopted such regulations. EPA has only an indirect role in this state process and cannot prevent any state from adopting California regulations. EPA notes that section 177 of the Act provides stringent guidelines for states that wish to implement California's emissions control standards: state standards must be identical to California standards; states may not cause the creation of a "third vehicle;" and states may not limit the manufacture or sale of a motor vehicle that has been certified as meeting California's standards. Thus, as long as California's anti-tampering provisions remain in place, states may

<sup>48</sup> 59 FR 51114 (October 7, 1994).

be somewhat constrained by CAA section 177 to accept California's anti-tampering requirements.

On the other hand, the National LEV program that EPA is approving today specifically excludes the anti-tampering requirements from its regulations, thus providing manufacturers with the ability not to include such provisions in their vehicles. It also contains specific language stating that all vehicles certified under this program must meet the requirements of CAA sections 202(m) (4) and (5). Thus, the National LEV program actually provides considerably more protection for the commenters than would the state LEV programs which the National LEV program would replace.

#### 7. In-Use Fuel

In the proposal, EPA reiterated a set of three principles agreed upon by representatives of the auto industry, some segments of the oil industry, and the OTC States:

(1) Adoption of the National LEV program does not impose unique gasoline requirements on any state. Gasoline specified for use by any state will have the same effect on the National LEV program as on the OTC LEV program.

(2) Testing is needed to evaluate the effects of non-California gasoline on emissions control systems.

(3) If testing results show a significant effect, EPA will conduct a multi-party process to resolve the issue without adversely affecting SIP credits or actual emission reductions when compared to OTC LEV using fuels available in the OTR or imposing obligations on manufacturers different from the obligations they would have had under OTC LEV.

One area where discussions have already started relates to current auto and oil industry studies that address, among other things, the possibility that changes in the malfunction indicator light (MIL) illumination criteria for National LEV on-board diagnostics systems might be appropriate. Provided that the above criteria were met and the manufacturers agreed, the National LEV program would not preclude a future EPA rulemaking to change the MIL illumination criteria for the OBD systems. EPA has recently issued a discussion paper summarizing its current understanding of sulfur effects on OBD catalyst monitoring on LEVs and will continue working with interested parties in developing a resolution of this issue.<sup>49</sup>

<sup>49</sup> OBD & Sulfur White Paper, March 1997, (Docket No. A-95-26, IV-B-06).

The Agency's approach to in-use fuels for the National LEV program remains essentially the same as was presented in the proposal. EPA is adopting the National LEV program on the condition that it does not require a change in federal fuel regulations. Thus, section 86.1705-97(g)(5) requires auto manufacturers to design National LEV vehicles to operate on fuels that are otherwise required under applicable federal regulations.

EPA retains its authority to adopt new fuel requirements for reasons other than the sale or design of vehicles sold because of the National LEV program.

#### 8. Hybrid Electric Vehicles

The National LEV program adopts California's approach to regulating emissions from HEVs, which is discussed fully in the NPRM (60 FR 52756). HEVs are powered by batteries, but also use a small combustion engine for additional range. The emissions from HEVs range from none, when running off the battery, to levels similar to TLEVs, when using the combustion engine. For certification, HEVs will be tested with the engine operating at worst case conditions over the standard test cycle. An HEV must meet the TLEV, LEV, or ULEV emission standards based on emissions from its combustion engine. This ensures that in the worst case situation, HEVs will still comply with the least stringent set of LEV standards. However, some HEVs will have to demonstrate compliance with different, somewhat less stringent, useful life standards for certification, depending upon the type of HEV being certified. In addition, an HEV's contribution to the manufacturer's NMOG fleet average will be calculated to account for the emissions benefits of its battery-powered operations. This approach is consistent with California's methodology for calculating a manufacturer's compliance with the NMOG fleet average standards.

The Agency is also adopting California's definitions of the following terms: electric vehicle, hybrid electric vehicle, series hybrid electric vehicle, and parallel hybrid electric vehicle. One commenter on the NPRM stated that these definitions are unnecessarily narrow and could adversely affect the United States fuel cell industry. The Agency acknowledges the commenter's concerns, but believes that the vehicle for change in this case rests with CARB. CARB staff have acknowledged the need to amend the current regulations as they pertain to HEVs given the rapid advancement of technology in the last five years, and are consequently preparing to revise and update their

program to deal with these types of vehicles more appropriately. Although the timing of CARB's final action is not certain, EPA intends to make changes to the National LEV regulations to incorporate CARB's finalized actions if and when it becomes appropriate to do so. The Response to Comments document contains additional discussion regarding this issue.

#### C. Low Volume and Small Volume Manufacturers

Today's rule adopts a new term, "low volume manufacturer," to mean a manufacturer that meets the California definition of a small volume manufacturer<sup>50</sup> and that has no more than 40,000<sup>51</sup> sales nationwide of LDVs and LLDTs per model year, based on the average sales over the last three model years. This definition will be used solely to determine the NMOG fleet average applicable to low volume manufacturers and whether a manufacturer must comply with the five percent cap on OTR sales of Tier 1 vehicles and TLEVs. Under today's rule, low volume manufacturers will not have to meet an NMOG average until MY2001, when they must meet an NMOG average of 0.075 g/mi in both the NTR and the 37 States trading regions. This treatment is consistent with the California LEV program's treatment of these manufacturers. The Agency will continue to apply the federal small volume manufacturer provisions, which provide relief from emission data and durability showings and reduce the amount of information required to be submitted, to small volume manufacturers (as defined in current federal regulations). Further explanation of and rationale for the low volume manufacturer provisions are provided in the NPRM (60 FR 52756-52757).

#### D. Legal Authority

EPA has statutory authority to promulgate the National LEV standards under sections 202(a) and 301(a) of the CAA, as discussed more fully in the NPRM (60 FR 52757-52758). Section 202(a)(1) directs the Administrator to prescribe standards for control of air pollutant emissions from motor vehicles. This is an affirmative grant of

<sup>50</sup> California defines a small-volume manufacturer as a manufacturer with sales in California of no more than 3000 vehicles that meet the CARB definitions of passenger cars, light-duty trucks, and medium-duty vehicles per model year, based on the average sales over the last three model years.

<sup>51</sup> EPA had requested comment on the appropriate level for a national annual sales limit. The Agency chose 40,000 as the level that will preclude post-NLEV attempts to "game" the program while still allowing manufacturers to proceed with current vehicle distribution decisions.

authority to the Administrator that allows her to set voluntary, as well as mandatory, motor vehicle air pollution standards. Today's voluntary standards are not precluded by section 202(b)(1)(C), which states that it is the intent of Congress that EPA not modify the mandatory "Tier 1" standards, promulgated under section 202(g), prior to MY2004. In addition, section 301(a) authorizes the Administrator to promulgate regulations necessary to carry out her functions under the Act. The voluntary standards proposed here fall within the Administrator's duty to implement the broad air pollution reduction purposes of the Act.

Section 202(a)(1) gives the Administrator authority to promulgate regulatory standards for emissions of air pollutants from motor vehicles. This subsection provides:

[T]he Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class \* \* \* of new motor vehicles \* \* \*, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

This is a broad grant of authority to the Administrator to prescribe standards, including voluntary standards, to regulate emissions that contribute to air pollution. Section 202(a) of the Act expressly allows—in fact, it requires—EPA to promulgate emission standards for motor vehicles. The language of section 202(a) does not indicate that such standards be limited to mandatory standards.

The National LEV program will regulate HCs, CO and NO<sub>x</sub>. These three pollutants are among the most significant contributors to air pollution in the United States and, thus, "may reasonably be anticipated to endanger public health or welfare." The strong CAA focus on controlling these pollutants indicates Congress' concern about the harm they cause and the need for their reduction.

Section 202(a) authorizes EPA to issue the fleet average NMOG standard (and the five percent cap on Tier 1 and TLEV sales in the OTR), as well as the emission standards individual vehicles must meet. That section's reference to "standards applicable to the emission of any air pollutant" includes requirements that are applicable to fleets of vehicles. "Standards" does not merely mean the emission levels to which individual vehicles are tested. For example, section 202(g) requires the Agency to promulgate "standards which provide that emissions from a

percentage of each manufacturer's sales volume of such vehicles and trucks shall comply [with specified levels]." Thus, the Agency may promulgate standards, such as fleet averages, phase-ins, and averaging, banking, and trading programs, that are fulfilled through compliance over an entire fleet, or a portion thereof, rather than through compliance by individual vehicles.

The Administrator's authority under section 202(a)(1) is limited only by the requirement that such standards be "in accordance with the provisions of" section 202. As discussed in the NPRM, nothing in section 202 bars EPA from adopting emission standards that would be binding if and only if a manufacturer were to opt into them. Nor is any provision of section 202 inconsistent with a voluntary approach, so as to implicitly bar EPA's action.

The voluntary standards do not conflict with section 202(b)(1)(C), which prohibits EPA from changing the Tier 1 emissions standards prior to MY2004. Section 202(b)(1)(C) states that "[i]t is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i) shall not be modified by the Administrator \* \* \* for any model year before the model year 2004." This language indicates Congress' intent to prohibit modification of the mandatory federal Tier 1 standards for NMHC, NO<sub>x</sub>, CO and PM. The promulgation of National LEV would not modify the Tier 1 standards because the program merely creates a set of voluntary standards, authorized under section 202(a), that manufacturers are permitted, but not required, to accept. EPA would not be modifying the Tier 1 standards itself. The Tier 1 standards will remain in effect, but manufacturers could choose to meet them by opting into National LEV. For manufacturers that do not opt into National LEV, the Tier 1 standards will be fully applicable. Congress did not intend to prevent manufacturers from voluntarily agreeing to meet reduced emission standards.

Some comments state that section 202(b)(1)(C) does not distinguish between voluntary and mandatory standards. However, such comments are inapposite. Section 202(b)(1)(C) does not prevent voluntary standards; on the contrary, it merely prohibits modifications to the Tier 1 standards. Since the National LEV program does not modify the mandatory Tier 1 standards, which remain fully effective, it is not prohibited by section 202(b)(1)(C). In fact, though the court in *Virginia v. EPA*, No. 95-1163 (D.C. Cir. March 11, 1997), found that section 202(b)(1)(C) forbids EPA from

"requir[ing], mandat[ing], order[ing], or impos[ing] conditions demanding that any state enact particular motor vehicle emission standards," *slip op.* at 32, the court specifically declined to make any determinations regarding the proposed National LEV program, noting that the "program is voluntary," *slip op.* at 10, n.4. This language implicitly distinguishes the National LEV program from the mandated program struck down in that case.

Moreover, the voluntary standards approach does not violate the intent of section 202(b)(1)(C) because it would expand, not restrict, motor vehicle manufacturers' options. Congress passed section 202(b)(1)(C) to protect manufacturers from EPA actions mandating a more restrictive national motor vehicle emissions program. However, in the context of the states' adoption of California LEV programs, these voluntary regulations actually have the effect of allowing manufacturers more flexibility in meeting their legal requirements. Were the voluntary standards program not promulgated, manufacturers would have to meet state LEV programs in the Northeast. The promulgation of the voluntary standards provides manufacturers with another method of meeting emission requirements in the Northeast. It would be an absurd result for section 202(b)(1)(C), which was enacted to protect manufacturers from regulations requiring tighter emission standards, to be interpreted to prevent manufacturers from volunteering into a program that would relieve them from meeting state regulations requiring such tighter standards.

Regarding comments that parties other than manufacturers are affected by the National LEV program, EPA's authority to require automobiles to meet emissions requirements under section 202(a) is directed towards automobile manufacturers. Though other parties may be indirectly affected by regulations promulgated under section 202, only manufacturers are directed to act in a certain manner by these regulations. Manufacturers are, of course, always permitted to build vehicles that meet a more stringent standard. In fact, manufacturers currently produce many vehicles that meet California's emission standards (50-state vehicle families). The effect of the National LEV program on other parties is no different than the effect on such parties if a manufacturer decided, in the absence of this program, to build vehicles to more stringent standards. The decision as to what emissions level a vehicle will meet is the choice of the

manufacturer based on marketing and other business decisions.

Moreover, this national emissions program creates significant benefits to consumers throughout the nation. Numerous states throughout the nation contain areas that are not in attainment with the National Ambient Air Quality Standard for ozone. Reductions in other pollutants also help produce cleaner air in areas throughout the nation regardless of their ozone status. Congress recognized that a central national program for control of emissions from automobiles is the best way to manage emissions from new motor vehicles. This is why Congress specifically preempted states from promulgating their own emission reduction programs for new motor vehicles in section 209 of the Act. The only exception in the Act is for California, which has special environmental concerns that are explicitly recognized by Congress. Other states may only use the federal auto emissions program or standards identical to California's standards. Manufacturers have stated, in fact, that even this limited ability of individual states to "piggyback" on California's regulations can cause significant commerce and cost concerns. Thus, the federal National LEV program appears to be consistent with the intent of Congress to encourage consistent vehicle regulations throughout the United States.

Section 301(a) provides a further source of EPA authority to promulgate the voluntary standards. Section 301(a) authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter." The primary purpose of the CAA is to protect and enhance the quality of the Nation's air resources by reducing air pollution. Controlling emissions from mobile sources is a key means for achieving the Act's purpose, and Congress recognized this in enacting the mobile source provisions. In addition, in numerous places throughout the Act, Congress demonstrated its concern that these goals be achieved in an efficient and cost-effective manner, minimizing the costs of air pollution control to the extent possible. In promulgating these voluntary standards, the Administrator is advancing the basic pollution reduction goals of the CAA in a manner that supports state efforts and is relatively cost-effective compared to OTC state-by-state adoption of CAL LEV programs. Because the decision to be subject to these standards is voluntary, EPA is simply providing an opportunity for an alternate means of compliance,

rather than mandating new requirements for manufacturers. These actions are consistent with section 202 and the rest of the Act, and are well within the Agency's broad authority under section 301(a).

#### *E. Enforceability and Prohibited Acts*

As discussed in the NPRM, once manufacturers have opted into the voluntary program, the program will become fully enforceable against them. Manufacturers will be liable for compliance with these regulations to the same extent they are liable for compliance with other federal motor vehicle regulations. The manufacturers will have to comply with virtually the same testing regime (certification, SEA, and in-use recall testing) and the same warranty requirements as for other standards. Any manufacturer that has opted into the program and subsequently fails to comply with the requirements of the program will be subject to sanctions under sections 203, 204 and 205 of the Act.

Manufacturers and other violators do not have a defense regarding the applicability of these sections to the voluntary program because such applicability is explicitly found in the regulations. Under section 307(b), any challenge to the National LEV provisions must be made within 60 days of publication of the final rule. Failure to challenge these regulations within the 60 day period for judicial review will prevent any person from subsequently challenging the enforceability of these regulations. In addition, in their opt-in notifications, manufacturers will have committed not to challenge EPA's legal authority to establish and enforce the National LEV program, and to seek to certify vehicles only in compliance with the National LEV requirements.

#### **V. National LEV Will Produce Creditable Emissions Reductions**

The National LEV NPRM included an extensive discussion of the criteria for National LEV to be an "acceptable LEV-equivalent program" for purposes of satisfying the OTC LEV SIP call. In light of the OTC LEV court decision invalidating the OTC SIP call (see III.C.3. above), there is no longer any federal legal requirement for National LEV to be an acceptable LEV-equivalent program. Nevertheless, it is still useful to look at the factors that EPA proposed to consider in making its determination. These factors bear on whether National LEV will be acceptable to both the OTC States and the manufacturers, and whether EPA will be able to grant states SIP credits for National LEV.

EPA proposed to define an acceptable LEV-equivalent program as a program that (1) would achieve VOC and NO<sub>x</sub> emissions reductions from mobile sources in the OTR equivalent to or greater than those that would be achieved by OTC LEV, and (2) would be enforceable. It is still important for EPA to consider these factors in promulgating the National LEV program, although the factors now have a different legal significance. The first criterion, emissions equivalency, is no longer a legal requirement. Nonetheless, EPA anticipates that when the OTC States decide whether to commit to National LEV, they will be interested in whether National LEV would achieve emissions reductions equivalent to the reductions that the OTC States would achieve absent National LEV. The second criterion, enforceability, retains legal significance; for EPA to credit states for SIP purposes with emissions reductions from National LEV, National LEV must be enforceable for its anticipated duration.

As to the first criterion, EPA today finds that National LEV, as set forth in today's rule, and OTC LEV, as set forth in the OTC LEV SIP call, would produce equivalent VOC and NO<sub>x</sub> emissions reductions. With respect to the second criterion, EPA finds that National LEV is enforceable with respect to the elements of the program that are completed in this rule. In promulgating the final outstanding provisions of National LEV for OTC State commitments and related issues, EPA will have to ensure that the complete program is adequately enforceable for states to rely on National LEV for emissions reductions and for EPA to grant states SIP credits on this basis.

This rule also establishes the criteria for a subsequent finding that National LEV is in effect. Once manufacturers have opted into and the OTC States have committed to National LEV, if the criteria for an in-effect finding are met, EPA will find that the program is in effect and will publish that finding in a **Federal Register** notice. Once EPA has found National LEV in effect, the National LEV emissions standards will be enforceable against covered manufacturers for the duration of the program.<sup>52</sup>

<sup>52</sup> As discussed in the proposal, a number of parties have suggested that advancing motor vehicle pollution control technology is an important benefit of OTC LEV and should be a criterion for determining whether National LEV is an acceptable LEV-equivalent program. Although EPA agrees that advancing technology is an important policy goal, and EPA believes that the National LEV program could be a part of an agreement that would provide important opportunities to promote ATVs, the

### A. Emissions Reductions From National LEV

There is no longer any federal legal requirement for the emission reductions from National LEV to be equivalent to those from OTC LEV. Nevertheless, to help the parties evaluate the relative merits of National LEV compared to OTC state-by-state adoption of the CAL LEV program, EPA is here presenting its

regulatory portion of the National LEV program does not address ATVs, EPA does not believe that advancing technology is or should be a legally-required criterion for approval of a LEV-equivalent program, and given the court decision invalidating the OTC LEV SIP call, there is no longer any legal requirement for National LEV to be a LEV-equivalent program. *Virginia v. EPA*, No. 95-1163 (D.C. Cir. March 11, 1997). Nevertheless, EPA recognizes that including some advanced technology component is important for all the parties to reach agreement on an MOU and could provide additional environmental benefits beyond emissions reduction equivalency.

To meet the parties' interests in promoting the development of ATVs, the auto manufacturers and the OTC States had agreed on language for an "ATV component," which was to be included as an attachment to the MOV they were negotiating if they were to finalize that agreement. EPA supports the approach the OTC States and auto manufacturers have been discussing to introduce and establish ATVs in the OTR and urges the parties to complete those efforts.

The ATV component that the OTC States and auto manufacturers included in their initialed MOUs is a unique agreement that would use an on-going, cooperative relationship to focus on shared visions, commitments and responsibilities. The parties would identify and address the means to achieve a viable ATV market, including infrastructure development, vehicle technology improvements, and incentive programs. The ATV component would rely on California's program to force technology development, and would ensure that technology takes hold in the OTR by having the parties jointly identify vehicle sales estimates and then work in an integrated manner to develop and execute the tasks necessary to establish and maintain a sustainable, viable market for ATVs at the retail level. The ATV component anticipates that OTC States, major motor vehicle manufacturers, other states, EPA, the Department of Energy, fuel providers, converters, fleet operators, and other manufacturers of specialty motor vehicles would each have roles to play to facilitate the introduction of ATVs. The ATV component presents the parties with an important opportunity to show that government/industry partnerships can achieve important environmental benefits and do so in a way that provides the parties with greater flexibility, while still holding them responsible for achieving the end goal.

The ATV component defines an ATV as a vehicle that is certified by CARB for sale in California or certified by EPA for sale outside of California and that is (1) a dual-fuel, bi-fuel, or dedicated alternatively fueled vehicle certified as a TLEV or more stringent when operated on the alternative fuel, (2) certified as a ULEV or ILEV using any fuel, or (3) a dedicated electric vehicle or HEV.

EPA would work with each state individually to determine the appropriate SIP credit for the ATV component once the program is implemented. As ATVs are bought in individual states, EPA and the state would be able to calculate the emissions benefits for the life of the ATVs. In addition, EPA would also work with states to determine whether and what SIP credit is appropriate for specific measures (such as commitments to buy a specified number of ATVs).

conclusion that the NO<sub>x</sub> and VOC emissions reductions from new motor vehicles within the OTR under National LEV would be equivalent to those produced by each OTC State's adoption of the CAL LEV program within the timeframe provided by the OTC LEV SIP call, based on EPA's modeling of the two programs. All of EPA's analyses of this issue lead to the same conclusion: given current assumptions about future vehicle performance and given the best currently available information about the migration of people and vehicles, it is reasonable to conclude that the NO<sub>x</sub> and VOC emissions benefits in the OTR of the National LEV program and each OTC State's adoption of the CAL LEV program are essentially equivalent. EPA has reviewed the comments on equivalency of the two approaches and continues to believe that EPA's analyses and conclusion are correct. More detailed discussions of EPA's approach to the modeling and the results and responses to specific comments are presented in the NPRM (60 FR 52759-52760), memoranda to the Subcommittee cited in the NPRM, the RIA for the OTC LEV final rule and for this final rule, and the Response to Comments document for this final rule.

To date, all of EPA's analysis of this issue has compared National LEV with OTC LEV, which presumes that every OTC State would adopt the CAL LEV program effective MY1999. Because the discussion below presents the results of this analysis, and because OTC LEV is simply shorthand for adoption of CAL LEV by each OTC State within the timeframe specified in the OTC LEV SIP call, the discussion below continues to reference the equivalence of National LEV and OTC LEV. Although the two approaches as implemented would likely have different start dates than what EPA has modeled, EPA does not believe that will undermine the finding that National LEV would produce acceptable emission reductions as compared to OTC state-by-state adoption of CAL LEV. EPA believes it is unrealistic for National LEV to start with MY1997, but it is also impossible for most OTC States to have CAL LEV programs effective MY1999. Thus, both programs would likely be implemented with start dates later than what was modeled. In the SNPRM, EPA will discuss the relative emissions effects of these changed circumstances. Nonetheless, EPA's conclusion that the two programs as designed produce equivalent emissions in the OTR is still useful information. EPA believes that the underlying modelling contains valid assumptions regarding the potential

emissions reductions from a national versus a regional approach to motor vehicle emission control. Thus, EPA's basic modelling approach remains applicable, regardless of any changes in program start dates. Also, EPA's equivalency conclusion provides a baseline for any subsequent reevaluations of the relative benefits of the two approaches; as long as any changes in start dates do not disproportionately reduce the emissions benefits from National LEV, National LEV would continue to reduce emissions in the OTR at least equivalent to the emissions that would be reduced by OTC state-by-state adoption of CAL LEV. This information will be important to OTC States as they decide whether to commit to accept National LEV in lieu of a State CAL LEV program.

Table 7 contains the results of EPA's current analysis of the comparative emissions reductions, as presented in the RIA. This analysis includes the effects of vehicle migration, as discussed below. The OTC LEV case shown here assumes that a ZEV sales mandate exists only in states that have already adopted this mandate (and that it exists at the level specified in the states' regulations that were adopted as of September, 1995).<sup>53</sup> However, even if it is assumed that there are ZEV sales mandates throughout the OTR at these same levels, it does not result in a change in EPA's conclusion that the emissions benefits of the OTC LEV program, including ZEV mandates in all OTC States, and the National LEV program are essentially equivalent.

TABLE 7.—OZONE SEASON WEEKDAY EMISSIONS FOR HIGHWAY VEHICLES IN THE OTR (TONS/DAY)

Year	Pollutant	OTC LEV	National LEV
2005 ....	NMOG	1,491	1,483
	NO <sub>x</sub>	2,385	2,389
2007 ....	NMOG	1,361	1,353
	NO <sub>x</sub>	2,218	2,212
2015 ....	NMOG	1,152	1,144
	NO <sub>x</sub>	1,943	1,894

Two factors would clearly be most important to the equivalency determination. As discussed in section IV.A.3., the National LEV program was designed to begin in the OTR with MY1997, two years earlier than the OTC LEV program was required to begin. In addition, beginning with MY2001, vehicles that migrate into the OTR from

<sup>53</sup>The modeling was essentially completed prior to CARB's change to its ZEV mandate regulations, so the modeling is based on ZEV mandates as they existed prior to CARB's changes.

other states would be substantially cleaner under the National LEV program than under the OTC LEV program because the National LEV program applies nationally. For the National LEV program to show equivalent emissions reductions to the OTC LEV program, these two factors would have to outweigh the additional benefits attributable to the OTC LEV program due to its lower fleet average NMOG standard.

EPA's analysis indicates that, in comparing National LEV starting in 1997 with OTC LEV starting in 1999, the impact of the earlier start date for the National LEV program was not enough by itself to compensate for National LEV's higher fleet average NMOG standard, except in the earlier years of the program. This analysis is based on existing EPA models and standard assumptions about the future performance of vehicles under both programs.

The effects of vehicle migration are more difficult to assess. Because actual state-by-state vehicle migration data were not available, EPA used human migration data as a surrogate. Using state-by-state human migration data from the Internal Revenue Service, EPA estimated the annual migration rate of people into and out of the OTR. Assuming that vehicles migrate at the same rate as people, EPA then constructed a simple model to determine what percentage of vehicles in the OTR vehicle fleet in any year would have been originally sold outside the OTR, taking into account annual in and out migration rates as well as motor vehicle scrappage rates. Using this approach, EPA determined that approximately 6.5 percent of the motor vehicle fleet in the OTR originated outside the OTR. While a number of commenters questioned EPA's approach to assessing the impact of migration, none presented an alternative basis for making this assessment or data indicating that EPA's assessment is incorrect. When the National LEV and OTC LEV programs are compared including this migration assumption, the emissions reductions associated with the two programs are equivalent.

The OTC States and auto manufacturers had agreed that EPA should periodically reevaluate the equivalency of National LEV and OTC LEV. Because equivalency with OTC LEV is no longer a legal criterion for National LEV, it is not clear that such a periodic reevaluation is still necessary. EPA plans to take comment on this issue in the SNPRM on the issue of OTC State commitments to the program. The initialled MOUs provide

that at least every three years, or pursuant to an OTC request, EPA would perform a modeling evaluation of the emissions reductions of National LEV compared to OTC LEV. This periodic evaluation would rely on the mobile source emissions model (MOBILE5a) used in the original equivalency determination, unless the OTC States, manufacturers, and EPA agreed to use an updated methodology. The initialled MOUs further provide that EPA would assess whether National LEV provides emissions benefits equivalent to the benefits identified in the original OTC LEV recommendation, taking into account changes in EPA regulations and their implementation affecting National LEV vehicles.

If EPA does conduct future comparisons, EPA does not believe it is accurate or necessary to compare the *actual* emissions reductions produced by National LEV to *modeled* emissions reductions projected to be produced by OTC state-by-state adoption of CAL LEV programs. To the extent that actual reductions under the two approaches could vary according to vehicle mix or other factors not currently anticipated, it is impossible to predict what actual emissions reductions would have been under OTC state-by-state adoption of CAL LEV programs. Any comparison between actual and modeled reductions would be inherently invalid because the projections would be determined using different baselines.

#### *B. Enforceability of National LEV*

EPA proposed that enforceability would be a legal criterion for EPA to find that National LEV would be an acceptable LEV-equivalent program that would relieve the OTC States of their obligations under the OTC LEV SIP call. Although the OTC LEV SIP call has been vacated, *Virginia v. EPA*, No. 95-1163 (D.C. Cir., March 11, 1997), National LEV still must be enforceable for EPA to grant States credits for SIP purposes. There are two aspects to ensuring National LEV is enforceable. First, the National LEV program emissions standards and requirements must be enforceable against those manufacturers that have opted into the program and are operating under its provisions. Second, the program itself must be sufficiently stable to make it likely to achieve the expected emissions reductions. To achieve the expected emissions reductions from National LEV, the off ramps must not be triggered and the program must remain in effect for its expected lifetime. As discussed below, EPA believes that National LEV meets the first aspect of enforceability—the program requirements are legally

enforceable against manufacturers in the program. Also, the program elements finalized today would contribute to a stable National LEV program. However, ensuring that the National LEV program will be stable over time also depends on program elements relating to OTC State commitments to National LEV that will not be finalized until after EPA provides further notice and comment. At the time of the proposal, the OTC States and the auto manufacturers had not yet finalized agreement on the mechanisms through which the States would commit to the National LEV program or the substance of the OTC State commitments regarding State section 177 programs. Violation of such commitments would allow manufacturers to opt out of National LEV. In expectation that the OTC States and the auto manufacturers would soon finalize agreement on these elements of the program, EPA deferred taking comment on the strength of such commitments, the likelihood that an off ramp might be triggered, or the overall stability of the National LEV program. Thus, a few key elements necessary for the stability of National LEV are still outstanding, pending further notice and opportunity for public comment.

As discussed in the NPRM (60 FR 52760), EPA believes that National LEV is fully enforceable against those manufacturers that have bound themselves to comply with the program. Once a manufacturer opts into the National LEV program, it must comply with the applicable standards. Because the National LEV regulations are promulgated under CAA sections 202 and 301, a manufacturer that chooses to be covered by these regulations would be subject to the same enforcement procedures as exist for the current mandatory federal motor vehicle program. For example, violations of the National LEV standards provisions would be subject to sanctions under CAA sections 204 and 205. The certification, SEA, recall, and warranty provisions of the current federal motor vehicle program also apply to the National LEV standards, as well as all other federal motor vehicle requirements not explicitly superseded by National LEV requirements. The applicability of federal enforcement provisions ensures that National LEV will be an enforceable program. As a result, as long as manufacturers continue to be subject to the National LEV program, the standards and requirements of the program will be clearly enforceable.

In addition to National LEV being legally enforceable, there will also be strong practical disincentives to manufacturers either challenging the

enforceability of the standards or even taking advantage of a potential offramp, unless the triggering event is something the manufacturers consider a substantial burden. The manufacturers strongly support National LEV as an alternative to individual State CAL LEV programs. Because manufacturers would have to comply with backstop CAL LEV programs in one or more States upon an opt-out, manufacturers will be reluctant to destabilize National LEV. To date, the States of Connecticut, Massachusetts, New Jersey, New York, Rhode Island, and Vermont have submitted SIP revisions that require a CAL LEV program either as the primary program or as a backstop if National LEV is not in effect. EPA is confident that one or more of these States would retain a CAL LEV program as a backstop if National LEV were in effect, as several States have indicated that this is their intent. This would ensure that if National LEV were not in effect, manufacturers would have to comply with CAL LEV in one or more States. This level of State adoption of backstops provides a sufficient measure of program stability to help make National LEV enforceable.

The only circumstances that would allow the National LEV program to terminate prematurely would be an OTC State's failure to meet whatever commitments it makes regarding adoption of motor vehicle programs under section 177 of the Act or certain EPA changes to Stable Standards. These circumstances allowing the program to terminate prematurely are limited, and EPA expects that the OTC States will commit to the National LEV program in a way that will make premature termination unlikely to occur due to their actions. EPA is not at this time evaluating the likelihood that the National LEV program will remain in effect for the intended duration of the program (i.e., until EPA promulgates enforceable federal standards that are at least as stringent as the National LEV standards) because EPA has not yet evaluated the OTC States' commitments. However, EPA believes that, at least with regard to an opt-out triggered by a change in the Stable Standards, premature program termination is highly unlikely.

EPA is confident that the Agency is unlikely to change any of the Stable Standards in a manner that would give the auto manufacturers the right to opt out of National LEV. As discussed in section IV.A., manufacturers would be allowed to opt out of National LEV if EPA made certain types of changes to the Core Stable Standards at any time during the program, or changes to the Non-Core Stable Standards effective

prior to MY2007. The Core Stable Standards are requirements that EPA does not have the authority to mandate and thus could not impose absent a voluntary program. In agreeing to specify a larger set of Stable Standards to include the Non-Core Stable Standards, which are requirements EPA has authority to modify, the Agency very carefully evaluated each proposed Non-Core Stable Standard. EPA considered how recently each standard or requirement had been updated, the possibility that increased stringency would be technologically feasible and cost-effective in the time frame of the National LEV program, and the focus of the Agency's future regulatory efforts in terms of the most promising areas for significant emissions reductions. As discussed in more detail in the NPRM, elsewhere in this preamble, and in the Response to Comments document, EPA's technical analysis revealed no significant shortcomings in the adopted Non-Core Stable Standards that would require new, more stringent standards applicable prior to MY2007, aside from those potentially mandated by the CAA and thus specifically excluded from triggering an offramp (e.g. cold CO past MY2000).

In addition, EPA will retain substantial flexibility to make many types of changes to the designated Stable Standards without triggering an offramp. In addition to changes to which the manufacturers do not object, for the Non-Core Stable Standards, EPA could make modifications that do not affect stringency or that harmonize the federal standard with the California standard without providing an opportunity for opt-out. Finally, EPA would always have the ability to make changes to the Non-Core Stable Standards if the need to make such changes outweighs the benefits of the National LEV program. Such a situation would only arise, however, if the emissions benefits from the change significantly outweighed the benefits from National LEV, in which case it is highly unlikely that any state would suffer air quality detriment.

#### C. Finding National LEV in Effect

As proposed, the National LEV regulations specify criteria for EPA to find that the program is in effect, and hence enforceable against the manufacturers that have opted in. EPA will find that the National LEV program is in effect if all manufacturers listed in the regulations have submitted opt-in notifications in accordance with the requirements specified in the

regulations.<sup>54</sup> EPA's finding that the program is in effect would be published in the **Federal Register**, but would not require further notice and comment rulemaking. Upon finding National LEV in effect, the National LEV requirements will be enforceable, and to the extent that manufacturers have conditioned their opt-ins upon EPA making such a finding, the opt-ins will become fully and unconditionally binding. In today's rule, EPA is not setting any deadline for the Agency to make this in effect finding, but EPA will address the question of a deadline in a subsequent final rule after it has provided further notice and opportunity to comment on the OTC State commitments and related issues.

Further Agency rulemaking to find that National LEV is in effect will be unnecessary because EPA is establishing the criteria for the finding through this notice and comment rulemaking, and EPA's finding that the criteria are satisfied is an easily verified objective determination. As discussed in more detail in the NPRM (60 FR 52762), a determination that the listed manufacturers have opted in in accordance with the National LEV regulations requires only a straightforward evaluation of whether each of the listed manufacturers has submitted an opt-in notification containing the requisite language and signed by a person with the specified authority.

#### D. SIP Credits

EPA will allocate SIP credits for National LEV on a state-by-state basis. EPA will work with each individual state, including states outside the OTR, to determine how appropriately to credit areas within the state for emissions reductions produced by the National LEV program. For calculating SIP credits, EPA will apply the same policy guidance to National LEV as it would apply to a state's adoption of CAL LEV.

### VI. Other Applicable Federal Requirements and Harmonization With California Requirements

#### A. Introduction

Section IV. described the provisions of the National LEV program, including the structure of the program, the voluntary emissions standards (exhaust and fleet average NMOG), and

<sup>54</sup> Before National LEV comes into effect, however, OTC States may need to take further action to commit to the National LEV program, pursuant to their agreement with the auto manufacturers. EPA will take comment on the details of such state actions in the SNPRM on OTC State commitments.

provisions for low volume manufacturers. As noted in that section, the federal new motor vehicle emissions control program (including other standards and requirements, and certification, compliance, and enforcement program elements) continues to apply to vehicles produced and sold by manufacturers that opt into the National LEV program. Significant elements of the federal program that apply to National LEV vehicles include the requirements for evaporative emissions, ORVR, Cold CO, the certification short test (CST), and federal high altitude compliance. Similarly, EPA would use the current federal compliance program to implement the National LEV program, including the fees program, SEA, emissions recall program, federal emissions warranties, and federal emissions defect reporting requirements. EPA would retain the authority to add regulatory requirements to the motor vehicle program, (e.g., as may be required under section 202(l) of the CAA to address air toxics) or to modify existing requirements as required by current law (e.g., as may be required under section 202(j) for cold CO). By adopting the set of Stable Standards, EPA is recognizing that it does not intend to modify certain existing regulations except in limited circumstances.

Given the manufacturers' voluntary commitment to National LEV, EPA committed to reduce the compliance burden for manufacturers in the National LEV program by working with CARB to harmonize federal and California motor vehicle standards and test procedures to the extent possible. This would allow manufacturers to design and test vehicles to one set of specifications for sale nationwide, rather than designing and testing to two sets (California's and EPA's). While the National LEV program itself goes a long way towards this objective by addressing program elements such as the exhaust emission standards, the test fuel, and test procedures, EPA has expended considerable effort towards reconciling differences between federal and California requirements in the balance of the mandatory federal program as well. EPA believes that the National LEV program, plus harmonization of other federal and California standards, is a smarter, cheaper way to regulate that increases environmental and public health benefits. The balance of this section describes the results of these harmonization efforts and some other aspects of the federal program. To further the objective of reducing

duplicative testing and compliance requirements on the manufacturers, EPA will seek consistency with California in future regulatory actions where practicable.

#### *B. Harmonization of Federal and California Standards*

The bulk of the harmonization that is occurring between the California and federal standards is taking place with respect to the National LEV tailpipe standards and related requirements, including OBD requirements. These standards and harmonization efforts are discussed in section IV., above. Following is a discussion of other applicable federal requirements and the status of harmonization efforts.

##### 1. Onboard Refueling Vapor Recovery and Evaporative Emissions

EPA believes that federal and California ORVR and evaporative emissions standards will be completely harmonized. EPA and CARB had already begun the process of harmonizing their respective ORVR and evaporative test procedures when the National LEV proposal was published. CARB set policy at its June 29, 1995, public hearing to adopt the EPA ORVR program for California and to proceed with a set of evaporative emissions technical amendments, including several revisions designed to harmonize the federal and California evaporative emissions requirements. Following the hearing, CARB adopted final amendments to their evaporative emissions test procedures, dated April 24, 1996, and effective on June 24, 1996, which allow automobile manufacturers to certify MY1997 and later vehicles using the federal fuel and temperature test conditions. CARB also notes that the ongoing effort to streamline the evaporative test procedures should result in one test procedure for both agencies, and that the revised test procedure will incorporate the federal fuel and temperature test conditions in the CARB procedures. EPA published a direct final rule in August 1995 adopting federal evaporative emissions technical amendments that are compatible with those being pursued by CARB (60 FR 43880, August 23, 1995).

In the proposal for this rulemaking, EPA stated its intent to evaluate the relative stringency of the federal and CARB evaporative emissions testing specifications for test temperature and test fuel, a question that was unresolved at the time the proposal was published. EPA indicated that use of CARB's test conditions, should they prove to be less stringent, could constitute an unacceptable relaxation of the existing

federal evaporative emissions requirement. As part of its evaluation, EPA hired a contractor to generate test data for both running loss and hot soak emissions. The testing program has been completed, and a final report has been submitted to the docket for this rule (see ADDRESSES). EPA has determined that the data currently available indicates that the federal fuel and temperature conditions are more stringent in terms of producing more vapor under prescribed test conditions. Based on the data currently available, CARB agrees that the federal fuel and temperature conditions are as stringent as the CARB conditions in terms of producing more vapor under specific test conditions. On that basis, EPA is continuing to require federal fuel and temperature for evaporative emissions testing. EPA understands that under CARB's recent modifications to its evaporative emission regulations that CARB now explicitly allows the use of the EPA conditions for certification, and that vehicles so certified would undergo in-use compliance testing using the federal conditions as well. While EPA believes that the federal fuel and temperature produce more vapor than the CARB fuel and temperature under prescribed test conditions and CARB now accepts the federal test conditions for purposes of certification, CARB intends to perform additional tests in the future to provide additional data on the impact of the test fuel and temperature on evaporative emissions in real life. If the results of such testing demonstrate that California's evaporative emissions reductions suffer as a result of the harmonized policy, CARB may re-evaluate the policy for corrective action.

Use of the federal evaporative test conditions means that National LEV vehicles certified to TLEV, LEV, or ULEV standards using the California Phase II test fuel option that are undergoing both evaporative and exhaust emissions testing will require a switch from California Phase II fuel for exhaust testing to federal fuel for evaporative emissions testing. The Agency anticipates that the incremental burden of the policy will be minimized because broader definitions of evaporative emissions families allow manufacturers to test far fewer vehicles for evaporative emissions than for tailpipe emissions. In addition, the fuel switch will frequently occur anyway because the same vehicles tested for ORVR will be tested for evaporative emissions, and both California and federal ORVR require federal fuel as the test fuel. Finally, the vehicle manufacturers have indicated that the

fuel switch is an acceptable trade-off for the benefits of harmonizing the evaporative test conditions between EPA and CARB.

The auto manufacturers have recently presented a proposal to both EPA and CARB for combining and streamlining the evaporative emissions and ORVR procedures. Both agencies are actively evaluating this proposal, which has as its goal a simpler procedure that saves government and industry resources while preserving air quality benefits nationally and in California. If these efforts are productive, EPA might propose regulations that would affect evaporative emissions and ORVR testing of the light-duty fleet during model years covered by the National LEV rule. The Agency does not anticipate a conflict between such an action and the designation of the current evaporative emissions and ORVR procedures as Non-Core Stable Standards. EPA would not pursue such a rulemaking to increase stringency in the programs, but rather to simplify and make less costly the test procedures applicable to both manufacturers and EPA, and EPA would expect manufacturers to support, rather than object to, any resulting changes.

## 2. Cold CO

California has adopted EPA's Cold CO requirements by reference, so the requirements are currently harmonized. EPA notes, however, that CARB has a compliance requirement with a complete set of emission standards, including an additional CO standard, during testing at 50 degrees. Because the 50 degree standards are part of the California LEV program, they are included as part of the compliance obligation for National LEVs.

## 3. Certification Short Test

The CST is one requirement for which differences in California and federal requirements are necessary due to differences in state-adopted Inspection and Maintenance (I/M) programs. As noted in the preamble to the NPRM (60 FR 52764), the Agency has a statutory obligation under section 206(a) of the CAA to promulgate procedures for manufacturers to demonstrate at the time of new vehicle certification that their LDV and LDT designs, when properly used and maintained, will pass the emissions short test procedures approved by EPA for use in state and local I/M programs. State and local I/M programs can choose their emission short test procedures from a variety of different options maintained in the federal regulations. Because California need not maintain the menu of available short test options that is required of EPA

under section 207(b) of the CAA, there is no adequate California counterpart to the federal CST to serve as the basis for harmonization. Thus, harmonization is not possible, and National LEV vehicles will be subject to the same CST requirements as any other federally certified LDVs.

## 4. High Altitude Requirements

In the NPRM, EPA noted its statutory obligation under section 206(f) of the CAA to require LDVs and LDTs to comply with mandatory section 202 standards at all altitudes; this requirement is incorporated in the current (Tier 1) emission standards. The National LEV proposal preamble noted that even if manufacturers were voluntarily complying with more stringent tailpipe emission standards, NLEVs would nonetheless still be required to demonstrate compliance with the Tier 1 standards, the cold CO requirements, and the evaporative emissions requirements at high altitude using the appropriate federal certification test fuel for the given test procedure, as defined in 40 CFR 86.113. The Agency received no comments on this aspect of the proposal, and, for the reasons described here and in the NPRM (60 FR 52764), the proposed approach is retained in the final rule.

### C. Federal Compliance Requirements

#### 1. Selective Enforcement Auditing and Quality Audit Programs

Pursuant to CAA section 206(b), vehicles certified to meet any of the National LEV emission standards and requirements will be subject to those standards and requirements in an SEA. Section 206(b) authorizes the Administrator to test new vehicles to determine whether vehicles being manufactured do, in fact, conform to the regulations with respect to which a certificate of conformity was issued. National LEV vehicles will also be subject to SEAs to show compliance with National LEV standards and all other applicable federal emission standards and requirements.

SEA authority serves as an important enforcement tool and provides the Agency with the ability to ensure that NLEVs are in compliance with the emissions standards. It also allows EPA to ensure that manufacturers are not gaming the averaging, banking, and trading provisions by maximizing credit generation or minimizing credit usage through certifying engine families to unrealistic emissions standards. In addition, the SEA program serves as an incentive for manufacturers to do their own emissions testing and remedy any

potential problems on their own before they are identified by the Agency. This helps to provide cleaner vehicles at the earliest possible time.

During an SEA, a manufacturer will test an engine family configuration certified to the National LEV standards by testing new vehicles off the production line using the same test procedures and conditions as used in the certification process for that family. When an SEA shows an audit failure of a configuration certified to National LEV standards, the certificate of conformity for the selected configuration may be suspended, and depending on the required remedy for the nonconformity, revoked. This is the same approach EPA has used for audit failures of configurations certified to conventional federal standards.<sup>55</sup>

In the NPRM, EPA noted that the promulgation of National LEV standards and the harmonization of other federal and California requirements will allow manufacturers to certify an increasing number of engine families to both California and National LEV standards (50-state engine families). This provides an opportunity for EPA to utilize its enforcement resources more efficiently and reduce the testing burden on manufacturers by coupling the SEA and corresponding CARB requirements for 50-state families and configurations. Thus, EPA proposed to use emissions testing done by the manufacturers on 50-state engine families under the California Quality Audit (CQA) Program as a basis for potential SEA actions, where such testing was conducted in a manner substantially similar to comparable federal requirements.

Allowing EPA to use data produced under the CQA Program builds on the harmonization of the California and National LEV programs to take advantage of new efficiencies possible in EPA enforcement. Additionally, this new use of data will reduce regulatory testing burdens on the manufacturers. Under the current SEA program, EPA's only recourse upon discovering 50-state non-compliance through CARB-required testing is to issue the manufacturer an SEA test order for the vehicle configuration. The manufacturer would then have to conduct duplicate testing for that configuration. If the configuration (which CARB had already determined to be in non-compliance) failed the audit, EPA would suspend and/or possibly revoke the certificate of conformity. The manufacturer would then have to develop a fix for the non-compliance and conduct and pass a re-

<sup>55</sup> See the NPRM (60 FR 52764-52766) for a more detailed explanation of the SEA procedures.

audit to comply with EPA requirements, as well as comply with CARB's remedial action plan. By adopting the authority to use CQA data in the SEA program, EPA is eliminating these additional testing requirements.

The regulations adopted in today's final rule will work in the following manner. If CARB has determined that a 50-state engine family or configuration is in non-compliance, based on manufacturer testing required by CARB, EPA would be able to take appropriate action without requiring the manufacturer to conduct duplicate testing. EPA would evaluate test data received from CARB or directly from a manufacturer for a family or configuration that CARB has determined to be in non-compliance with any applicable standard. If testing were conducted in a manner substantially similar to comparable federal requirements, EPA would evaluate the test data with respect to the 40 percent Acceptable Quality Level (AQL) sampling plans found in Appendices X and XI to 40 CFR part 86 to determine compliance with applicable federal standards. EPA believes the random sampling manufacturers use to select vehicles for CARB-required testing will provide a representative family or configuration sample, which can be appropriately evaluated with respect to the 40 percent AQL criteria. If the test data for the family or configuration does not meet the 40 percent AQL, EPA would determine the family or configuration to be in non-compliance, and EPA would have authority to suspend and/or revoke the certificate of conformity for the 50-state family or configuration. Additionally, subsequent to a suspension or revocation, the rule allows EPA to reinstate or reissue a certificate, upon a manufacturer's written request, after the manufacturer has agreed to comply with remedial action required by CARB, if EPA believes the action is an effective remedy for the entire family or configuration. The manufacturer would not have to conduct a re-audit of the suspended/revoked configuration.

EPA's authority for this approach is provided by CAA section 206(b)(2)(A)(i), which allows EPA to suspend or revoke a certificate based on tests conducted under section 206(b)(1). Section 206(b)(1) authorizes tests to be conducted by the Administrator directly, or by the manufacturer, in accordance with conditions specified by the Administrator. In 40 CFR part 86, EPA prescribes procedures for testing whether new motor vehicles conform to the regulations with respect to which EPA issued the certificate of conformity.

Most of these procedures are the same as the procedures specified by California in the Assembly-Line Test Procedures Quality Audit. EPA has modified the regulations for manufacturer SEA testing to prescribe the procedures detailed in the regulations or substantially similar procedures, which could encompass testing performed under the CQA program. Substantially similar procedures must produce results that are reliable and probative indicators of the likely outcome of an SEA based on the Part 86 testing requirements detailed in the SEA regulations. Even if CARB specifies additional details in the course of testing by the manufacturer, as long as the test that the manufacturer actually conducts is still in accordance with procedures substantially similar to those detailed by EPA, such a test will be in accordance with the conditions specified by the Administrator. Thus, EPA may rely on such tests as a basis to suspend or revoke a certificate of conformity.

Because EPA's regulatory authority to suspend or revoke certificates is based on testing conducted by EPA or the manufacturer, EPA will only suspend or revoke certificates in the manner described above if the manufacturer has conducted the testing. The manufacturer testing need not be pursuant to a federal test order, however. Also, EPA is aware that all emissions testing done under the auspices of the CQA program will not necessarily be done using procedures substantially similar to comparable federal requirements, making EPA's use of some of this data in its SEA program infeasible. Therefore, EPA will work cooperatively with CARB and manufacturers in considering all information provided by the manufacturer prior to making a decision whether to suspend, revoke, and reissue certificates of conformity based on data generated under the CQA program. As with any suspension or revocation of a certificate of conformity, a manufacturer that disagrees with EPA's decision to suspend or revoke a certificate may request a public hearing within 15 days of EPA's suspension or revocation decision.

## 2. Imports

As proposed, EPA is not listing independent commercial importers (ICIs) among the manufacturers that would have to opt into the National LEV program for EPA to find it in effect. Instead, ICIs will have the opportunity to voluntarily certify their vehicles to meet National LEV standards if their customers so desire. However, ICIs are prohibited from participating in

averaging, banking, or trading programs. ICIs not certifying vehicles to National LEV standards will continue to be required to meet the emissions standards applicable to the year in which the vehicle was originally manufactured.

EPA continues to believe that ICIs should not be required to opt into the National LEV program since they generally do not build new motor vehicles.<sup>56</sup> Additionally, due to the very limited number of vehicles, of various model years, that ICIs handle, ICIs would be unable to participate in the averaging, banking, and trading provisions, which require that a manufacturer has substantial control over the certification categories (TLEVs, LEVs, etc.) of the vehicles in its fleet.

## 3. In-Use and Warranty Requirements

As described in the NPRM, the federal provisions regarding in-use (recall) testing will be used to determine compliance with the National LEV standards. These provisions are set out in 40 CFR part 85, subpart S. The vehicle age and mileage limitations on recall testing, as required by sections 202(d)(1) and 207(c) are not affected by today's action.<sup>57</sup> It is not appropriate to substitute California's entire in-use testing and recall program requirements for the corresponding federal provisions as part of the National LEV program because the two recall programs have different enforcement goals based on differences in statutory authority. In addition, EPA must account for the differences arising from a compliance program applied on a national versus a State-specific level. However, EPA and California will continue to cooperate wherever possible in their enforcement activities to reduce any unnecessary duplication and to provide efficient and timely sharing of information.

There is no additional burden on manufacturers attributable to operation of two enforcement programs because when testing NLEVs to determine their compliance with the in-use standards, EPA will use, when appropriate, those test procedures utilized in the National LEV certification process. As discussed above, these procedures will generally be similar to California's procedures. Thus, manufacturers will not need to comply with two different sets of enforcement testing procedures.

<sup>56</sup> Comments supported not requiring ICIs to opt in to the National LEV program.

<sup>57</sup> EPA does not require any recall testing beyond seven years or 75,000 miles, whichever comes first, for vehicles with a useful life period of ten years or 100,000 miles, or beyond seven years or 90,000 miles, whichever comes first, for vehicles with a useful life of 11 years or 120,000 miles.

In response to manufacturers' concerns over potential in-use fuel effects on National LEV vehicles, EPA has stated that it would allow extra vehicle preconditioning if necessary. It is not currently possible to determine an appropriate level of additional preconditioning, given the uncertainty as to in-use fuel effects on National LEV vehicles and the question as to whether current levels of preconditioning are in fact sufficient to alleviate these effects. Therefore, EPA is not including a specific level of additional preconditioning in today's action. However, EPA's regulations allow additional preconditioning for unusual circumstances when such need is demonstrated by a manufacturer.<sup>58</sup> Detrimental effects on National LEV vehicles from commercially available fuel sold in the 49 States could likely be considered an unusual circumstance. Thus, under these regulations EPA expects to work with manufacturers to determine the appropriate level of any necessary additional vehicle preconditioning.

As discussed in the proposal, the federal warranty and defect reporting requirements will apply to National LEV vehicles as they would to other vehicles certified under the federal motor vehicle program.

#### VII. Structure of National LEV Regulations

The requirements applicable to NLEVs are drawn largely from two different and complex sources—the current federal motor vehicle program and California's existing LEV program. Given this, the Agency initially chose in the NPRM to structure the regulations such that they referenced, rather than repeated, the two sources as much as possible. To accomplish this, the Agency created 40 CFR part 86 subpart R to serve as the "road map" of National LEV requirements. This new subpart has several objectives. First, it details the general applicability and provisions of the National LEV program, including how auto manufacturers opt into the program and under what circumstances they can opt out of the program. Second, it details the specific emission standards, fleet average NMOG standards, and averaging, banking, and trading provisions that apply to vehicles certified under the program. As noted in section IV.B.1., the emission standards are identical to those currently in place in California, but are explicitly included in the regulations. Because of differences from the provisions in California, the NMOG average is also

explicitly included in subpart R. While the averaging, banking, and trading provisions are modeled after California's, there are enough differences in applying such a program nationally that they too are included specifically in the new subpart. Third, subpart R details the regulatory requirements from the California LEV program that apply to National LEV. The provisions in the existing federal program generally remain applicable to the National LEV program, except in specific instances, detailed in subpart R, where the California provisions are used instead.

Incorporation of provisions from the California LEV program is slightly more complex, and has evolved since the NPRM. In general, the Agency has used the method of "incorporation by reference" (IBR). The IBR method allows federal agencies to publish regulations in the **Federal Register** by referring to materials already published elsewhere, rather than repeating that information. The legal effect of an IBR is that the material is treated as if it were published in the **Federal Register**. This material, like any other properly issued regulation, has the force and effect of law. Material is eligible for IBR if several conditions are met, including the criteria that the material be reasonably available to those affected by the regulation and that the volume of material published in the **Federal Register** is substantially reduced. Each use of the IBR method must be approved by the Director of the Federal Register.

The Agency has incorporated by reference in the National LEV regulations a number of California regulatory documents. These documents are maintained by the **Federal Register** and in the public docket (see **ADDRESSES**) as a single bound document titled "California Regulatory Requirements Applicable to the National Low Emission Vehicle Program, October, 1996." The National LEV regulations detail the specific California documents that have been incorporated, as well as the specific sections within those documents that do not apply to National LEV, in an appendix to part 86. Only those California documents that can be regarded as finalized regulatory documents with the full force of law can be incorporated by reference.

In the NPRM the Agency used the IBR method extensively to incorporate CARB regulatory provisions. Since then, however, the Agency noted some problems with this approach, including a lack of clarity regarding exactly what in the federal and CARB regulations applied or did not apply to the National

LEV program. Such problems arose in particular when CARB regulations referenced federal regulations, but applied them in a modified fashion (CARB regulatory documents that are more "stand-alone" do not present these problems and have been incorporated by reference as described above). These issues were resolved in today's final regulations by explicitly including in subpart R some of the text of CARB regulations and specifying how and under what circumstances that text should apply.

#### VIII. Technical Correction to Maintenance Instructions

This final rule also makes a technical correction to regulations mandating that manufacturers provide purchasers with instructions regarding the proper maintenance and use of vehicles. On August 9, 1995, EPA published in the **Federal Register** (60 FR 40474) a rule requiring that information for use in emission-related repairs be made available to the service and repair industry ("the service information rule"). The regulations promulgated in that rule were placed in paragraph (g) of 40 CFR § 86.094–38, which provides the requirements for Maintenance Instructions for 1994 and later model year vehicles. Paragraphs (a) through (f) of that section were to be unchanged from the preexisting requirements for Maintenance Instructions provided in § 86.087–38. However, EPA inadvertently did not include a reference to the preexisting regulations when it promulgated § 86.094–38 (a) through (f). Specifically, EPA generally would use the designation "[Reserved]. For guidance see § 86.087–38 (a)–(f)" to indicate the incorporation of earlier regulatory language. However, the promulgated rule states only that § 86.094–38 (a)–(f) are "[Reserved]," without reference to the earlier regulatory language. This may have caused some confusion regarding whether the preexisting regulations were still in effect beginning in the 1994 model year. This technical amendment clarifies that EPA did not intend to remove the preexisting requirements for maintenance instructions when it promulgated the service information rule.

EPA is promulgating this technical amendment as a final rule under the good cause exception in section 553(b)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(B). Notice and public procedure for this technical amendment are unnecessary and contrary to the public interest because this amendment merely corrects an obviously unintended error in the

<sup>58</sup> See 40 CFR 86.132–96(d).

regulations. At no time during the service information rulemaking did EPA state its intention to remove the preexisting maintenance instructions requirements from the regulations; nor was such a significant change contemplated or requested. Therefore, this technical change merely clarifies that regulations already in existence were not inadvertently deleted in the service information rule. EPA does not expect any objection to this technical correction. Moreover, because these regulations are applicable to current model year families, EPA believes it is in the public interest to promulgate this technical amendment as soon as possible.

## IX. Administrative Requirements

### A. Administrative Designation

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, 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 interfere with an action taken or planned by another agency;

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

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because of annual impacts on the economy that are likely to exceed \$100 million. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

### B. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. Only manufacturers of motor vehicles, a

group which does not contain a substantial number of small entities, will have to comply with the requirements of this rule.

### C. Unfunded Mandates Reform Act

Under sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA), EPA generally must prepare a written statement to accompany any proposed or final rule that includes a federal mandate that may result in expenditures by state, local, or tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year.

EPA has determined that the written statement requirements of sections 202 and 205 of UMRA do not apply to today's rule, and thus does not require EPA to conduct further analyses pursuant to those requirements. National LEV is not a federal mandate because it does not impose any enforceable duties and because it is a voluntary program. Because National LEV would not impose a federal mandate on any party, section 202 does not apply to this rule. Even if these unfunded mandates provisions did apply to this rule, they are met by the Regulatory Impact Analysis prepared pursuant to Executive Order 12866 and contained in the docket.

Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has not prepared such a plan because small governments would not be significantly or uniquely impacted by the rule.

### D. Congressional Review of Agency Rulemaking

Under section 801(a)(1)(A) of the Administrative Procedure Act (APA) as amended by the Small Business Regulatory Enforcement Reform Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. OMB has designated this a "major rule" as defined in section 804(2) of the APA, as amended.

### E. Reporting and Recordkeeping Requirements

The Information Collection Request (ICR) in this rule has been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. An ICR document has been prepared by EPA (ICR No. 1761.02) and a copy may be obtained from Sandy

Farmer, OPPE Regulatory Information Division, EPA, 401 M St., SW (Mail Code 2137), Washington, DC 20460 or by calling (202) 260-2740. The information requirements are not effective until OMB approves them.

The information collection would be conducted to support the averaging, banking and trading provisions included in the National LEV program. These averaging, banking and trading provisions would give automobile manufacturers a measure of flexibility in meeting the fleet average NMOG standards. EPA would use the reported data to calculate credits and debits and otherwise ensure compliance with the applicable production levels. When a manufacturer has opted into the voluntary National LEV program, reporting would be mandatory as per the regulations included in this rulemaking. This rulemaking would not change the requirements regarding confidentiality claims for submitted information, which are generally set out in 40 CFR part 2.

The information collection burden associated with this rule (testing, record keeping and reporting requirements) is estimated to average 241.3 hours annually for a typical manufacturer. It is expected that approximately 25 manufacturers will provide an annual report to EPA. However, the hours spent annually on information collection activities by a given manufacturer depends upon manufacturer-specific variables, such as the number of engine families, production changes, emissions defects, and so forth.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This estimate also includes the time needed to: Review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, D.C. 20503, marked "Attention: Desk Officer for EPA." Include the ICR number in any correspondence.

**X. Statutory Authority**

The promulgation of these regulations is authorized by sections 202, 203, 204, 205, 206, 207, 208 and 301 of the Clean Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA) (42 U.S.C. 7521, 7522, 7523, 7524, 7525, 7541, 7542, and 7601).

**XI. Judicial Review**

Under section 307(b)(1) of the Act, EPA hereby finds that these regulations are of national applicability. Accordingly, judicial review of this action is available only by filing of a petition for review in the United States Court of Appeals for the District of Columbia Circuit within 60 days of publication in the **Federal Register**. Under section 307(b)(2) of the Act, the requirements which are the subject of today's rule may not be challenged later in judicial proceedings brought by EPA to enforce these requirements. This rulemaking and any petitions for review are subject to the provisions of section 307(d) of the Clean Air Act.

**List of Subjects**

*40 CFR Part 85*

Confidential business information, Imports, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements, Research, Warranties.

*40 CFR Part 86*

Administrative practice and procedure, Confidential business information, Incorporation by reference, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: May 2, 1997.

**Carol M. Browner,**  
*Administrator.*

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

**PART 85—CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES AND MOTOR VEHICLE ENGINES**

1. The authority citation for part 85 is revised to read as follows:

**Authority:** 42 U.S.C. 7521, 7522, 7524, 7525, 7541, 7542, and 7601(a).

**Subpart P—[Amended]**

2. Section 85.1515 is amended by revising paragraph (c) to read as follows:

**§ 85.1515 Emission standards and test procedures applicable to imported nonconforming motor vehicles and motor vehicle engines.**

\* \* \* \* \*

(c) Nonconforming motor vehicles or motor vehicle engines of 1994 OP model year and later conditionally imported

pursuant to § 85.1505 or § 85.1509 shall meet all of the emission standards specified in 40 CFR part 86 for the model year in which the motor vehicle or motor vehicle engine is modified. At the option of the ICI, the nonconforming motor vehicle may comply with the emissions standards in 40 CFR 86.1708–97 or 86.1709–97, as applicable to a light-duty vehicle or light light-duty truck, in lieu of the otherwise applicable emissions standards specified in 40 CFR part 86 for the model year in which the nonconforming motor vehicle is modified. The provisions of 40 CFR 86.1710–97 do not apply to imported nonconforming motor vehicles. The useful life specified in 40 CFR part 86 for the model year in which the motor vehicle or motor vehicle engine is modified is applicable where useful life is not designated in this subpart.

\* \* \* \* \*

**PART 86—CONTROL OF AIR POLLUTION FROM NEW AND IN-USE MOTOR VEHICLES AND NEW AND IN-USE MOTOR VEHICLE ENGINES: CERTIFICATION AND TEST PROCEDURES**

3. The authority citation for part 86 is revised to read as follows:

**Authority:** 42 U.S.C. 7401–7671(q).

4. Section 86.1 is amended by revising the entry for ASTM E29–90 in the table in paragraph (b)(1) and by adding an entry after the existing entry to the table in paragraph (b)(4), to read as follows:

**§ 86.1 Reference materials.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

Document number and name	40 CFR part 86 reference
* * * * *	* * * * *
ASTM E29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications.	86.609–84; 86.609–96; 86.609–97; 86.609–98; 86.1009–84; 86.1009–96; 86.1442; 86.1708–97; 86.1709–97; 86.1710–97; 86.1728–97.

\* \* \* \* \* (4) \* \* \*

Document number and name	40 CFR part 86 reference
* * * * *	* * * * *
California Regulatory Requirements Applicable to the National Low Emission Vehicle Program, October, 1996	86.608–97; 86.608–98; 86.612–97; 86.1008–97; 86.1012–97; 86.1702–97; 86.1708–97; 86.1709–97; 86.1717–97; 86.1735–97; 86.1771–97; 86.1775–97; 86.1776–97; 86.1777–97; Appendix XVI; Appendix XVII.

**Subpart A—[Amended]**

5. Section 86.082-2 is amended by revising paragraph (a) to read as follows:

**§ 86.082-2 Definitions.**

(a) The definitions of this section apply to this subpart and also to subparts B, D, I, and R of this part.

\* \* \* \* \*

6. Section 86.085-37 is amended by revising paragraph (b)(1) introductory text to read as follows:

**§ 86.085-37 Production vehicles and engines.**

\* \* \* \* \*

(b)(1) Any manufacturer of light-duty vehicles or light-duty trucks obtaining certification under this part shall notify the Administrator, on a yearly basis, of the number of vehicles domestically produced for sale in the United States and the number of vehicles produced and imported for sale in the United States during the preceding year. Such information shall also include the number of vehicles produced for sale pursuant to § 88.204-94(b) of this chapter. A manufacturer may elect to provide this information every 60 days instead of yearly by combining it with the notification required under § 86.079-36. The notification must be submitted 30 days after the close of the reporting period. A manufacturer may combine the information required under § 86.1712(b) with the information included in paragraphs (b)(1) (i) through (iv) of this section into the report required under this section. The vehicle production information required shall be submitted as follows:

\* \* \* \* \*

7. Section 86.090-2 is amended by revising the definition for "Flexible fuel vehicle (or engine)" and adding a new definition in alphabetical order for "Dual fuel vehicle (or engine)" to read as follows:

**§ 86.090-2 Definitions.**

\* \* \* \* \*

*Dual fuel vehicle (or engine)* means any motor vehicle (or motor vehicle engine) engineered and designed to be operated on two different fuels, but not on a mixture of fuels.

\* \* \* \* \*

*Flexible fuel vehicle (or engine)* means any motor vehicle (or motor vehicle engine) engineered and designed to be operated on any mixture of two or more different fuels.

\* \* \* \* \*

8. Section 86.094-38 is amended by adding introductory text and revising paragraphs (a) through (f), to read as follows:

**§ 86.094-38 Maintenance instructions.**

Section 86.094-38 includes text that specifies requirements that differ from those specified in § 86.087-38. Where a paragraph in § 86.087-38 is identical and applicable to § 86.094-38, this may be indicated by specifying the corresponding paragraph and the statement "[Reserved]. For guidance see § 86.087-38."

(a) through (f) [Reserved]. For guidance see § 86.087-38.

\* \* \* \* \*

9. Section 86.096-30 is amended by adding paragraphs (a)(19) through (a)(22) to read as follows:

**§ 86.096-30 Certification.**

\* \* \* \* \*

(a) \* \* \* \* \*  
(19) For all light-duty vehicles and light light-duty trucks certified to standards under §§ 86.1710 through 86.1712, the provisions of paragraphs (a)(19) (i) through (iv) of this section apply.

(i) All certificates issued are conditional upon manufacturer compliance with all provisions of §§ 86.1710 through 86.1712 both during and after model year production.

(ii) Failure to meet the requirements of § 86.1710 (a) through (d) will be considered to be a failure to satisfy the conditions upon which the certificate(s) was issued and the vehicles sold in violation of the fleet average NMOG standard shall not be covered by the certificate.

(iii) The manufacturer shall bear the burden of establishing to the satisfaction of the Administrator that the conditions upon which the certificate was issued were satisfied.

(iv) For recall and warranty purposes, vehicles not covered by a certificate because of a violation of this condition of the certificate will continue to be held to the standards stated in the certificate that would have otherwise applied to the vehicles.

(20) For all light-duty vehicles and light light-duty trucks certified to standards under §§ 86.1710 through 86.1712, the provisions of paragraphs (a)(20) (i) through (iv) of this section apply.

(i) All certificates issued are conditional upon manufacturer compliance with all provisions of §§ 86.1710 through 86.1712 both during and after model year production.

(ii) Failure to comply fully with the prohibition against a manufacturer selling credits that it has not generated or are not available, as specified in § 86.1710(e), will be considered to be a failure to satisfy the conditions upon which the certificate(s) was issued and

the vehicles sold in violation of this prohibition shall not be covered by the certificate.

(iii) The manufacturer shall bear the burden of establishing to the satisfaction of the Administrator that the conditions upon which the certificate was issued were satisfied.

(iv) For recall and warranty purposes, vehicles not covered by a certificate because of a violation of this condition of the certificate will continue to be held to the standards stated in the certificate that would have otherwise applied to the vehicles.

(21) For all light-duty vehicles and light light-duty trucks certified to standards under §§ 86.1710 through 86.1712, the provisions of paragraphs (a)(21) (i) through (iv) of this section apply.

(i) All certificates issued are conditional upon manufacturer compliance with all provisions of §§ 86.1710 through 86.1712 both during and after model year production.

(ii) Failure to comply fully with the prohibition against offering for sale Tier 1 vehicles and TLEVs in the Northeast Trading Region, as defined in § 86.1702, after model year 2000 if vehicles with the same engine families are not certified and offered for sale in California in the same model year, as specified in § 86.1711(a), will be considered to be a failure to satisfy the conditions upon which the certificate(s) was issued and the vehicles sold in violation of this prohibition shall not be covered by the certificate.

(iii) The manufacturer shall bear the burden of establishing to the satisfaction of the Administrator that the conditions upon which the certificate was issued were satisfied.

(iv) For recall and warranty purposes, vehicles not covered by a certificate because of a violation of this condition of the certificate will continue to be held to the standards stated in the certificate that would have otherwise applied to the vehicles.

(22) For all light-duty vehicles and light light-duty trucks certified to standards under §§ 86.1710 through 86.1712, the provisions of paragraphs (a)(22) (i) through (iv) of this section apply.

(i) All certificates issued are conditional upon manufacturer compliance with all provisions of §§ 86.1710 through 86.1712 both during and after model year production.

(ii) Failure to comply fully with the prohibition against selling Tier 1 vehicles and TLEVs in the Northeast Trading Region, as defined in § 86.1702, in excess of five percent of the industry-wide fleet, as specified in § 86.1711(b),

will be considered a failure to satisfy the conditions upon which the certificate was issued and the vehicles sold in violation of this prohibition shall not be covered by the certificate.

(iii) The manufacturer shall bear the burden of establishing to the satisfaction of the Administrator that the conditions upon which the certificate was issued were satisfied.

(iv) For recall and warranty purposes, vehicles not covered by a certificate because of a violation of this condition of the certificate will continue to be held to the standards stated in the certificate that would have otherwise applied to the vehicles.

\* \* \* \* \*

10. A new § 86.097-1 is added to subpart A to read as follows:

**§ 86.097-1 General applicability.**

Section 86.097-1 includes text that specifies requirements that differ from those specified in § 86.094-1. Where a paragraph in § 86.094-1 is identical and applicable to § 86.097-1, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]. For guidance see § 86.094-1.”

(a) through (b) [Reserved]. For guidance see § 86.094-1.

(c) *National Low Emission Vehicle Program for light-duty vehicles and light light-duty trucks.* A manufacturer may elect to certify 1997 and later model year light-duty vehicles and light light-duty trucks to the provisions of the National Low Emission Vehicle Program contained in subpart R of this part. Subpart R of this part is applicable only to those manufacturers that opt into the National Low Emission Vehicle Program, under the provisions of that subpart, and that have not exercised a valid opt-out from the NLEV Program that has gone into effect under the provisions of § 86.1705 (d) and (e). All provisions of this subpart are applicable to vehicles certified pursuant to subpart R of this part, except as specifically noted in subpart R of this part.

(d) [Reserved]

(e) through (f) [Reserved]. For guidance see § 86.094-1.

**Subpart B—[Amended]**

11. Section 86.101 is amended by adding a paragraph (c) to read as follows:

**§ 86.101 General applicability.**

\* \* \* \* \*

(c) *National Low Emission Vehicle Program for light-duty vehicles and light light-duty trucks.* A manufacturer may elect to certify 1997 and later model

year light-duty vehicles and light light-duty trucks to the provisions of the National Low Emission Vehicle Program contained in subpart R of this part.

Subpart R of this part is applicable only to those manufacturers that opt into the National Low Emission Vehicle Program, under the provisions of subpart R of this part, and that have not exercised a valid opt-out from the NLEV Program, which opt out has gone into effect under the provisions of § 86.1705(d) and (e). All provisions of this subpart are applicable to vehicles certified pursuant to subpart R of this part, except as specifically noted in subpart R of this part.

**Subpart G—[Amended]**

12. Section 86.601-84 is amended by designating the existing text as introductory text, by adding paragraph (a), and by adding and reserving paragraph (b) to read as follows:

**§ 86.601-84 Applicability.**

\* \* \* \* \*

(a) *Section numbering; construction.*

(1) The model year of initial applicability is indicated by the two digits following the hyphen of the section number. A section remains in effect for subsequent model years until it is superseded.

(2) A section reference without a model year suffix shall be interpreted to be a reference to the section applicable to the appropriate model year.

(b) [Reserved]

13. Section 86.602-97 is added to subpart G to read as follows:

**§ 86.602-97 Definitions.**

Section 86.602-97 includes text that specifies requirements that differ from those specified in § 86.602-84. Where a paragraph in § 86.602-84 is identical and applicable to § 86.602-97, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]. For guidance see § 86.602-84.”

(a) through (b)(8) [Reserved]. For guidance see § 86.602-84.

(b)(9) *Executive Officer* means the Executive Officer of the California Air Resources Board or his or her authorized representative.

(10) *Executive Order* means the document the Executive Officer grants a manufacturer for an engine family that certifies the manufacturer has verified that the engine family complies with all applicable standards and requirements pursuant to Title 13 of the California Code of Regulations.

(11) *50-state engine family* means an engine family that meets both federal and California Air Resources Board

motor vehicle emission control regulations and has received a federal certificate of conformity as well as an Executive Order.

14. Section 86.602-98 is amended by adding paragraphs (b)(9) through (b)(11) to read as follows:

**§ 86.602-98 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(9) *Executive Officer* means the Executive Officer of the California Air Resources Board or his or her authorized representative.

(10) *Executive Order* means the document the Executive Officer grants a manufacturer for an engine family that certifies the manufacturer has verified that the engine family complies with all applicable standards and requirements pursuant to Title 13 of the California Code of Regulations.

(11) *50-state engine family* means an engine family that meets both federal and California Air Resources Board motor vehicle emission control regulations and has received a federal certificate of conformity as well as an Executive Order.

15. Section 86.603-97 is added to subpart G to read as follows:

**§ 86.603-97 Test orders.**

Section 86.603-97 includes text that specifies requirements that differ from those specified in § 86.603-88. Where a paragraph in § 86.603-88 is identical and applicable to § 86.603-97, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]. For guidance see § 86.603-88.”

(a) through (e) [Reserved]. For guidance see § 86.603-88.

(f) In the event evidence exists indicating an engine family is in noncompliance, the Administrator may, in addition to other powers provided by this section, issue a test order specifying the engine family the manufacturer is required to test.

16. Section 86.603-98 is amended by adding paragraph (f) to read as follows:

**§ 86.603-98 Test orders.**

\* \* \* \* \*

(f) In the event evidence exists indicating an engine family is in noncompliance, the Administrator may, in addition to other powers provided by this section, issue a test order specifying the engine family the manufacturer is required to test.

17. Section 86.608-97 is added to subpart G to read as follows:

**§ 86.608-97 Test procedures.**

Section 86.608-97 includes text that specifies requirements that differ from

those specified in §§ 86.608–90 and 86.608–96. Where a paragraph in § 86.608–90 or § 86.608–96 is identical and applicable to § 86.608–97, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]. For guidance see § 86.608–90.” or “[Reserved]. For guidance see § 86.608–96.”

(a) The prescribed test procedures are the Federal Test Procedure, as described in subpart B and/or subpart R of this part, whichever is applicable, the cold temperature CO test procedure as described in subpart C of this part, and the Certification Short Test procedure as described in subpart O of this part. Where the manufacturer conducts testing based on the requirements specified in Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), the prescribed test procedures are the procedures cited in the previous sentence, or substantially similar procedures, as determined by the Administrator. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program are incorporated by reference (see § 86.1). For purposes of Selective Enforcement Audit testing, the manufacturer shall not be required to perform any of the test procedures in subpart B of this part relating to evaporative emission testing, except as specified in paragraph (a)(2) of this section.

(1) [Reserved]. For guidance see § 86.608–96.

(2) The following exceptions to the test procedures in subpart B and/or subpart R of this part are applicable to Selective Enforcement Audit testing:

(i) For mileage accumulation, the manufacturer may use test fuel meeting the specifications for mileage and service accumulation fuels of § 86.113, or, for vehicles certified to the National LEV standards, the specifications of § 86.1771. Otherwise, the manufacturer may use fuels other than those specified in this section only with the advance approval of the Administrator.

(ii) [Reserved]. For guidance see § 86.608–90.

(iii) The manufacturer may perform additional preconditioning on Selective Enforcement Audit test vehicles other than the preconditioning specified in § 86.132, or § 86.1773 for vehicles certified to the National LEV standards, only if the additional preconditioning had been performed on certification test vehicles of the same configuration.

(a)(2)(iv) through (a)(2)(vii) [Reserved]. For guidance see § 86.608–90.

(a)(2)(viii) The manufacturer need not comply with § 86.142, or § 86.1775, since the records required therein are provided under other provisions of this subpart G.

(a)(2)(ix) through (a)(3) [Reserved]. For guidance see § 86.608–90.

(a)(4) [Reserved]. For guidance see § 86.608–96.

(b) through (i) [Reserved]. For guidance see § 86.608–90.

18. Section 86.608–98 is amended by revising paragraphs (a) introductory text, (a)(2) introductory text, (a)(2)(i), (a)(2)(iii), and (a)(2)(viii), to read as follows:

**§ 86.608–98 Test procedures.**

(a) The prescribed test procedures are the Federal Test Procedure, as described in subpart B and/or subpart R of this part, whichever is applicable, the cold temperature CO test procedure as described in subpart C of this part, and the Certification Short Test procedure as described in subpart O of this part. Where the manufacturer conducts testing based on the requirements specified in Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), the prescribed test procedures are the procedures cited in the previous sentence, or substantially similar procedures, as determined by the Administrator. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program are incorporated by reference (see § 86.1). For purposes of Selective Enforcement Audit testing, the manufacturer shall not be required to perform any of the test procedures in subpart B of this part relating to evaporative emission testing, other than refueling emissions testing, except as specified in paragraph (a)(2) of this section.

\* \* \* \* \*

(2) The following exceptions to the test procedures in subpart B and/or subpart R of this part are applicable to Selective Enforcement Audit testing:

(i) For mileage accumulation, the manufacturer may use test fuel meeting the specifications for mileage and service accumulation fuels of § 86.113, or, for vehicles certified to the National LEV standards, the specifications of § 86.1771. Otherwise, the manufacturer may use fuels other than those specified in this section only with the advance approval of the Administrator.

\* \* \* \* \*

(iii) The manufacturer may perform additional preconditioning on Selective Enforcement Audit test vehicles other

than the preconditioning specified in § 86.132, or § 86.1773, for vehicles certified to the National LEV standards only if the additional preconditioning was performed on certification test vehicles of the same configuration.

\* \* \* \* \*

(viii) The manufacturer need not comply with § 86.142, § 86.155, or § 86.1775, since the records required therein are provided under other provisions of this subpart G.

\* \* \* \* \*

19. Section 86.609–97 is added to subpart G to read as follows:

**§ 86.609–97 Calculation and reporting of test results.**

Section 86.609–97 includes text that specifies requirements that differ from those specified in §§ 86.609–84 and 86.609–96. Where a paragraph in § 86.609–84 or § 86.609–96 is identical and applicable to § 86.609–97, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]. For guidance see § 86.609–84.” or “[Reserved]. For guidance see § 86.609–96.”

(a) through (b) [Reserved]. For guidance see § 86.609–96.

(c) *Final deteriorated test results*—(1) *For each test vehicle.* The final deteriorated test results for each test vehicle tested according to subpart B, subpart C, or subpart R of this part are calculated by first multiplying or adding, as appropriate, the final test results by or to the appropriate deterioration factor derived from the certification process for the engine or evaporative/refueling family and model year to which the selected configuration belongs, and then by multiplying by the appropriate reactivity adjustment factor, if applicable, and rounding to the same number of decimal places contained in the applicable emission standard. Rounding is done in accordance with the Rounding-Off Method specified in ASTM E29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications. This procedure is incorporated by reference (see § 86.1). For the purpose of this paragraph (c), if a multiplicative deterioration factor as computed during the certification process is less than one, that deterioration factor is one. If an additive deterioration factor as computed during the certification process is less than zero, that deterioration factor will be zero.

(c)(2) [Reserved]. For guidance see § 86.609–96.

(d) [Reserved]. For guidance see § 86.609–84.

20. Section 86.609-98 is amended by revising paragraph (c)(1) to read as follows:

**§ 86.609-98 Calculation and reporting of test results.**

\* \* \* \* \*

(c) \* \* \*

(1) *For each test vehicle.* The final deteriorated test results for each light-duty vehicle tested for exhaust emissions and/or refueling emissions according to subpart B, subpart C, or subpart R of this part are calculated by first multiplying or adding, as appropriate, the final test results by or to the appropriate deterioration factor derived from the certification process for the engine or evaporative/refueling family and model year to which the selected configuration belongs, and then by multiplying by the appropriate reactivity adjustment factor, if applicable, and rounding to the same number of decimal places contained in the applicable emission standard. Rounding is done in accordance with the Rounding-Off Method specified in ASTM E29-90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications. This procedure has been incorporated by reference (see § 86.1). For the purpose of this paragraph (c), if a multiplicative deterioration factor as computed during the certification process is less than one, that deterioration factor is one. If an additive deterioration factor as computed during the certification process is less than zero, that deterioration factor will be zero.

\* \* \* \* \*

21. Section 86.612-97 is added to subpart G to read as follows:

**§ 86.612-97 Suspension and revocation of certificates of conformity.**

(a) The certificate of conformity is immediately suspended with respect to any vehicle failing pursuant to § 86.610(b) effective from the time that testing of that vehicle is completed.

(b)(1) *Selective Enforcement Audits.* The Administrator may suspend the certificate of conformity for a configuration that does not pass a Selective Enforcement Audit pursuant to § 86.610-98(c) based on the first test, or all tests, conducted on each vehicle. This suspension will not occur before ten days after failure to pass the audit.

(2) *California Assembly-Line Quality Audit Testing.* The Administrator may suspend the certificate of conformity for a 50-state family or configuration tested in accordance with procedures prescribed under § 86.608 that the Executive Officer has determined to be

in non-compliance with one or more applicable pollutants based on the requirements specified in Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), if the results of vehicle testing conducted by the manufacturer do not meet the acceptable quality level criteria pursuant to § 86.610. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) are incorporated by reference (see § 86.1). A vehicle that is tested by the manufacturer pursuant to California Assembly-Line Quality Audit Test Procedures, in accordance with procedures prescribed under § 86.608, and determined to be a failing vehicle will be treated as a failed vehicle described in § 86.610(b), unless the manufacturer can show that the vehicle would not be considered a failed vehicle using the test procedures specified in § 86.608. This suspension will not occur before ten days after the manufacturer receives written notification that the Administrator has determined the 50-state family or configuration exceeds one or more applicable federal standards.

(c)(1) *Selective Enforcement Audits.* If the results of vehicle testing pursuant to the requirements of this subpart indicates the vehicles of a particular configuration produced at more than one plant do not conform to the regulations with respect to which the certificate of conformity was issued, the Administrator may suspend the certificate of conformity with respect to that configuration for vehicles manufactured by the manufacturer in other plants of the manufacturer.

(2) *California Assembly-Line Quality Audit Testing.* If the Administrator determines that the results of vehicle testing pursuant to the requirements specified in Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) and the procedures prescribed in § 86.608 indicate the vehicles of a particular 50-state engine family or configuration produced at more than one plant do not conform to applicable federal regulations with respect to which a certificate of conformity was issued, the Administrator may suspend, pursuant to paragraph (b)(2) of this section, the certificate of conformity with respect to that engine family or configuration for vehicles manufactured in other plants of the manufacturer. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October,

1996) are incorporated by reference (see § 86.1).

(d) The Administrator will notify the manufacturer in writing of any suspension or revocation of a certificate of conformity in whole or in part: Except, that the certificate of conformity is immediately suspended with respect to any vehicle failing pursuant to § 86.610(b) and as provided for in paragraph (a) of this section.

(e)(1) *Selective Enforcement Audits.* The Administrator may revoke a certificate of conformity for a configuration when the certificate has been suspended pursuant to paragraph (b)(1) or (c)(1) of this section if the proposed remedy for the nonconformity, as reported by the manufacturer to the Administrator, is one requiring a design change(s) to the engine and/or emission control system as described in the Application for Certification of the affected configuration.

(2) *California Assembly-Line Quality Audit Testing.* The Administrator may revoke a certificate of conformity for an engine family or configuration when the certificate has been suspended pursuant to paragraph (b)(2) or (c)(2) of this section if the proposed remedy for the nonconformity, as reported by the manufacturer to the Executive Officer and/or the Administrator, is one requiring a design change(s) to the engine and/or emission control system as described in the Application for Certification of the affected engine family or configuration.

(f) Once a certificate has been suspended for a failed vehicle as provided for in paragraph (a) of this section, the manufacturer must take the following actions:

(1) Before the certificate is reinstated for that failed vehicle—

(i) Remedy the nonconformity; and  
(ii) Demonstrate that the vehicle's final deteriorated test results conform to the applicable emission standards or family particulate emission limits, as defined in this part 86 by retesting the vehicle in accordance with the requirements of this subpart.

(2) Submit a written report to the Administrator within thirty days after successful completion of testing on the failed vehicle, which contains a description of the remedy and test results for the vehicle in addition to other information that may be required by this subpart.

(g) Once a certificate has been suspended pursuant to paragraph (b) or (c) of this section, the manufacturer must take the following actions before the Administrator will consider reinstating such certificate:

(1) Submit a written report to the Administrator which identifies the reason for the noncompliance of the vehicles, describes the proposed remedy, including a description of any proposed quality control and/or quality assurance measures to be taken by the manufacturer to prevent the future occurrence of the problem, and states the date on which the remedies will be implemented.

(2) Demonstrate that the engine family or configuration for which the certificate of conformity has been suspended does in fact comply with the requirements of this subpart by testing vehicles selected from normal production runs of that engine family or configuration at the plant(s) or the facilities specified by the Administrator, in accordance with:

(i) The conditions specified in the initial test order pursuant to § 86.603 for a configuration suspended pursuant to paragraph (b)(1) or (c)(1) of this section; or

(ii) The conditions specified in a test order pursuant to § 86.603 for an engine family or configuration suspended pursuant to paragraph (b)(2) or (c)(2) of this section.

(3) If the Administrator has not revoked the certificate pursuant to paragraph (e) of this section and if the manufacturer elects to continue testing individual vehicles after suspension of a certificate, the certificate is reinstated for any vehicle actually determined to have its final deteriorated test results in conformance with the applicable standards through testing in accordance with the applicable test procedures.

(4) In cases where the Administrator has suspended a certificate of conformity for a 50-state engine family or configuration pursuant to paragraph (b)(2) or (c)(2) of this section, manufacturers may request in writing that the Administrator reinstate the certificate of an engine family or configuration when, in lieu of the actions described in paragraphs (g) (1) and (2) of this section, the manufacturer has agreed to comply with Chapter 3 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), provided an Executive Order is in place for the engine family or configuration. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) are incorporated by reference (see § 86.1).

(h) Once a certificate for a failed engine family or configuration has been revoked under paragraph (e) (1) or (2) of this section and the manufacturer desires to introduce into commerce a modified version of that engine family

or configuration, the following actions will be taken before the Administrator may issue a certificate for the new engine family or configuration:

(1) If the Administrator determines that the proposed change(s) in vehicle design may have an effect on emission performance deterioration and/or fuel economy, he/she shall notify the manufacturer within five working days after receipt of the report in paragraph (g)(1) of this section or after receipt of information pursuant to paragraph (g)(4) of this section whether subsequent testing under this subpart will be sufficient to evaluate the proposed change(s) or whether additional testing will be required.

(2) After implementing the change(s) intended to remedy the nonconformity, the manufacturer shall demonstrate:

(i) If the certificate was revoked pursuant to paragraph (e)(1) of this section, that the modified vehicle configuration does in fact conform with the requirements of this subpart by testing vehicles selected from normal production runs of that modified vehicle configuration in accordance with the conditions specified in the initial test order pursuant to § 86.603. The Administrator shall consider this testing to satisfy the testing

requirements of § 86.079–32 or § 86.079–33 if the Administrator had so notified the manufacturer. If the subsequent testing results in a pass decision pursuant to the criteria in § 86.610–96(c), the Administrator shall reissue or amend the certificate, if necessary, to include that configuration: *Provided*, that the manufacturer has satisfied the testing requirements specified in paragraph (h)(1) of this section. If the subsequent audit results in a fail decision pursuant to the criteria in § 86.610(c), the revocation remains in effect. Any design change approvals under this subpart are limited to the modification of the configuration specified by the test order.

(ii) If the certificate was revoked pursuant to paragraph (e)(2) of this section, that the modified engine family or configuration does in fact conform with the requirements of this subpart by testing vehicles selected from normal production runs of that modified engine family or configuration in accordance with the conditions specified in a test order pursuant to § 86.603. The Administrator shall consider this testing to satisfy the testing requirements of § 86.079–32 or § 86.079–33 if the Administrator had so notified the manufacturer. If the subsequent testing results in a pass decision pursuant to § 86.610(c), the Administrator shall reissue or amend the certificate as

necessary: *Provided*, That the manufacturer has satisfied the testing requirements specified in paragraph (h)(1) of this section. If the subsequent testing results in a fail decision pursuant to § 86.610(c), the revocation remains in effect. Any design change approvals under this subpart are limited to the modification of engine family or configuration specified by the test order.

(3) In cases where the Administrator has revoked a certificate of conformity for a 50-state engine family or configuration pursuant to paragraph (e)(2) of this section, manufacturers may request in writing that the Administrator reissue the certificate of an engine family or configuration when, in lieu of the actions described in paragraphs (h) (1) and (2) of this section, the manufacturer has complied with Chapter 3 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), provided an Executive Order is in place for the engine family or configuration. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) are incorporated by reference (see § 86.1).

(i) A manufacturer may at any time subsequent to an initial suspension of a certificate of conformity with respect to a test vehicle pursuant to paragraph (a) of this section, but not later than fifteen (15) days or such other period as may be allowed by the Administrator after notification of the Administrator's decision to suspend or revoke a certificate of conformity in whole or in part pursuant to paragraph (b), (c) or (e) of this section, request that the Administrator grant such manufacturer a hearing as to whether the tests have been properly conducted or any sampling methods have been properly applied.

(j) After the Administrator suspends or revokes a certificate of conformity pursuant to this section or notifies a manufacturer of his intent to suspend, revoke or void a certificate of conformity under § 86.084–30(d), and prior to the commencement of a hearing under § 86.614, if the manufacturer demonstrates to the Administrator's satisfaction that the decision to suspend, revoke or void the certificate was based on erroneous information, the Administrator shall reinstate the certificate.

(k) To permit a manufacturer to avoid storing non-test vehicles when conducting testing of an engine family or configuration subsequent to suspension or revocation of the certificate of conformity for that engine family or configuration pursuant to

paragraph (b), (c), or (e) of this section, the manufacturer may request that the Administrator conditionally reinstate the certificate for that engine family or configuration. The Administrator may reinstate the certificate subject to the condition that the manufacturer consents to recall all vehicles of that engine family or configuration produced from the time the certificate is conditionally reinstated if the engine family or configuration fails the subsequent testing and to remedy any nonconformity at no expense to the owner.

#### Subpart K—[Amended]

22. Section 86.1001–84 is amended by designating the existing text as introductory text, by adding paragraph (a), and by adding and reserving paragraph (b) to read as follows:

##### § 86.1001–84 Applicability.

\* \* \* \* \*

(a) *Section numbering; construction.*

(1) The model year of initial applicability is indicated by the two digits following the hyphen of the section number. A section remains in effect for subsequent model years until it is superseded.

(2) A section reference without a model year suffix shall be interpreted to be a reference to the section applicable to the appropriate model year.

(b) [Reserved]

23. Section 86.1002–97 is added to subpart K to read as follows:

##### § 86.1002–97 Definitions.

(a) The definitions in this section apply to this subpart.

(b) As used in this subpart, all terms not defined in this section have the meaning given them in the Act.

*Acceptable quality level (AQL)* means the maximum percentage of failing engines or vehicles, that for purposes of sampling inspection, can be considered satisfactory as a process average.

*Axle ratio* means all ratios within  $\pm 3\%$  of the axle ratio specified in the configuration in the test order.

*Compliance level* means an emission level determined during a Production Compliance Audit pursuant to subpart L of this part.

*Configuration* means a subclassification, if any, of a heavy-duty engine family for which a separate projected sales figure is listed in the manufacturer's Application for Certification and which can be described on the basis of emission control system, governed speed, injector size, engine calibration, and other parameters which may be designated by the Administrator, or a subclassification

of a light-duty truck engine family/ emission control system combination on the basis of engine code, inertia weight class, transmission type and gear ratios, axle ratio, and other parameters which may be designated by the Administrator.

*Executive Officer* means the Executive Officer of the California Air Resources Board or his or her authorized representative.

*Executive Order* means the document the Executive Officer grants a manufacturer for an engine family that certifies the manufacturer has verified the engine family complies with all applicable standards and requirements pursuant to Title 13 of the California Code of Regulations.

*50-state engine family* means an engine family that meets both federal and California Air Resources Board motor vehicle emission control regulations and has received a federal certificate of conformity as well as an Executive Order.

*Inspection criteria* means the pass and fail numbers associated with a particular sampling plan.

*Test engine* means an engine in a test sample.

*Test sample* means the collection of vehicles or engines of the same configuration which have been drawn from the population of engines or vehicles of that configuration and which will receive exhaust emission testing.

*Test vehicle* means a vehicle in a test sample.

24. Section 86.1002–2001 is amended by adding paragraphs (b)(8) through (b)(11) to read as follows:

##### § 86.1002–2001 Definitions.

\* \* \* \* \*

(b) \* \* \*

(8) *Axle ratio* means all ratios within  $\pm 3\%$  of the axle ratio specified in the configuration in the test order.

(9) *Executive Officer* means the Executive Officer of the California Air Resources Board or his or her authorized representative.

(10) *Executive Order* means the document the Executive Officer grants a manufacturer for an engine family that certifies the manufacturer has verified the engine family complies with all applicable standards and requirements pursuant to Title 13 of the California Code of Regulations.

(11) *50-state engine family* means an engine family that meets both federal and California Air Resources Board motor vehicle emission control regulations and has received a federal certificate of conformity as well as an Executive Order.

25. Section 86.1003–97 is added to subpart K to read as follows:

##### § 86.1003–97 Test orders.

Section 86.1003–97 includes text that specifies requirements that differ from those specified in § 86.1003–90. Where a paragraph in § 86.1003–90 is identical and applicable to § 86.1003–97, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]. For guidance see § 86.1003–90.”

(a) through (f) [Reserved]. For guidance see § 86.1003–90.

(g) In the event evidence exists indicating an engine family is in noncompliance, the Administrator may, in addition to other powers provided by this section, issue a test order specifying the engine family the manufacturer is required to test.

26. Section 86.1003–2001 is amended by adding paragraph (g) to read as follows:

##### § 86.1003–2001 Test orders.

\* \* \* \* \*

(g) In the event evidence exists indicating an engine family is in noncompliance, the Administrator may, in addition to other powers provided by this section, issue a test order specifying the engine family the manufacturer is required to test.

27. Section 86.1008–97 is added to subpart K to read as follows:

##### § 86.1008–97 Test procedures.

Section 86.1008–97 includes text that specifies requirements that differ from those specified in §§ 86.1008–90 and 86.1008–96. Where a paragraph in § 86.1008–90 or § 86.1008–96 is identical and applicable to § 86.1008–97, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]. For guidance see § 86.1008–90.” or “[Reserved]. For guidance see § 86.1008–96.”

(a)(1) [Reserved]. For guidance see § 86.1008–96.

(2) For light-duty trucks, the prescribed test procedures are the Federal Test Procedure, as described in subpart B and/or subpart R of this part, whichever is applicable, the idle CO test procedure as described in subpart P of this part, the cold temperature CO test procedure as described in subpart C of this part, and the Certification Short Test procedure as described in subpart O of this part. Where the manufacturer conducts testing based on the requirements specified in Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), the prescribed test procedures are the procedures cited in the previous sentence, or substantially similar procedures, as determined by

the Administrator. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program are incorporated by reference (see § 86.1). For purposes of Selective Enforcement Audit testing, the manufacturer shall not be required to perform any of the test procedures in subpart B of this part relating to evaporative emission testing, except as specified in paragraph (a)(3) of this section. The Administrator may select and prescribe the sequence of any Certification Short Tests. Further, the Administrator may, on the basis of a written application by a manufacturer, approve optional test procedures other than those in subparts B, C, P, and O of this part for any motor vehicle which is not susceptible to satisfactory testing using the procedures in subparts B, C, P, and O of this part.

(3) When testing light-duty trucks the following exceptions to the test procedures in subpart B and/or subpart R of this part are applicable:

(i) For mileage accumulation, the manufacturer may use test fuel meeting the specifications for mileage and service accumulation fuels of § 86.113-94, or, for vehicles certified to the National LEV standards, the specifications of § 86.1771. Otherwise, the manufacturer may use fuels other than those specified in this section only with the advance approval of the Administrator.

(ii) [Reserved]. For guidance see § 86.1008-90.

(iii) The manufacturer may perform additional preconditioning on Selective Enforcement Audit test vehicles other than the preconditioning specified in § 86.132, or § 86.1773 for vehicles certified to the National LEV standards, only if the additional preconditioning had been performed on certification test vehicles of the same configuration.

(a)(3)(iv) through (a)(3)(vii) [Reserved]. For guidance see § 86.1008-90.

(a)(3)(viii) The manufacturer need not comply with § 86.142 or § 86.1775, since the records required therein are provided under other provisions of this subpart.

(a)(3)(ix) [Reserved]. For guidance see § 86.1008-90.

(a)(4) [Reserved]. For guidance see § 86.1008-96.

(5) [Reserved]. For guidance see § 86.1008-90.

(6) [Reserved]. For guidance see § 86.1008-96.

(b) through (i) [Reserved]. For guidance see § 86.1008-90.

28. Section 86.1008-2001 is amended by revising paragraphs (a)(2), (a)(3)

introductory text, (a)(3)(i), (a)(3)(iii), and (a)(3)(viii) to read as follows:

**§ 86.1008-2001 Test procedures.**

(a) \* \* \*

(2) For light-duty trucks, the prescribed test procedures are the Federal Test Procedure as described in subpart B and/or subpart R of this part, whichever is applicable, the idle CO test procedure as described in subpart P of this part, the cold temperature CO test procedure as described in subpart C of this part, and the Certification Short Test procedure as described in subpart O of this part. For purposes of Selective Enforcement Audit Testing, the manufacturer shall not be required to perform any of the test procedures in subpart B of this part relating to evaporative emission testing, other than refueling emissions testing, except as specified in paragraph (a)(3) of this section. The Administrator may select and prescribe the sequence of any CSTs. Further, the Administrator may, on the basis of a written application by a manufacturer, approve optional test procedures other than those in subparts B, C, P, O, and R of this part for any motor vehicle which is not susceptible to satisfactory testing using the procedures in subparts B, C, P, O, and R of this part.

(3) When testing light-duty trucks, the following exceptions to the test procedures in subpart B and/or subpart R of this part are applicable to Selective Enforcement Audit testing:

(i) For mileage accumulation, the manufacturer may use test fuel meeting the specifications for mileage and service accumulation fuels of § 86.113, or, for vehicles certified to the National LEV standards, the specifications of § 86.1771. Otherwise, the manufacturer may use fuels other than those specified in this section only with the advance approval of the Administrator.

(iii) The manufacturer may perform additional preconditioning on SEA test vehicles other than the preconditioning specified in § 86.132, or § 86.1773 for vehicles certified to the National LEV standards, only if the additional preconditioning was performed on certification test vehicles of the same configuration.

\* \* \* \* \*

(viii) The manufacturer need not comply with § 86.142, § 86.155, or § 86.1775 since the records required therein are provided under other provisions of this subpart K.

\* \* \* \* \*

29. Section 86.1009-97 is added to subpart K to read as follows:

**§ 86.1009-97 Calculation and reporting of test results.**

Section 86.1009-97 includes text that specifies requirements that differ from those specified in §§ 86.1009-84 and 86.1009-96. Where a paragraph in § 86.1009-84 or § 86.1009-96 is identical and applicable to § 86.1009-97, this may be indicated by specifying the corresponding paragraph and the statement "[Reserved]. For guidance see § 86.1009-84." or "[Reserved]. For guidance see § 86.1009-96."

(a) and (b) [Reserved]. For guidance see § 86.1009-96.

(c) *Final deteriorated test results.* (1) The final deteriorated test results for each heavy-duty engine or light-duty truck tested according to subpart B, C, D, I, N, P, or R of this part are calculated by first multiplying or adding, as appropriate, the final test results by or to the appropriate deterioration factor derived from the certification process for the engine family control system combination and model year to which the selected configuration belongs, and then by multiplying by the appropriate reactivity adjustment factor, if applicable. If the multiplicative deterioration factor as computed during the certification process is less than one, that deterioration factor will be one. If the additive deterioration factor as computed during the certification process is less than zero, that deterioration factor will be zero.

(c)(2) [Reserved]

(c)(3) through (c)(4) [Reserved]. For guidance see § 86.1009-96.

(d) [Reserved]. For guidance see § 86.1009-84.

30. Section 86.1009-2001 is amended by revising paragraph (c)(1) to read as follows:

**§ 86.1009-2001 Calculation and reporting of test results.**

\* \* \* \* \*

(c) \* \* \*

(1) The final deteriorated test results for each light-duty truck, heavy-duty engine, or heavy-duty vehicle tested according to subpart B, C, D, I, M, N, P, or R of this part are calculated by first multiplying or adding, as appropriate, the final test results by or to the appropriate deterioration factor derived from the certification process for the engine or evaporative/refueling family and model year to which the selected configuration belongs, and then by multiplying by the appropriate reactivity adjustment factor, if applicable. For the purpose of this paragraph (c), if a multiplicative deterioration factor as computed during the certification process is less than one, that deterioration factor will be one. If

an additive deterioration factor as computed during the certification process is less than zero, that deterioration factor will be zero.

\* \* \* \* \*

31. Section 86.1012-97 is added to subpart K to read as follows:

**§ 86.1012-97 Suspension and revocation of certificates of conformity.**

(a) The certificate of conformity is immediately suspended with respect to any engine or vehicle failing pursuant to § 86.1010(b) effective from the time that testing of that engine or vehicle is completed.

(b)(1) *Selective Enforcement Audits.* The Administrator may suspend the certificate of conformity for a configuration that does not pass a Selective Enforcement Audit pursuant to § 86.1010(c) based on the first test, or all tests, conducted on each engine or vehicle. This suspension will not occur before ten days after failure to pass the audit.

(2) *California Assembly-Line Quality Audit Testing.* The Administrator may suspend the certificate of conformity for a 50-state engine family or configuration tested in accordance with procedures prescribed under § 86.1008 that the Executive Officer has determined to be in non-compliance with one or more applicable pollutants based on Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), if the results of vehicle testing conducted by the manufacturer do not meet the acceptable quality level criteria pursuant to § 86.1010. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) are incorporated by reference (see § 86.1). A vehicle that is tested by the manufacturer in accordance with procedures prescribed under § 86.1008 and determined to be a failing vehicle pursuant to Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) will be treated as a failed vehicle described in § 86.1010(b), unless the manufacturer can show that the vehicle would not be considered a failed vehicle using the test procedures specified in § 86.1008. This suspension will not occur before ten days after the manufacturer receives written notification that the Administrator has determined the 50-state engine family or configuration exceeds one or more applicable federal standards.

(c)(1) *Selective Enforcement Audits.* If the results of engine or vehicle testing

pursuant to the requirements of this subpart indicate that engines or vehicles of a particular configuration produced at more than one plant do not conform to the regulations with respect to which the certificate of conformity was issued, the Administrator may suspend the certificate of conformity with respect to that configuration for engines or vehicles manufactured by the manufacturer in other plants of the manufacturer.

(2) *California Assembly-Line Quality Audit Testing.* If the Administrator determines that the results of vehicle testing pursuant to Chapter 1 or Chapter 2 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) and the procedures prescribed in § 86.1008 indicate the vehicles of a particular 50-state engine family or configuration produced at more than one plant do not conform to applicable regulations with respect to which a certificate of conformity was issued, the Administrator may suspend, pursuant to paragraph (b)(2) of this section, the certificate of conformity with respect to that engine family or configuration for vehicles manufactured by the manufacturer in other plants of the manufacturer. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) are incorporated by reference (see § 86.1).

(d) The Administrator will notify the manufacturer in writing of any suspension or revocation of a certificate of conformity in whole or in part: Except, that the certificate is immediately suspended with respect to any failed engines or vehicles as provided for in paragraph (a) of this section.

(e)(1) *Selective Enforcement Audits.* The Administrator may revoke a certificate of conformity for a configuration when the certificate has been suspended pursuant to paragraph (b)(1) or (c)(1) of this section if the proposed remedy for the nonconformity, as reported by the manufacturer to the Administrator is one requiring a design change(s) to the engine and/or emission control system as described in the Application for Certification of the affected configuration.

(2) *California Assembly-Line Quality Audit Testing.* The Administrator may revoke a certificate of conformity for an engine family or configuration when the certificate has been suspended pursuant to paragraph (b)(2) or (c)(2) of this section if the proposed remedy for the nonconformity, as reported by the manufacturer to the Executive Officer and/or the Administrator, is one

requiring a design change(s) to the engine and/or emission control system as described in the Application for Certification of the affected engine family or configuration.

(f) Once a certificate has been suspended for a failed engine or vehicle as provided for in paragraph (a) of this section, the manufacturer must take the following actions:

(1) Before the certificate is reinstated for that failed engine or vehicle—

- (i) Remedy the nonconformity; and
- (ii) Demonstrate that the engine or vehicle's final deteriorated test results conform to the applicable emission standards or family particulate emission limits, as defined in this part 86 by retesting the engine or vehicle in accordance with the requirements of this subpart.

(2) Submit a written report to the Administrator within thirty days after successful completion of testing on the failed engine or vehicle, which contains a description of the remedy and test results for the engine or vehicle in addition to other information that may be required by this subpart.

(g) Once a certificate has been suspended pursuant to paragraph (b) or (c) of this section, the manufacturer must take the following actions before the Administrator will consider reinstating such certificate:

(1) Submit a written report to the Administrator which identifies the reason for the noncompliance of the vehicles, describes the proposed remedy, including a description of any proposed quality control and/or quality assurance measures to be taken by the manufacturer to prevent the future occurrence of the problem, and states the date on which the remedies will be implemented.

(2) Demonstrate that the engine family or configuration for which the certificate of conformity has been suspended does in fact comply with the requirements of this subpart by testing engines or vehicles selected from normal production runs of that engine family or configuration at the plant(s) or the facilities specified by the Administrator, in accordance with:

(i) The conditions specified in the initial test order pursuant to § 86.1003 for a configuration suspended pursuant to paragraph (b)(1) or (c)(1) of this section; or

(ii) The conditions specified in a test order pursuant to § 86.1003 for an engine family or configuration suspended pursuant to paragraph (b)(2) or (c)(2) of this section.

(3) If the Administrator has not revoked the certificate pursuant to paragraph (e) of this section and if the

manufacturer elects to continue testing individual engines or vehicles after suspension of a certificate, the certificate is reinstated for any engine or vehicle actually determined to have its final deteriorated test results in conformance with the applicable standards through testing in accordance with the applicable test procedures.

(4) In cases where the Administrator has suspended a certificate of conformity for a 50-state engine family or configuration pursuant to paragraph (b)(2) or (c)(2) of this section, manufacturers may request in writing that the Administrator reinstate the certificate of an engine family or configuration when, in lieu of the actions described in paragraphs (g) (1) and (2) of this section, the manufacturer has complied with Chapter 3 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), provided an Executive Order is in place for the engine family or configuration. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) are incorporated by reference (see § 86.1).

(h) Once a certificate for a failed engine family or configuration has been revoked under paragraph (e) (1) or (2) of this section and the manufacturer desires to introduce into commerce a modified version of that engine family or configuration the following actions will be taken before the Administrator may issue a certificate for the new engine family or configuration:

(1) If the Administrator determines that the proposed change(s) in engine or vehicle design may have an effect on emission performance deterioration and/or fuel economy, he/she shall notify the manufacturer within 5 working days after receipt of the report in paragraph (g)(1) of this section or after receipt of information pursuant to paragraph (g)(4) of this section whether subsequent testing under this subpart will be sufficient to evaluate the proposed change(s) or whether additional testing will be required.

(2) After implementing the change(s) intended to remedy the nonconformity, the manufacturer shall demonstrate:

(i) If the certificate was revoked pursuant to paragraph (e)(1) of this section, that the modified configuration does in fact conform with the requirements of this subpart by testing engines or vehicles selected from normal production runs of that modified configuration in accordance with the conditions specified in the initial test order pursuant to § 86.1003. The Administrator shall consider this testing

to satisfy the testing requirements of § 86.079–32 or § 86.079–33 if the Administrator had so notified the manufacturer. If the subsequent testing results in a pass decision pursuant to the criteria in § 86.1010(c), the Administrator shall reissue or amend the certificate, if necessary, to include that configuration: *Provided*, that the manufacturer has satisfied the testing requirements specified in paragraph (h)(1) of this section. If the subsequent audit results in a fail decision pursuant to the criteria in § 86.1010(c), the revocation remains in effect. Any design change approvals under this subpart are limited to the modification of the configuration specified by the test order.

(ii) If the certificate was revoked pursuant to paragraph (e)(2) of this section, that the modified engine family or configuration does in fact conform with the requirements of this subpart by testing vehicles selected from normal production runs of that modified engine family or configuration in accordance with the conditions specified in a test order pursuant to § 86.1003. The Administrator shall consider this testing to satisfy the testing requirements of § 86.079–32 or § 86.079–33 if the Administrator had so notified the manufacturer. If the subsequent testing results in a pass decision pursuant to § 86.1010(c), the Administrator shall reissue or amend the certificate as necessary: *Provided*, that the manufacturer has satisfied the testing requirements specified in paragraph (h)(1) of this section. If the subsequent testing results in a fail decision pursuant to § 86.1010(c), the revocation remains in effect. Any design change approvals under this subpart are limited to the modification of the engine family or configuration specified by the test order.

(3) In cases where the Administrator has revoked a certificate of conformity for a 50-state engine family or configuration pursuant to paragraph (e)(2) of this section, manufacturers may request in writing that the Administrator reissue the certificate for an engine family or configuration when, in lieu of the actions described in paragraphs (h) (1) and (2) of this section, the manufacturer has complied with Chapter 3 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), provided an Executive Order is in place for the engine family or configuration. The California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) are incorporated by reference (see § 86.1).

(i) through (k) [Reserved]

(l) At any time subsequent to an initial suspension of a certificate of conformity for a test engine or vehicle pursuant to paragraph (a) of this section, but not later than fifteen (15) days or such other period as may be allowed by the Administrator after notification of the Administrator's decision to suspend or revoke a certificate of conformity in whole or in part pursuant to paragraphs (b), (c), (d), (e), or (h) of this section, a manufacturer may request a hearing as to whether the tests have been properly conducted or any sampling methods have been properly applied.

(m) After the Administrator suspends or revokes a certificate of conformity pursuant to this section or notifies a manufacturer of his intent to suspend, revoke or void a certificate of conformity under paragraph § 86.087–30(e), and prior to the commencement of a hearing under § 86.1014, if the manufacturer demonstrates to the Administrator's satisfaction that the decision to suspend, revoke or void the certificate was based on erroneous information, the Administrator shall reinstate the certificate.

(n) To permit a manufacturer to avoid storing non-test engines or vehicles when conducting testing of an engine family or configuration subsequent to suspension or revocation of the certificate of conformity for that engine family or configuration pursuant to paragraph (b), (c), or (e) of this section, the manufacturer may request that the Administrator conditionally reinstate the certificate for that engine family or configuration. The Administrator may reinstate the certificate subject to the condition that the manufacturer consents to recall all engines or vehicles of that engine family or configuration produced from the time the certificate is conditionally reinstated if the engine family or configuration fails the subsequent testing and to remedy any nonconformity at no expense to the owner.

32. Section 86.1014–97 is added to subpart K to read as follows:

**§ 86.1014–97 Hearings on suspension, revocation and voiding of certificates of conformity.**

Section 86.1014–97 includes text that specifies requirements that differ from those specified in § 86.1014–84. Where a paragraph in § 86.1014–84 is identical and applicable to § 86.1014–97, this may be indicated by specifying the corresponding paragraph and the statement “[Reserved]”. For guidance see § 86.1014–84’.

(a) through (c)(2)(ii) introductory text [Reserved]. For guidance see § 86.1014–84.

(c)(2)(ii)(A) Whether tests have been properly conducted, specifically, whether the tests were conducted in accordance with applicable regulations and whether test equipment was properly calibrated and functioning; and (c)(2)(ii)(B) through (aa) [Reserved]. For guidance see § 86.1014–84.

33. A new subpart R consisting of §§ 86.1701–97 through 86.1780–97 is added to part 86 to read as follows:

**Subpart R—General Provisions for the Voluntary National Low Emission Vehicle Program for Light-Duty Vehicles and Light-Duty Trucks**

Sec.

86.1701–97 General applicability.

86.1702–97 Definitions.

86.1703–97 Abbreviations.

86.1704–97 Section numbering; construction.

86.1705–97 General provisions; opt-in; opt-out.

86.1706–97 National LEV program in effect.

86.1707–97 [Reserved]

86.1708–97 Exhaust emission standards for 1997 and later light-duty vehicles.

86.1709–97 Exhaust emission standards for 1997 and later light-duty trucks.

86.1710–97 Fleet average non-methane organic gas exhaust emission standards for light-duty vehicles and light-duty trucks.

86.1711–97 Limitations on sale of Tier 1 vehicles and TLEVs; five percent cap.

86.1712–97 Maintenance of records; submittal of information.

86.1713–97 Light-duty exhaust durability programs.

86.1714–97 Small-volume manufacturers certification procedures.

86.1715–97 [Reserved]

86.1716–97 Prohibition of defeat devices.

86.1717–97 Emission control diagnostic system for 1997 and later light-duty vehicles and light-duty trucks.

86.1718–97 through 86.1720–97 [Reserved]

86.1721–97 Application for certification.

86.1722–97 [Reserved]

86.1723–97 Required data.

86.1724–97 Test vehicles and engines.

86.1725–97 Maintenance.

86.1726–97 Mileage and service accumulation; emission measurements.

86.1727–97 [Reserved]

86.1728–97 Compliance with emission standards.

86.1729–97 through 86.1733–97 [Reserved]

86.1734–97 Alternative procedure for notification of additions and changes.

86.1735–97 Labeling.

86.1736–97 through 86.1769–97 [Reserved]

86.1770–97 All-Electric Range Test requirements.

86.1771–97 Fuel specifications.

86.1772–97 Road load power test weight and inertia weight class determination.

86.1773–97 Test sequence; general requirements.

86.1774–97 Vehicle preconditioning.

86.1775–97 Exhaust sample analysis.

86.1776–97 Records required.

86.1777–97 Calculations; exhaust emissions.

86.1778–97 Calculations; particulate emissions.

86.1779–97 General enforcement provisions.

86.1780–97 Prohibited acts.

**Subpart R—General Provisions for the Voluntary National Low Emission Vehicle Program for Light-Duty Vehicles and Light-Duty Trucks**

**§ 86.1701–97 General applicability.**

(a) The provisions of this subpart may be adopted by vehicle manufacturers pursuant to the provisions specified in § 86.1705. The provisions of this subpart are generally applicable to 1997 and later model year light-duty vehicles and light-duty trucks to be sold in the Northeast Trading Region, and 2001 and later model year light-duty vehicles and light-duty trucks to be sold in the United States. In cases where a provision applies only to certain vehicles based on model year, vehicle class, motor fuel, engine type, vehicle emission category, intended sales destination, or other distinguishing characteristics, such limited applicability is cited in the appropriate section or paragraph. The provisions of this subpart shall be referred to as the “National Low Emission Vehicle Program” or “National LEV” or “NLEV.”

(b) All requirements of 40 CFR parts 85 and 86, unless specifically superseded by the provisions of this subpart, shall apply to vehicles under the National LEV Program. Compliance with the provisions of this subpart will be deemed compliance with some of the requirements of 40 CFR parts 85 and 86, as set forth elsewhere in this subpart.

(c) The requirements of this subpart apply to new vehicles manufactured by covered manufacturers for model years prior to the first model year for which a mandatory federal exhaust emissions program for light-duty vehicles and light-duty trucks is at least as stringent as the National LEV program with respect to NMOG, NO<sub>x</sub>, and CO exhaust emissions, as determined by the Administrator.

**§ 86.1702–97 Definitions.**

(a) The definitions in subpart A of this part apply to this subpart, except where the same term is defined differently in paragraph (b) of this section.

(b) The following definitions shall apply to this subpart:

*Advanced technology vehicle (ATV)* means any light-duty vehicle or light-duty truck that is covered by a federal certificate of conformity or an Executive Order, as defined in § 86.1002, which is either:

(1) A dual fuel, flexible fuel, or dedicated alternatively fueled vehicle certified as a TLEV or more stringent when operated on the alternative fuel;

(2) A ULEV or Inherently Low-Emission Vehicle (ILEV), as defined in 40 CFR 88.302, either conventionally or alternatively fueled;

(3) An HEV or ZEV.

*Alcohol fuel* means either methanol or ethanol as those terms are defined in this subpart.

*All-electric range test* means a test sequence used to determine the range of an electric vehicle or of a hybrid electric vehicle without the use of its auxiliary power unit. The All-Electric Range Test cycle is defined in § 86.1770.

*Averaging sets* are the categories of LDVs and LDTs for which the manufacturer calculates a fleet average NMOG value. The four averaging sets for fleet average NMOG value calculation purposes are:

(1) Class A delivered to a point of first sale in the Northeast Trading Region;

(2) Class A delivered to a point of first sale in the 37 States;

(3) Class B delivered to a point of first sale in the Northeast Trading Region; and

(4) Class B delivered to a point of first sale in the 37 States.

*Battery assisted combustion engine vehicle* means any vehicle which allows power to be delivered to the driven wheels solely by a combustion engine, but which uses a battery pack to store energy which may be derived through remote charging, regenerative braking, and/or a flywheel energy storage system or other means which will be used by an electric motor to assist in vehicle operation.

*Battery pack* means any electrical energy storage device consisting of any number of individual battery modules which is used to propel electric or hybrid electric vehicles.

*Certification level* means the official exhaust emission result from an emission-data vehicle which has been adjusted by the applicable mass deterioration factor and is submitted to the Administrator for use in determining compliance with an emission standard for the purpose of certifying a particular engine family. For those engine families which are certified using reactivity adjustment factors developed by the manufacturer pursuant to Appendix XVII of this part, the exhaust NMOG certification level shall include adjustment by the ozone deterioration factor.

*Class A* comprises LDVs and LDTs 0–3750 lbs LVW that are subject to the provisions of this subpart.

*Class B* comprises LDTs 3751–5750 lbs LVW that are subject to the provisions of this subpart.

*Continually regenerating trap oxidizer system* means a trap oxidizer system that does not utilize an automated regeneration mode during normal driving conditions for cleaning the trap.

*Conventional gasoline* means any certification gasoline which meets the specifications of § 86.113(a). The ozone-forming potential of conventional gasoline vehicle emissions shall be determined by using the methods and gasoline specifications contained in Appendix XVII of this part.

*Core Stable Standards* means the standards and requirements in § 86.1705(g)(1) (i) through (vi).

*Covered manufacturer* means an original equipment manufacturer (OEM), as defined at 40 CFR 85.1502(9), that meets the conditions specified under § 86.1705(a).

*Covered vehicle or engine* means a vehicle specified in § 86.1701(a), or an engine in such a vehicle, that is manufactured by a covered manufacturer.

*Credits* means fleet average NMOG credits as calculated from the amount that the manufacturer's applicable fleet average NMOG value is below the applicable fleet average NMOG standard, times the applicable production for a given model year. NMOG credits have units of g/mi.

*Debits* means fleet average NMOG debits as calculated from the amount that the manufacturer's applicable fleet average NMOG value is above the applicable fleet average NMOG standard, times the applicable production for a given model year. NMOG debits have units of g/mi.

*Dedicated ethanol vehicle* means any ethanol-fueled motor vehicle that is engineered and designed to be operated solely on ethanol.

*Dedicated methanol vehicle* means any methanol-fueled motor vehicle that is engineered and designed to be operated solely on methanol.

*Diesel engine* means any engine powered with diesel fuel, gaseous fuel, or alcohol fuel for which diesel engine speed/torque characteristics and vehicle applications are retained.

*Electric vehicle* means any vehicle which operates solely by use of a battery or battery pack. This definition also includes vehicles which are powered mainly through the use of an electric battery or battery pack, but which use a flywheel that stores energy produced by the electric motor or through regenerative braking to assist in vehicle operation.

*Element of design* means any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine.

*Ethanol* means any fuel for motor vehicles and motor vehicle engines that is composed of either commercially available or chemically pure ethanol (CH<sub>3</sub>CH<sub>2</sub>OH) and gasoline as specified in § 86.1771 (Fuel Specifications). The required fuel blend is based on the type of ethanol-fueled vehicle being certified and the particular aspect of the certification procedure being conducted.

*Ethanol vehicle* means any motor vehicle that is engineered and designed to be operated using ethanol as a fuel.

*Executive Officer* of the California Air Resources Board (ARB), as used in the referenced materials listed in § 86.1 and Appendix XIII of this part, means the Administrator of the Environmental Protection Agency (EPA).

*Fleet average NMOG value* is the fleet average NMOG value calculated for a particular averaging set, based upon the applicable production for that averaging set.

*49 states* is the region comprised of the United States excluding California.

*Fuel-fired heater* means a fuel burning device which creates heat for the purpose of warming the passenger compartment of a vehicle but does not contribute to the propulsion of the vehicle.

*Gaseous fuels* means liquefied petroleum gas, compressed natural gas, or liquefied natural gas fuels for use in motor vehicles.

*Hybrid electric vehicle (HEV)* means any vehicle which is included in the definition of a "series hybrid electric vehicle," a "parallel hybrid electric vehicle," or a "battery assisted combustion engine vehicle."

*Low emission vehicle (LEV)* means any vehicle certified to the low emission vehicle standards specified in this subpart.

*Low volume manufacturer*, for a particular model year, means any vehicle manufacturer that: Is considered a "small volume manufacturer" by the State of California according to the State of California regulatory definition of "small volume manufacturer", contained in the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996), which is incorporated by reference (see § 86.1); and has nationwide sales of light-duty vehicles and light light-duty trucks less than or equal to 40,000 units per model year

based on the average number of vehicles sold by the manufacturer for each of the three most recent model years. For manufacturers certifying for the first time, model-year sales shall be based on projected sales.

*Methane reactivity adjustment factor* means a factor applied to the mass of methane emissions from natural gas fueled vehicles for the purpose of determining the gasoline equivalent ozone-forming potential of the methane emissions.

*Methanol* means any fuel for motor vehicles and motor vehicle engines that is composed of either commercially available or chemically pure methanol (CH<sub>3</sub>OH) and gasoline as specified in § 86.1771 (Fuel Specifications). The required fuel blend is based on the type of methanol-fueled vehicle being certified and the particular aspect of the certification procedure being conducted.

*Methanol vehicle* means any motor vehicle that is engineered and designed to be operated using methanol as a fuel.

*Natural gas* means either compressed natural gas or liquefied natural gas.

*Natural gas vehicle* means any motor vehicle that is engineered and designed to be operated using either compressed natural gas or liquefied natural gas.

*Non-Core Stable Standards* means the standards and requirements in § 86.1705(g)(1)(vii) through (xii).

*Non-methane organic gases (NMOG)* means the sum of oxygenated and non-oxygenated hydrocarbons contained in a gas sample as measured in accordance with Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These requirements are incorporated by reference (see § 86.1).

*Non-regeneration emission test* means a complete emission test which does not include a regeneration.

*Northeast Trading Region (NTR)* means the region comprised of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia.

*Organic material non-methane hydrocarbon equivalent (or OMNMFHCE)* for methanol-fueled vehicles means the sum of the carbon mass contribution of non-oxygenated hydrocarbons (excluding methane), methanol, and formaldehyde as contained in a gas sample, expressed as gasoline-fueled hydrocarbons. For ethanol-fueled vehicles, organic material non-methane hydrocarbon equivalent (OMNMFHCE) means the sum of carbon mass contribution of non-oxygenated

hydrocarbons (excluding methane), methanol, ethanol, formaldehyde and acetaldehyde as contained in a gas sample, expressed as gasoline-fueled hydrocarbons.

*Ozone deterioration factor* means a factor applied to the mass of NMOG emissions from TLEVs, LEVs, or ULEVs which accounts for changes in the ozone-forming potential of the NMOG emissions from a vehicle as it accumulates mileage.

*Parallel hybrid electric vehicle* means any vehicle which allows power to be delivered to the driven wheels by either a combustion engine and/or by a battery powered electric motor.

*Periodically regenerating trap oxidizer system* means a trap oxidizer system that utilizes, during normal driving conditions for cleaning the trap, an automated regeneration mode which can be easily detected.

*Point of first sale* is the location where the completed LDV or LDT is purchased, also known as the final product purchase location. The point of first sale may be a retail customer, dealer, or secondary manufacturer. In cases where the end user purchases the completed vehicle directly from the manufacturer, the end user is the point of first sale.

*Production* is the number of vehicles and/or trucks that a manufacturer produces in a given model year that are subject to the provisions of this subpart and are included in the same averaging set.

*Reactivity adjustment factor* means a fraction applied to the mass of NMOG emission from a vehicle powered by a fuel other than conventional gasoline for the purpose of determining a gasoline-equivalent NMOG emission value. The reactivity adjustment factor is defined as the ozone-forming potential of the exhaust from a vehicle powered by a fuel other than conventional gasoline divided by the ozone-forming potential of conventional gasoline vehicle exhaust.

*Regeneration* means the process of oxidizing accumulated particulate matter. It may occur continually or periodically.

*Regeneration emission test* means a complete emission test which includes a regeneration.

*Regeneration interval* means the interval from the start of a regeneration to the start of the next regeneration.

*Series hybrid electric vehicle* means any vehicle which allows power to be delivered to the driven wheels solely by a battery powered electric motor, but which also incorporates the use of a combustion engine to provide power to the battery and/or electric motor.

*37 States* is the trading region comprised of the United States excluding California and the Northeast Trading Region.

*Transitional low emission vehicle (TLEV)* means any vehicle certified to the transitional low emission vehicle standards specified in this subpart.

*Trap oxidizer system* means an emission control system which consists of a trap to collect particulate matter and a mechanism to oxidize the accumulated particulate.

*Type A hybrid electric vehicle* means an HEV which achieves a minimum range of 60 miles over the All-Electric Range Test as defined in § 86.1770.

*Type B hybrid electric vehicle* means an HEV which achieves a range of 40–59 miles over the All-Electric Range Test as defined in § 86.1770.

*Type C hybrid electric vehicle* means an HEV which achieves a range of 0–39 miles over the All-Electric Range test and all other HEVs excluding “Type A” and “Type B” HEVs as defined in § 86.1770.

*Ultra-low emission vehicle (ULEV)* means any vehicle certified to the ultra-low emission vehicle standards specified in this subpart.

*Zero-emission vehicle (ZEV)* means any vehicle which is certified to produce zero emissions of any criteria pollutants under any and all possible operational modes and conditions. Incorporation of a fuel fired heater shall not preclude a vehicle from being certified as a ZEV provided the fuel fired heater cannot be operated at ambient temperatures above 40 degrees Fahrenheit and the heater is demonstrated to have zero evaporative emissions under any and all possible operational modes and conditions.

#### § 86.1703–97 Abbreviations.

(a) The abbreviations in subpart A of this part apply to this subpart.

(b) In addition, the following abbreviations shall apply to this subpart:

HEV—hybrid electric vehicle.  
LEV—low emission vehicle.  
NMOG—non-methane organic gases.  
NTR—Northeast Trading Region.  
TLEV—transitional low emission vehicle.  
ULEV—ultra low emission vehicle.  
ZEV—zero emission vehicle.

#### § 86.1704–97 Section numbering; construction.

(a) The model year of initial applicability is indicated by the last two digits of the six-digit group of the section number. A section remains in effect for subsequent model years until it is superseded.

(b) A section reference without a model year suffix shall be interpreted to

be a reference to the section applicable to the appropriate model year.

#### § 86.1705–97 General provisions; opt-in; opt-out.

(a) Covered manufacturers must comply with the provisions in this subpart, and in addition, must comply with the requirements of 40 CFR parts 85 and 86. A manufacturer shall be a covered manufacturer if:

(1) The manufacturer (or, in the case of joint ventures or similar cooperative arrangements between two or more manufacturers, the participating manufacturers) has opted into the program pursuant to paragraph (c) of this section;

(2) Where a manufacturer has included the condition on opt-in provided for in paragraph (c) of this section, that condition has been satisfied; and

(3) The manufacturer has not validly opted out, pursuant to paragraphs (d) and (e) of this section, or the manufacturer has validly opted out but that opt-out has not become effective under paragraph (d) of this section.

(b) Covered manufacturers must comply with the standards and requirements specified in this subpart beginning in model year 1997. A manufacturer not listed in § 86.1706(c) that opts into the program after EPA issues a finding pursuant to § 86.1706(a) that the program is in effect must comply with the standards and requirements of this subpart beginning in the model year that includes January 1 of the calendar year after the calendar year in which that manufacturer opts in. Light-duty vehicles and light light-duty trucks sold by covered manufacturers must comply with the provisions of this subpart.

(c)(1) To opt into the National LEV program, a motor vehicle manufacturer must submit a written statement to the Administrator signed by a person or entity within the corporation or business with authority to bind the corporation or business to its election and holding the position of vice president for environmental affairs or a position of comparable or greater authority. The statement must unambiguously and unconditionally (apart from the permissible condition specified in paragraph (c)(2) of this section) indicate the manufacturer's agreement to opt into the program and be subject to the provisions in this subpart, and include the following language:

[xx company,] its subsidiaries, successors and assigns hereby opts into the voluntary National LEV program, as defined in 40 CFR part 86, subpart R,

and agrees to be legally bound by all of the standards, requirements and other provisions of the National LEV program. [xx company] commits not to challenge EPA's authority to establish or enforce the National LEV program, and commits not to seek to certify any vehicle except in compliance with the regulations in subpart R.

(2) The opt-in statement may indicate that the manufacturer opts into the program subject to the condition that the Administrator finds under § 86.1706(a) that the National LEV program is in effect with the following language: "This opt-in is subject only to the condition that the Administrator make a finding pursuant to 40 CFR 86.1706(a) that the National LEV program is in effect."

(3) A manufacturer shall be considered to have opted in upon the Administrator's receipt of the opt-in notification and satisfaction of the condition set forth in paragraph (c)(2) of this section, if applicable.

(d) A covered manufacturer may opt out of the National LEV program only if one of the following specified conditions allowing opt-out occurs. A manufacturer must exercise the opt-out option within 180 days of the occurrence allowing opt-out, or the opt-out option expires. This time period for opt-out is extended by an additional thirty days if any manufacturer submits an opt-out notification to the Administrator within the 180 day time period. A valid opt-out shall become effective upon the times indicated in paragraphs (d)(2) (iii) and (iv) of this section or on a date specified by the manufacturer, whichever is later. The following are the conditions allowing opt-out:

(1) [Reserved]

(2) EPA promulgates a final rule or other final agency action making a revision not specified in paragraph (g)(3) or (g)(4) of this section to a standard or requirement listed in paragraph (g)(1) of this section and the covered manufacturer objects to the revision.

(i) Only a covered manufacturer that objects to a revision may opt out if EPA adopts that revision, except that if such a manufacturer opts out, other manufacturers that did not object to the revision may also opt out on the basis of that revision. An objection shall be sufficient for this purpose only if it was filed during the public comment period on the proposed revision and the objection specifies that the revision is sufficiently significant to allow opt-out under this paragraph (d).

(ii) An opt-out under this paragraph (d) shall be extinguished if, prior to the

effective date of the opt-out specified in paragraphs (d)(2)(iii) and (iv) of this section, the Administrator signs a rule to withdraw the revision to which the manufacturer objected.

(iii) A valid opt-out based on a revision to a Core Stable Standard shall become effective starting the model year that includes January 1 of the second calendar year following the calendar year in which the manufacturer opted out or the first model year to which EPA's revised regulations apply, whichever is sooner.

(iv) A valid opt-out based on a revision to a Non-Core Stable Standard shall become effective starting the first model year to which EPA's revised regulations apply.

(e)(1) To opt out of the National LEV program, a covered manufacturer must notify the Administrator as provided in paragraph (c)(1) of this section, except that the notification shall specify the condition under paragraph (d) of this section allowing opt-out, include evidence that this condition has occurred, and indicate the manufacturer's intent to opt out of the program and no longer be subject to the provisions in this subpart. For an opt-out pursuant to paragraph (d)(2) of this section, the manufacturer must specify the revision triggering the opt-out and shall also provide evidence that the triggering revision does not harmonize the standard or requirement with a comparable California standard or requirement, if applicable, or that the triggering revision has increased the stringency of the revised standard or requirement, if applicable. The notification shall include the following language: "[xx company,] its subsidiaries, successors and assigns hereby opt out of the voluntary National LEV program, as defined in 40 CFR part 86, subpart R."

(2) Within sixty days of receipt of an opt-out notification, EPA shall determine whether the opt-out is valid by determining whether the alleged condition allowing opt-out has occurred and whether the opt-out complies with the requirements under paragraph (d) of this section and this paragraph (e). For an opt-out based on paragraph (d)(2) of this section, EPA may determine that the opt-out is valid provided that EPA does not withdraw the revision objected to prior to the effective date of the opt-out. If EPA then withdraws the revision, EPA may find that the opt-out is no longer valid. An EPA determination regarding the validity of an opt-out is not a rule, but is a nationally applicable final agency action subject to judicial review pursuant to section 307(b) of the Clean Air Act (42 U.S.C. 7607(b)).

(3) A manufacturer that has submitted an opt-out notification to EPA remains a covered manufacturer under paragraph (a) of this section until EPA or a reviewing court determines that the opt-out is valid and the opt-out has come into effect under paragraph (d) of this section.

(4) In the event that a manufacturer petitions for judicial review of an EPA determination that an opt-out is invalid, the manufacturer remains a covered manufacturer until final judicial resolution of the petition. Pending resolution of the petition, and after the date that the opt-out would have come into effect under paragraph (d) of this section if EPA had determined the opt-out was valid, the manufacturer may certify vehicles to any standards in this part 86 applicable to vehicles certified in that model year and sell such vehicles without regard to the limitations contained in § 86.1711. However, if the opt-out is finally determined to be invalid, the manufacturer will be liable for any failure to comply with §§ 86.1710 through 86.1712, except for failure to comply with the limitations contained in § 86.1711(b).

(f) A manufacturer that has opted out and is no longer a covered manufacturer under this subpart shall be subject to all provisions that would apply to a manufacturer that had not opted into the National LEV program, including all applicable standards and requirements promulgated under title II of the Clean Air Act (42 U.S.C. 7521 *et seq.*) and any state standards in effect pursuant to section 177 of the Clean Air Act (42 U.S.C. 7507). Vehicles certified under the National LEV program must continue to meet the standards to which they were certified, regardless of whether the manufacturer of those vehicles remains a covered manufacturer. A manufacturer that has opted out remains responsible for any debts outstanding on the effective date of opt-out, pursuant to § 86.1710(d)(3).

(g)(1) The following are the emissions standards and requirements that, if revised, may provide covered manufacturers the opportunity to opt out pursuant to paragraph (d)(2) of this section:

(i) The tailpipe emissions standards for NMOG, NO<sub>x</sub>, CO, HCHO, and PM specified in § 86.1708 (b) and (c) and § 86.1709 (b) and (c);

(ii) Fleet average NMOG standards and averaging, banking and trading provisions specified in § 86.1710;

(iii) Provisions regarding limitations on sale of Tier 1 vehicles and TLEVs contained in § 86.1711;

(iv) The compliance test procedure (Federal Test Procedure) as specified in subparts A and B of this part, as used for determining compliance with the exhaust emission standards specified in § 86.1708 (b) and (c) and § 86.1709 (b) and (c);

(v) The compliance test fuel, as specified in § 86.1771;

(vi) The definition of low volume manufacturer specified in § 86.1702;

(vii) The on-board diagnostic system requirements specified in § 86.1717;

(viii) The light-duty vehicle refueling emissions standards and provisions specified in §§ 86.098–8(d) and subsequent model year provisions, and the light-duty truck refueling emissions standards and provisions specified in § 86.001–9(d) and subsequent model year provisions;

(ix) The cold temperature carbon monoxide standards and provisions for light-duty vehicles specified in § 86.096–8(k) and subsequent model year provisions, and for light light-duty trucks specified in § 86.097–9(k) and subsequent model year provisions;

(x) The evaporative emissions standards and provisions for light-duty vehicles specified in § 86.096–8(b) and subsequent model year provisions, and the evaporative emissions standards and provisions for light light-duty trucks specified in § 86.097–9(b) and subsequent model year provisions;

(xi) The reactivity adjustment factors and procedures specified in § 86.1777(d);

(xii) The Supplemental Federal Test Procedure, standards and phase-in schedules specified in § 86.000–8(e) and subsequent model year provisions, § 86.000–9(e) and subsequent model year provisions, § 86.127 (f) and (g), § 86.129 (e) and (f), § 86.130(e), § 86.131(f), § 86.132 (n) and (o), § 86.158, § 86.159, § 86.160, § 86.161, § 86.162, § 86.163, § 86.164, and Appendix I, paragraphs (g) and (h), to this part.

(2) The standards and requirements listed in paragraphs (g)(1) (i) through (vi) of this section are the “Core Stable Standards”; the standards and requirements listed in paragraphs (g)(1) (vii) through (xii) of this section are the “Non-Core Stable Standards.”

(3) The following types of revisions to the Stable Standards listed in paragraphs (g)(1) (i) through (xii) of this section do not provide covered manufacturers the right to opt out of the National LEV program:

(i) Revisions to which covered manufacturers do not object;

(ii) Revisions to a Non-Core Stable Standard that do not increase the overall stringency of the standard or requirement;

(iii) Revisions to a Non-Core Stable Standard that harmonize the standard or requirement with the comparable California standard or requirement for the same model year (even if the harmonization increases the stringency of the standard or requirement);

(iv) Revisions to a Non-Core Stable Standard that are effective after model year 2006;

(v) Revisions to cold temperature carbon monoxide standards and provisions for light-duty vehicles (as specified in § 86.096–8(k) and subsequent model year provisions) and for light light-duty trucks (as specified in § 86.097–9(k) and subsequent model year provisions) that are effective after model year 2000;

(vi) Revisions to the reactivity adjustment factors specified in § 86.1777 applicable to gasoline meeting the specifications of § 86.1771(a)(1), if such revisions maintain these reactivity adjustment factors at values not greater than 1.0.

(4) Promulgation of mandatory standards and requirements that end the effectiveness of the National LEV program pursuant to § 86.1701(c) does not provide an opportunity to opt out of the National LEV program.

(5) Adoption of the National LEV program does not impose gasoline or other in-use fuel requirements and is not intended to require any new federal or state regulation of fuels. Vehicles under National LEV will be able to operate on any fuels, including conventional gasoline, that, in the absence of the National LEV program, could be sold under federal or state law.

**§ 86.1706–97 National LEV program in effect.**

(a)(1) EPA shall find that the NLEV program is in effect and shall subsequently publish this determination if the following conditions have been met:

(i) All manufacturers listed in paragraph (b) of this section have lawfully opted in pursuant to § 86.1705; and

(ii) No valid opt-out has become effective pursuant to § 86.1705.

(2) A finding pursuant to paragraph (a)(1) of this section shall become effective at time of signature by the Administrator.

(b) List of manufacturers of light-duty vehicles and light-duty trucks:

American Suzuki Motor Corporation  
 BMW of North America, Inc.  
 Chrysler Corporation  
 Fiat Auto U.S.A., Inc.  
 Ford Motor Company  
 General Motors Corporation  
 Hyundai Motor America  
 Isuzu Motors America, Inc.  
 Jaguar Motors Ltd.  
 Kia Motors America, Inc.  
 Land Rover North America, Inc.  
 Mazda (North America) Inc.  
 Mercedes-Benz of North America  
 Mitsubishi Motor Sales of America, Inc.  
 Nissan North America, Inc.  
 Porsche Cars of North America, Inc.  
 Rolls-Royce Motor Cars Inc.  
 Saab Cars USA, Inc.  
 Subaru of America, Inc.  
 Toyota Motor Sales, U.S.A., Inc.  
 Volkswagen of America, Inc.  
 Volvo North America Corporation

**§ 86.1707–97 [Reserved]**

**§ 86.1708–97 Exhaust emission standards for 1997 and later light-duty vehicles.**

(a) Light-duty vehicles certified under the provisions of this subpart shall comply with the applicable exhaust emission standards in this section. In addition to the exhaust emission standards in this section, light-duty vehicles certified under the provisions of this subpart shall comply with all applicable emission standards and requirements in § 86.096–8 and subsequent model year provisions.

(1) Light-duty vehicles that meet the exhaust emission standards in this section are deemed to be in compliance with all the exhaust emission standards in § 86.096–8(a)(1)(i) and subsequent model year provisions, except for the emission standards and test procedures for total hydrocarbon (THC), particulate matter (PM), and high altitude conditions. Diesel light-duty vehicles that meet the PM standard in this section are deemed to be in compliance with the PM standard in § 86.096–8 and subsequent model year provisions.

(b)(1) *Standards.* (i) Exhaust emissions from 1997 and later model year light-duty vehicles classified as TLEVs, LEVs, and ULEVs shall not exceed the standards in Tables R97–1 and R97–2 in rows designated with the applicable vehicle emission category. These standards shall apply equally to certification and in-use vehicles, except as provided in paragraph (c) of this section. The tables follow:

TABLE R97-1.—INTERMEDIATE USEFUL LIFE STANDARDS (G/MI) FOR LIGHT-DUTY VEHICLES CLASSIFIED AS TLEVS, LEVS, AND ULEVS

Vehicle emission category	NMOG	CO	NO <sub>x</sub>	HCHO
TLEV .....	0.125	3.4	0.4	0.015
LEV .....	0.075	3.4	0.2	0.015
ULEV .....	0.040	1.7	0.2	0.008

TABLE R97-2.—FULL USEFUL LIFE STANDARDS (G/MI) FOR LIGHT-DUTY VEHICLES CLASSIFIED AS TLEVS, LEVS, AND ULEVS

Vehicle emission category	NMOG	CO	NO <sub>x</sub> S	HCHO	PM (diesels only)
TLEV .....	0.156	4.2	0.6	0.018	0.08
LEV .....	0.090	4.2	0.3	0.018	0.08
ULEV .....	0.055	2.1	0.3	0.011	0.04

(ii) *Diesel vehicles.* The particulate matter (PM) standards in paragraph (b)(1)(i) of this section are applicable to diesel light-duty vehicles only. For diesel vehicles certifying to the standards set forth in paragraph (b)(1)(i) of this section, "NMOG" shall mean non-methane hydrocarbons.

(iii) *NMOG standards for flexible-fuel and dual-fuel light-duty vehicles.* Flexible-fuel and dual-fuel light-duty vehicles shall be certified to exhaust emission standards for NMOG established both for the operation of the vehicle on an available fuel other than gasoline and for the operation of the vehicle on gasoline as specified in § 86.1771.

(A) The applicable NMOG emission standards for flexible-fuel and dual-fuel light-duty vehicles when certifying the vehicle for operation on fuels other than gasoline shall be the NMOG standards in paragraph (b)(1)(i) of this section.

(B) The applicable NMOG emission standards for flexible-fuel and dual-fuel light-duty vehicles when certifying the vehicle for operation on gasoline shall be the NMOG standards in Tables R97-3 and R97-4 in the rows designated with the applicable vehicle emission category, as follows:

TABLE R97-3.—INTERMEDIATE USEFUL LIFE NMOG STANDARDS (G/MI) FOR FLEXIBLE-FUEL AND DUAL-FUEL LIGHT-DUTY VEHICLES CLASSIFIED AS TLEVS, LEVS, AND ULEVS

Vehicle emission category	NMOG
TLEV .....	0.25
LEV .....	0.125
ULEV .....	0.075

TABLE R97-4.—FULL USEFUL LIFE NMOG STANDARDS (G/MI) FOR FLEXIBLE-FUEL AND DUAL-FUEL LIGHT-DUTY VEHICLES CLASSIFIED AS TLEVS, LEVS, AND ULEVS

Vehicle emission category	NMOG
TLEV .....	0.31
LEV .....	0.156
ULEV .....	0.090

(iv) *Highway NO<sub>x</sub>.* The maximum projected NO<sub>x</sub> emissions measured on the federal Highway Fuel Economy Test in 40 CFR part 600, subpart B, shall not be greater than 1.33 times the applicable light-duty vehicle standards shown in Tables R97-1 and R97-2. Both the projected emissions and the Highway Fuel Economy Test standard shall be rounded to the nearest 0.1 g/mi in accordance with the Rounding-Off Method specified in ASTM E29-90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications, before being compared. These procedures are incorporated by reference (see § 86.1).

(v) *Hybrid electric vehicle requirements.* Deterioration factors for hybrid electric vehicles shall be based on the emissions and mileage accumulation of the auxiliary power unit. For certification purposes only, Type A hybrid electric vehicles shall demonstrate compliance with 50,000 mile emission standards (using 50,000 mile deterioration factors), and shall not be required to demonstrate compliance with 100,000 mile emission standards. For certification purposes only, Type B hybrid electric vehicles shall demonstrate compliance with 50,000 mile emission standards (using 50,000 mile deterioration factors) and 100,000 mile emission standards (using 75,000 mile deterioration factors). For certification purposes only, Type C

hybrid electric vehicles shall demonstrate compliance with 50,000 mile emission standards (using 50,000 mile deterioration factors) and 100,000 mile emission standards (using 100,000 mile deterioration factors).

(vi) *50 degree F requirements.* Light-duty vehicles shall comply with the emission standards for NMOG, CO, NO<sub>x</sub>, and HCHO in paragraph (b)(1)(i) of this section at 50° F, according to the procedure specified in § 86.1773. Hybrid electric, natural gas, and diesel fueled vehicles are not required to comply with the provisions of this paragraph (b)(1)(vi).

(2) [Reserved]

(c) *Intermediate in-use emission standards.* (1) 1997 through 1999 model year light-duty vehicles certified as LEVs and 1997 through 2002 model year light-duty vehicles certified as ULEVs shall meet the applicable intermediate and full useful life in-use standards in paragraphs (c)(2) or (c)(3) of this section, according to the following provisions:

(i) In-use compliance with standards beyond the intermediate useful life shall be waived for LEVs and ULEVs through the 1998 model year.

(ii) The applicable in-use emission standards for vehicle emission categories and model years not shown in Tables R97-5, R97-6, and R97-7 shall be the intermediate and full useful life standards in paragraph (b) of this section.

(2) Light-duty vehicles, including flexible-fuel and dual-fuel light-duty vehicles when operated on an available fuel other than gasoline, shall meet all intermediate and full useful life in-use standards for the applicable vehicle emission category and model year in Tables R97-5 and R97-6, as follows:

TABLE R97-5.—INTERMEDIATE USEFUL LIFE (50,000 MILE) IN-USE STANDARDS (G/MI) FOR LIGHT-DUTY VEHICLES

Vehicle emission category	Model year	NMOG	CO	NO <sub>x</sub>	HCHO
LEV .....	1997-1999	0.100	3.4	0.3	0.015
ULEV .....	1997-1998	0.058	2.6	0.3	0.012
	1999-2000	0.055	2.1	0.3	0.012
	2001-2002	0.055	2.1	0.3	0.008

TABLE R97-6.—FULL USEFUL LIFE (100,000 MILE) IN-USE STANDARDS (G/MI) FOR LIGHT-DUTY VEHICLES

	Model year	NMOG	CO	NO <sub>x</sub>	HCHO
LEV .....	1999	0.125	4.2	0.4	0.018
ULEV .....	1999-2002	0.075	3.4	0.4	0.011

(3) Flexible-fuel and dual-fuel light-duty vehicles when operated on gasoline shall meet all intermediate and full useful life in-use standards for the applicable vehicle emission category and model year in Tables R97-5 and R97-6, except that the applicable intermediate useful life NMOG standards for 1997 and 1998 model year flexible-fuel and dual-fuel light-duty vehicles when operated on gasoline shall be those in Table R97-7, as follows:

TABLE R97-7.—INTERMEDIATE USEFUL LIFE (50,000 MILE) IN-USE NMOG STANDARDS FOR 1997 AND 1998 MODEL YEAR FLEXIBLE-FUEL AND DUAL-FUEL LIGHT-DUTY VEHICLES WHEN OPERATED ON GASOLINE

Vehicle emission category	NMOG (g/mi)
LEV .....	0.188
ULEV .....	0.100

(d) *NMOG measurement and reactivity adjustment.* NMOG emissions shall be measured in accordance with Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These requirements are incorporated by reference (see § 86.1). NMOG emissions shall be compared to the applicable NMOG emissions certification or in-use standard according to the following calculation procedures:

(1) For TLEVs, LEVs, and ULEVs designed to operate on any fuel other

than conventional gasoline, and for flexible-fuel and dual-fuel TLEVs, LEVs, and ULEVs when operated on a fuel other than gasoline as specified in § 86.1771, manufacturers shall multiply NMOG exhaust mass emission levels by the applicable reactivity adjustment factor set forth in § 86.1777, or established by the Administrator pursuant to § 86.1777. The product of the NMOG exhaust emission levels and the reactivity adjustment factor shall be compared to the applicable certification or in-use exhaust NMOG mass emission standards established for the particular vehicle emission category to determine compliance.

(2) In addition to multiplying the exhaust NMOG mass emission levels by the applicable reactivity adjustment factor, TLEV, LEV, or ULEV natural gas vehicles shall multiply the exhaust methane mass emission level by the applicable methane reactivity adjustment factor in § 86.1777 or established by the Administrator pursuant to § 86.1777. The reactivity-adjusted NMOG value shall be added to the reactivity-adjusted methane value and then the sum shall be compared to the applicable certification or in-use exhaust NMOG mass emission standards established for the particular vehicle emission category to determine compliance.

(3) The exhaust NMOG mass emission levels for fuel-flexible and dual-fuel vehicles when operating on gasoline as specified in § 86.1771 shall not be multiplied by a reactivity adjustment factor.

**§ 86.1709-97 Exhaust emission standards for 1997 and later light light-duty trucks.**

(a) Light light-duty trucks certified under the provisions of this subpart shall comply with the applicable exhaust emission standards in this section. In addition to the exhaust emission standards in this section, light light-duty trucks certified under the provisions of this subpart shall comply with all applicable emission standards and requirements in § 86.097-9 and subsequent model year provisions.

(1) Light light-duty trucks that meet the exhaust emission standards in this section are deemed to be in compliance with all the exhaust emission standards in § 86.097-9(a)(1)(i) and subsequent model year provisions, except for the emission standards and test procedures for total hydrocarbon (THC), particulate matter (PM), and high altitude conditions. Diesel light light-duty trucks that meet the PM standard in this section are deemed to be in compliance with the PM standards in § 86.097-9 and subsequent model year provisions.

(2) [Reserved]

(b)(1) *Standards.* (i) Exhaust emissions from 1997 and later model year light light-duty trucks classified as TLEVs, LEVs, and ULEVs shall not exceed the standards in Tables R97-8 and R97-9 in rows designated with the applicable vehicle emission category and loaded vehicle weight. These standards shall apply equally to certification and in-use vehicles, except as provided in paragraph (c) of this section. The tables follow:

TABLE R97-8.—INTERMEDIATE USEFUL LIFE STANDARDS (G/MI) FOR LIGHT LIGHT-DUTY TRUCKS CLASSIFIED AS TLEVs, LEVs, AND ULEVs

Loaded vehicle weight	Vehicle emission category	NMOG	CO	NO <sub>x</sub>	HCHO
0-3750 .....	TLEV	0.125	3.4	0.4	0.015

TABLE R97-8.—INTERMEDIATE USEFUL LIFE STANDARDS (G/MI) FOR LIGHT LIGHT-DUTY TRUCKS CLASSIFIED AS TLEVS, LEVS, AND ULEVS—Continued

Loaded vehicle weight	Vehicle emission category	NMOG	CO	NO <sub>x</sub>	HCHO
3751-5750 .....	LEV	0.075	3.4	0.2	0.015
	ULEV	0.040	1.7	0.2	0.008
	TLEV	0.160	4.4	0.7	0.018
	LEV	0.100	4.4	0.4	0.018
	ULEV	0.050	2.2	0.4	0.009

TABLE R97-9.—FULL USEFUL LIFE STANDARDS (G/MI) FOR LIGHT LIGHT-DUTY TRUCKS CLASSIFIED AS TLEVS, LEVS, AND ULEVS

Loaded vehicle weight	Vehicle emission category	NMOG	CO	NO <sub>x</sub>	HCHO	PM (diesels only)
0-3750 .....	TLEV	0.156	4.2	0.6	0.018	0.08
	LEV	0.090	4.2	0.3	0.018	0.08
	ULEV	0.055	2.1	0.3	0.011	0.04
3751-5750 .....	TLEV	0.200	5.5	0.9	0.023	0.10
	LEV	0.130	5.5	0.5	0.023	0.10
	ULEV	0.070	2.8	0.5	0.013	0.05

(ii) *Diesel vehicles.* The particulate matter (PM) standards in paragraph (b)(1)(i) of this section are applicable to diesel vehicles only. For diesel vehicles certifying to the standards set forth in paragraph (b)(1)(i) of this section, "NMOG" shall mean non-methane hydrocarbons.

(iii) *NMOG standards for flexible-fuel and dual-fuel light duty trucks.* Flexible-fuel and dual-fuel light light-duty trucks shall be certified to exhaust emission standards for NMOG established both for the operation of the vehicle on an available fuel other than gasoline and for the operation of the vehicle on gasoline as specified in § 86.1771.

(A) The applicable NMOG emission standards for flexible-fuel and dual-fuel light light-duty trucks when certifying the vehicle for operation on fuels other than gasoline shall be the NMOG standards in paragraph (b)(1)(i) of this section.

(B) The applicable NMOG emission standards for flexible-fuel and dual-fuel light light-duty trucks when certifying the vehicle for operation on gasoline shall be the NMOG standards in Tables R97-10 and R97-11 in the rows designated with the applicable vehicle emission category and loaded vehicle weight, as follows:

TABLE R97-10.—INTERMEDIATE USEFUL LIFE NMOG STANDARDS (G/MI) FOR FLEXIBLE-FUEL AND DUAL-FUEL LIGHT LIGHT-DUTY TRUCKS CLASSIFIED AS TLEVS, LEVS, AND ULEVS

Loaded vehicle weight	Vehicle emission category	NMOG
0-3750 .....	TLEV	0.25
	LEV	0.125
	ULEV	0.075
3751-5750 .....	TLEV	0.32
	LEV	0.160
	ULEV	0.100

TABLE R97-11.—FULL USEFUL LIFE NMOG STANDARDS (G/MI) FOR FLEXIBLE-FUEL AND DUAL-FUEL LIGHT LIGHT-DUTY TRUCKS CLASSIFIED AS TLEVS, LEVS, AND ULEVS

Loaded vehicle weight	Vehicle emission category	NMOG
0-3750 .....	TLEV	0.31
	LEV	0.156
	ULEV	0.090
3751-5750 .....	TLEV	0.40
	LEV	0.200
	ULEV	0.130

(iv) *Highway NO<sub>x</sub>.* The maximum projected NO<sub>x</sub> emissions measured on the federal Highway Fuel Economy Test in 40 CFR part 600, subpart B, shall be not greater than 1.33 times the applicable light light-duty truck standards shown in Tables R97-8 and R97-9. Both the projected emissions and the Highway Fuel Economy Test standard shall be rounded to the nearest

0.1 g/mi in accordance with the Rounding-Off Method specified in ASTM E29-90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications, before being compared. These procedures are incorporated by reference (see § 86.1).

(v) *Hybrid electric vehicle requirements.* Deterioration factors for hybrid electric vehicles shall be based on the emissions and mileage accumulation of the auxiliary power unit. For certification purposes only, Type A hybrid electric vehicles shall demonstrate compliance with 50,000 mile emission standards (using 50,000 mile deterioration factors), and shall not be required to demonstrate compliance with 100,000 mile emission standards. For certification purposes only, Type B hybrid electric vehicles shall demonstrate compliance with 50,000 mile emission standards (using 50,000 mile deterioration factors) and 100,000 mile emission standards (using 75,000 mile deterioration factors). For certification purposes only, Type C hybrid electric vehicles shall demonstrate compliance with 50,000 mile emission standards (using 50,000 mile deterioration factors) and 100,000 mile emission standards (using 100,000 mile deterioration factors).

(vi) *50 degree F requirements.* Light light-duty trucks shall comply with the emission standards for NMOG, CO, NO<sub>x</sub>, and HCHO in paragraph (b)(1)(i) of this section at 50 degrees F, according to the procedure specified in § 86.1773. Hybrid electric vehicles, natural gas vehicles, and diesel fueled vehicles are

not required to comply with the provisions of this paragraph (b)(1)(vi).

(2) [Reserved]

(c) *Intermediate in-use emission standards.* (1) 1997 and 1998 model year light light-duty trucks certified as LEVs or ULEVs shall meet the applicable intermediate and full useful life in-use standards in paragraphs (c)(2) or (c)(3) of this section, according to the following provisions:

(i) In-use compliance with standards beyond the intermediate useful life shall be waived for LEVs and ULEVs through the 1998 model year.

(ii) The applicable in-use emission standards for vehicle emission categories and model years not shown in Tables R97-12, R97-13, and R97-14 shall be the intermediate and full useful life standards in paragraph (b) of this section.

(2) Light light-duty trucks, including flexible-fuel and dual-fuel light light-duty trucks when operated on an available fuel other than gasoline, shall meet all intermediate and full useful life in-use standards for the applicable vehicle emission category, loaded vehicle weight, and model year in Tables R97-12 and R97-13, as follows:

TABLE R97-12.—INTERMEDIATE USEFUL LIFE (50,000 MILE) IN-USE STANDARDS (G/MI) FOR LIGHT LIGHT-DUTY TRUCKS

Loaded vehicle weight	Vehicle emission category	Model year	NMOG	CO	NO <sub>x</sub>	HCHO
0-3750 .....	LEV	1997-1999	0.100	3.4	0.3	0.015
	ULEV	1997-1998	0.058	2.6	0.3	0.012
		1999-2000	0.055	2.1	0.3	0.012
		2001-2002	0.055	2.1	0.3	0.008
3751-5750 .....	LEV	1997-1998	0.128	4.4	0.5	0.018
		1999	0.130	4.4	0.5	0.018
	ULEV	1997-1998	0.075	3.3	0.5	0.014
		1999-2002	0.070	2.8	0.5	0.014

TABLE R97-13.—FULL USEFUL LIFE (100,000 MILE) IN-USE STANDARDS (G/MI) FOR LIGHT LIGHT-DUTY TRUCKS

Loaded vehicle weight	Vehicle emission category	Model year	NMOG	CO	NO <sub>x</sub>	HCHO
0-3750 .....	LEV	1999	0.125	4.2	0.4	0.018
	ULEV	1999-2002	0.075	3.4	0.4	0.011
3751-5750 .....	LEV	1999	0.160	5.5	0.7	0.018
	ULEV	1999-2002	0.100	4.4	0.7	0.014

(3) Flexible-fuel and dual-fuel light light-duty trucks when operated on gasoline shall meet all intermediate and full useful life in-use standards for the applicable vehicle emission category and model year in Tables R97-12 and R97-13, except that the applicable intermediate useful life NMOG standards for 1997 and 1998 model year flexible-fuel and dual-fuel light light-duty trucks when operated on gasoline shall be those in Table R97-14, as follows:

TABLE R97-14.—INTERMEDIATE USEFUL LIFE (50,000 MILE) IN-USE NMOG STANDARDS (G/MI) FOR 1997 AND 1998 MODEL YEAR FLEXIBLE-FUEL AND DUAL-FUEL LIGHT LIGHT-DUTY TRUCKS WHEN OPERATED ON GASOLINE

Loaded vehicle weight	Vehicle emission category	NMOG
0-3750 .....	LEV	0.188
	ULEV	0.100
3751-5750 .....	LEV	0.238
	ULEV	0.128

(d) *NMOG measurement and reactivity adjustment.* NMOG emissions shall be measured in accordance with

Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These procedures are incorporated by reference (see § 86.1). NMOG emissions shall be compared to the applicable NMOG emissions certification or in-use standard according to the following calculation procedures:

(1) For TLEVs, LEVs, and ULEVs designed to operate on any fuel other than conventional gasoline, and for flexible-fuel and dual-fuel TLEVs, LEVs, and ULEVs when operated on a fuel other than gasoline as specified in § 86.1771, manufacturers shall multiply NMOG mass exhaust emission levels by the applicable reactivity adjustment factor set forth in § 86.1777 or established by the Administrator pursuant to § 86.1777. The product of the NMOG exhaust emission levels and the reactivity adjustment factor shall be compared to the applicable certification or in-use exhaust NMOG mass emission standards established for the particular vehicle emission category to determine compliance.

(2) In addition to multiplying the exhaust NMOG mass emission levels by the applicable reactivity adjustment factor, TLEV, LEV, or ULEV natural gas

vehicles shall multiply the exhaust methane mass emission level by the applicable methane reactivity adjustment factor in § 86.1777 or established by the Administrator pursuant to § 86.1777. The reactivity-adjusted NMOG value shall be added to the reactivity-adjusted methane value and then the sum shall be compared to the applicable certification or in-use exhaust NMOG mass emission standards established for the particular vehicle emission category to determine compliance.

(3) The exhaust NMOG mass emission levels for fuel-flexible and dual-fuel vehicles when operating on gasoline as specified in § 86.1771 shall not be multiplied by a reactivity adjustment factor.

**§ 86.1710-97 Fleet average non-methane organic gas exhaust emission standards for light-duty vehicles and light light-duty trucks.**

(a)(1) Each manufacturer shall certify light-duty vehicles or light light-duty trucks to meet the exhaust emission standards in this subpart for TLEVs, LEVs, ULEVs, or ZEVs, or the exhaust emission standards of § 86.096-8(a)(1)(i) and subsequent model year provisions or § 86.097-9(a)(1)(i) and subsequent

model year provisions, such that, using the applicable intermediate useful life standards, the manufacturer's fleet average NMOG values for light-duty

vehicles and light light-duty trucks sold in the applicable region according to the specifications of Tables R97-15 and R97-16 are less than or equal to the

standards in Tables R97-15 and R97-16 in the rows designated with the applicable vehicle type, loaded vehicle weight, and model year, as follows:

TABLE R97-15.—FLEET AVERAGE NON-METHANE ORGANIC GAS STANDARDS (G/MI) FOR LIGHT-DUTY VEHICLES AND LIGHT LIGHT-DUTY TRUCKS SOLD IN THE NORTHEAST TRADING REGION

Vehicle type	Loaded vehicle weight	Model year	Fleet average NMOG
Light-duty vehicles and Light-duty trucks .....	All 0-3750	1997 .....	0.200
		1998 .....	0.200
		1999 .....	0.148
		2000 .....	0.095
		2001 and later .....	0.075
Light-duty trucks .....	3751-5750	1997 .....	0.256
		1998 .....	0.256
		1999 .....	0.190
		2000 .....	0.124
		2001 and later .....	0.100

TABLE R97-16.—FLEET AVERAGE NON-METHANE ORGANIC GAS STANDARDS (G/MI) FOR LIGHT-DUTY VEHICLES AND LIGHT LIGHT-DUTY TRUCKS SOLD IN THE 37 STATES

Vehicle type	Loaded vehicle weight	Model year	Fleet average NMOG
Light-duty vehicles and Light light-duty trucks .....	All 0-3750	2001 and later .....	0.075
Light light-duty trucks .....	3751-5750	2001 and later .....	0.100

(2)(i) For the purpose of calculating the HEV contribution factor for the fleet average NMOG value, a manufacturer may use adjusted values to estimate the contributions of hybrid electric vehicles (or "HEVs") based on the range of the HEV without the use of the engine. See § 86.1702 for definitions of HEV types for purposes of calculating adjusted NMOG emissions.

(ii) For the purpose of calculating fleet average NMOG values, vehicles that have no tailpipe emissions but use fuel-fired heaters and that are not certified as ZEVs shall be treated as Type A HEV ULEVs.

(3)(i) Each manufacturer's applicable fleet average NMOG value for all light light-duty trucks from 0-3750 lbs loaded vehicle weight and light-duty vehicles sold in the applicable region according to Tables R97-15 and R97-16 shall be calculated in units of g/mi NMOG according to the following equation, where the term "Sold" means sold in the applicable region according to Tables R97-15 and R97-16, and the term "Vehicles" means light light-duty trucks from 0-3750 lbs loaded vehicle weight and light-duty vehicles:  $((\text{No. of Vehicles Certified to the Federal Tier 1 Exhaust Emission Standards and Sold}) \times (0.25)) + ((\text{No. of TLEVs Sold excluding HEVs}) \times (0.125)) + ((\text{No. of LEVs Sold excluding HEVs}) \times (0.075)) + ((\text{No. of ULEVs Sold excluding HEVs}) \times (0.040)) + (\text{HEV contribution$

factor)) / (Total No. of Vehicles Sold, including ZEVs and HEVs).

(ii)(A) "HEV contribution factor" shall mean the NMOG emission contribution of HEVs to the fleet average NMOG value. The HEV contribution factor shall be calculated in units of g/mi as follows, where the term "Sold" means sold in the applicable region according to Tables R97-15 and R97-16.

(B) HEV contribution factor =  $((\text{No. of Type A HEV TLEVs Sold}) \times (0.100)) + ((\text{No. of Type B HEV TLEVs Sold}) \times (0.113)) + ((\text{No. of Type C HEV TLEVs Sold}) \times (0.125)) + ((\text{No. of Type A HEV LEVs Sold}) \times (0.057)) + ((\text{No. of Type B HEV LEVs Sold}) \times (0.066)) + ((\text{No. of Type C HEV LEVs Sold}) \times (0.075)) + ((\text{No. of Type A HEV ULEVs Sold}) \times (0.020)) + ((\text{No. of Type B HEV ULEVs Sold}) \times (0.030)) + ((\text{No. of Type C HEV ULEVs Sold}) \times (0.040))$ .

(iii)(A) For any model year in which a manufacturer certifies its entire fleet of light light-duty trucks from 0-3750 lbs LVW and light-duty vehicles to intermediate useful life NMOG emission standards specified in §§ 86.1708 and 86.1709 that are less than or equal to the applicable fleet average NMOG standard specified in Table R97-15, the manufacturer may choose not to calculate a separate fleet average NMOG value for each region for such vehicles for that model year.

(B) The fleet average NMOG value for a manufacturer electing under

paragraph (a)(3)(iii)(A) of this section not to calculate a separate fleet average NMOG value shall be deemed to be the applicable fleet average NMOG standard specified in Table R97-15 for the applicable model year.

(C) A manufacturer making the election under paragraph (a)(3)(iii)(A) of this section may not generate credits for that model year for light light-duty trucks from 0-3750 lbs LVW and light-duty vehicles.

(4)(i) Each manufacturer's applicable fleet average NMOG value for all light light-duty trucks from 3751-5750 lbs loaded vehicle weight sold in the applicable region according to Tables R97-15 and R97-16 shall be calculated in units of g/mi NMOG according to the following equation, where the term "Sold" means sold in the applicable region according to Tables R97-15 and R97-16, and the term "Vehicles" means light light-duty trucks from 3751-5750 lbs loaded vehicle weight:  $((\text{No. of Vehicles Certified to the Federal Tier 1 Exhaust Emission Standards and Sold}) \times (0.32)) + ((\text{No. of TLEVs Sold excluding HEVs}) \times (0.160)) + ((\text{No. of LEVs Sold excluding HEVs}) \times (0.100)) + ((\text{No. of ULEVs Sold excluding HEVs}) \times (0.050)) + (\text{HEV Contribution factor}) / (\text{Total No. of Vehicles Sold, including ZEVs and HEVs})$ .

(ii)(A) "HEV contribution factor" shall mean the NMOG emission contribution of HEVs to the fleet average NMOG. The

HEV contribution factor shall be calculated in units of g/mi as follows, where the term "Sold" means sold in the applicable region according to Tables R97-15 and R97-16.

(B) HEV contribution factor= $((\text{No. of Type A HEV TLEVs Sold}) \times (0.130)) + ((\text{No. of Type B HEV TLEVs Sold}) \times (0.145)) + ((\text{No. of Type C HEV TLEVs Sold}) \times (0.160)) + ((\text{No. of Type A HEV LEVs Sold}) \times (0.075)) + ((\text{No. of Type B HEV LEVs Sold}) \times (0.087)) + ((\text{No. of Type C HEV LEVs Sold}) \times (0.100)) + ((\text{No. of Type A HEV ULEVs Sold}) \times (0.025)) + ((\text{No. of Type B HEV ULEVs Sold}) \times (0.037)) + ((\text{No. of Type C HEV ULEVs Sold}) \times (0.050))$ .

(iii)(A) For any model year in which a manufacturer certifies its entire fleet of light light-duty trucks from 3751-5750 lbs LVW to intermediate useful life NMOG emission standards specified in § 86.1709 that are less than or equal to the applicable fleet average NMOG requirement specified in Table R97-15, the manufacturer may choose not to calculate a separate fleet average NMOG value for each region for such vehicles for that model year.

(B) The fleet average NMOG value for a manufacturer electing under paragraph (a)(4)(iii)(A) of this section not to calculate a separate fleet average NMOG value shall be deemed to be the applicable fleet average NMOG requirement specified in Table R97-15 for the applicable model year.

(C) A manufacturer making the election under paragraph (a)(4)(iii)(A) of this section may not generate credits for that model year for light light-duty trucks from 3751-3750 lbs LVW.

(5)(i) The calculation of the fleet average NMOG value pursuant to paragraphs (a)(3) and (a)(4) of this section shall exclude ATVs, as defined in § 86.1702, purchased in the NTR by state governments. In determining the quantity of vehicles to be excluded from the NMOG calculations, a manufacturer shall only be required to exclude vehicles that are reported by the purchasing government in a timely letter, containing adequate information, directed to the representative of the manufacturer listed in the manufacturer's application for certification. Such letter shall be considered timely only if it is received no later than February 1 of the calendar year following the model year of the purchased vehicles.

(ii) Adequate information includes the number of vehicles purchased, vehicle makes and models, and the associated engine families. A copy of the letter should be sent to EPA.

(6) For any model year prior to model year 2001 for which a manufacturer

meets the definition of "low volume manufacturer" in § 86.1702, it shall be exempt from the requirements in paragraph (a)(1) of this section. The requirements in paragraph (a)(1) of this section applicable to the 2001 and later model years shall apply to low volume manufacturers.

(b) *Fleet average NMOG credit and debit calculations.* (1) For each averaging set, as defined in § 86.1702, manufacturers that achieve fleet average NMOG values lower than the fleet average NMOG standard for the corresponding model year may generate credits.

(2) For each averaging set, manufacturers that obtain applicable fleet average NMOG values exceeding the fleet average NMOG standard for the corresponding model year shall generate debits.

(3) For each averaging set, credits and debits are to be calculated according to the following equation and rounded, in accordance with the Rounding-Off Method specified in ASTM E29-90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications, which is incorporated by reference (see § 86.1), to the nearest whole number (intermediate calculations will not be rounded):

$$\text{Number of Credits/Debits} = ((\text{Applicable Fleet Average NMOG Standard}) - (\text{Manufacturer's Applicable Fleet Average NMOG Value})) \times (\text{Applicable Production}).$$

(4) For each region and model year, a manufacturer's available credits or level of debits shall be the sum of credits or debits derived from the respective class A and class B averaging sets for that region and model year.

(c) *Fleet average NMOG credits.* (1) Credits may be used to offset only fleet average NMOG debits of the same region (NTR or 37 States).

(2) Credits may only be used, traded or carried over to the next model year after they are earned. Credits are earned on the last day of the model year. Before trading or carrying over credits to the next model year, a manufacturer must apply available credits to offset any of its debits from the same region, where the deadline to offset such debits has not yet passed.

(3) Credits earned in any given model year shall retain full value through the subsequent model year.

(4) Unused credits that are available at the end of the second, third, and fourth model years after the model year in which the credits were generated shall be discounted to 50%, 25%, and 0% of the original value of the credits,

respectively. The discounting of credits also applies to credits transferred to other parties.

(5) Credits may not be used to remedy any nonconformities determined by a Selective Enforcement Audit, recall testing, or testing performed with respect to Title 13, Chapter 2, Articles 1 and 2 of the California Code of Regulations.

(6) Prior to model year 2001, low volume manufacturers may earn credits in the NTR to transfer to other motor vehicle manufacturers for use in the NTR or to bank for their own use in the NTR in 2001 and subsequent model years. Such credits will be calculated as set forth in paragraphs (a) and (b) of this section, except that the applicable fleet average NMOG standard shall be 0.25 g/mi NMOG for the averaging set for light light-duty trucks from 0-3750 lbs LVW and light-duty vehicles or 0.32 g/mi NMOG for the averaging set for light light-duty trucks from 3751-5750 lbs LVW. Credits shall be discounted in accordance with the provisions in paragraph (c)(4) of this section.

(7) Manufacturers may earn and bank credits in the 37 states prior to model year 2001. Such credits will be calculated as set forth in paragraphs (a) and (b) of this section, except that the applicable fleet average NMOG standard shall be 0.25 g/mi NMOG for the averaging set for light light-duty trucks from 0-3750 lbs LVW and light-duty vehicles or 0.32 g/mi NMOG for the averaging set for light light-duty trucks from 3751-5750 lbs LVW.

(i) Emissions credits earned in the 37 states prior to the 2001 model year shall be treated as generated in the 2001 model year.

These credits shall be discounted in accordance with the provisions in paragraph (c)(4) of this section.

(iii) In the 2001 model year, a one-time discount rate of 10 percent shall be applied to all credits earned under the provisions of this paragraph (c)(7).

(8) There are no property rights associated with credits generated under the provisions of this section. Credits are a limited authorization to emit the designated amount of emissions. Nothing in the regulations or any other provision of law should be construed to limit EPA's authority to terminate or limit this authorization through a rulemaking.

(d) *Fleet average NMOG debits.* (1) Manufacturers shall offset any debits for a given model year by the fleet average NMOG reporting deadline for the model year following the model year in which the debits were generated. Manufacturers may offset debits by generating credits or acquiring credits

generated by another manufacturer. Any credit used to offset a debit must be from the same region (NTR or 37 States) in which the debit was incurred.

(2)(i) Failure to meet the requirements of paragraphs (a) through (d) of this section within the required timeframe for offsetting debits will be considered to be a failure to satisfy the conditions upon which the certificate(s) was issued and the individual noncomplying vehicles not covered by the certificate shall be determined according to this section.

(ii) If debits are not offset within the specified time period, the number of vehicles not meeting the fleet average NMOG standards and not covered by the certificate shall be calculated by dividing the total amount of debits for the model year by the fleet average NMOG standard applicable for the model year and averaging set in which the debits were first incurred. If both averaging sets are in debit, any applicable credits will first be allocated between the averaging sets according to the manufacturer's expressed preferences. Then, the number of vehicles not covered by the certificate shall be calculated using the revised debit values.

(iii) EPA will determine the vehicles for which the condition on the certificate was not satisfied by designating vehicles in those engine families with the highest certification NMOG emission values first and continuing until a number of vehicles equal to the calculated number of noncomplying vehicles as determined above is reached. If this calculation determines that only a portion of vehicles in an engine family contribute to the debit situation, then EPA will designate actual vehicles in that engine family as not covered by the certificate, starting with the last vehicle produced and counting backwards.

(3) If a manufacturer opts out of the National LEV program pursuant to § 86.1705, the manufacturer continues to be responsible for offsetting any debits outstanding on the effective date of the opt-out within the required time period. Any failure to offset the debits will be considered to be a violation of paragraph (d)(1) of this section and may subject the manufacturer to an enforcement action for sale of vehicles not covered by a certificate, pursuant to paragraph (d)(2) of this section.

(4) For purposes of calculating tolling of the statute of limitations, a violation of the requirements of paragraph (d)(1) of this section, a failure to satisfy the conditions upon which a certificate(s) was issued and hence a sale of vehicles not covered by the certificate, all occur

upon the expiration of the deadline for offsetting debits specified in paragraph (d)(1) of this section.

(e) *NMOG credit transfers.* (1) EPA may reject NMOG credit transfers if the involved manufacturers fail to submit the credit transfer notification in the annual report.

(2) A manufacturer may not sell credits that are not available for sale pursuant to the provisions in paragraph (c)(2) of this section.

(3) Except in instances of fraud on the part of the credit recipient, where a manufacturer sells credits that were not available for sale, the credits shall be treated as valid, and the manufacturer that sold the credits shall be liable for any resulting shortfall.

(4)(i) If a manufacturer transfers a credit that it has not generated pursuant to paragraph (b) of this section or acquired from another party, the manufacturer will be considered to have generated a debit in the model year that the manufacturer transferred the credit. The manufacturer must offset such debits by the deadline for the annual report for that same model year.

(ii) Failure to offset the debits within the required time period will be considered a failure to satisfy the conditions upon which the certificate(s) was issued and will be addressed pursuant to paragraph (d)(2) of this section.

**§ 86.1711–97 Limitations on sale of Tier 1 vehicles and TLEVs; five percent cap.**

(a) In the 2001 and subsequent model years, manufacturers may sell Tier 1 vehicles and TLEVs in the NTR only if vehicles with the same engine families are certified and offered for sale in California in the same model year, except as provided under § 86.1705(e)(4).

(b)(1) The industry-wide percentage of Tier 1 and TLEV light-duty vehicles and light light-duty trucks sold in the NTR for 2001 and subsequent model years shall not exceed five percent of the total number of light-duty vehicles and light light-duty trucks sold in the NTR in a given model year.

(2) When EPA determines that the five-percent cap requirement of this section is first exceeded, EPA will notify covered manufacturers of the exceedance during the calendar year following the model year for which there was an exceedance. The requirement in paragraph (b)(1) of this section will be enforceable starting with the model year containing January 1 of the calendar year following the calendar year in which EPA notifies manufacturers of the exceedance and for each model year thereafter.

(3)(i) An exceedance of the requirement in this section is determined according to the following equation where the term "Vehicles" means light-duty vehicles and light light-duty trucks, but excludes vehicles sold by a manufacturer that has opted out of the National LEV program pursuant to the provisions of § 86.1705, pending final judicial resolution of the opt-out petition:

$$\text{Total number of Vehicles exceeding five-percent cap} = ((\text{Total number of Tier 1 Vehicles and TLEVs sold in the NTR}) - ((\text{Total number of Vehicles sold in the NTR}) - 0.05))$$

(ii) Where a manufacturer has elected to use the reporting provision specified in § 86.1710(a)(3)(iii) or § 86.1710(a)(4)(iii), EPA will estimate that manufacturer's number of vehicles sold in the NTR by using the following equation, where the term "Vehicles" means light-duty vehicles and light light-duty trucks, but excludes vehicles sold by a manufacturer that has opted out of the National LEV program pursuant to the provisions of § 86.1705, pending final judicial resolution of the opt-out petition:

$$\text{Estimated number of Vehicles in the NTR} = (((\text{sum of Vehicles the manufacturer sold in the NTR for the latest two reported model years}) / (\text{sum of Vehicles the manufacturer sold in the 49 states for the same latest two reported model years})) \times (\text{number of Vehicles the manufacturer sold in the 49 states as reported for the current model year}))$$

(4)(i) Failure to meet the five-percent cap as specified in this paragraph (b) will be considered to be a failure to satisfy the conditions upon which the certificate(s) was issued and the individual nonconforming vehicles not covered by the certificate shall be determined as set forth in this paragraph (b)(4).

(ii) For a model year in which the industry-wide five percent cap is exceeded, as specified in paragraph (b)(1) of this section, each manufacturer that sold Tier 1 and TLEV light-duty vehicles and light light-duty trucks in the NTR in excess of five percent of its sales of light-duty vehicles and light light-duty trucks in the NTR is a noncomplying manufacturer.

(iii) A noncomplying manufacturer's share of vehicles exceeding the five percent cap for a given model year shall be determined by the following equation, where the term "Vehicles" means light-duty vehicles and light light-duty trucks sold in the NTR, but excludes vehicles sold by a manufacturer that has opted out of the National LEV program pursuant to the

provisions of § 86.1705, pending final judicial resolution of the opt-out petition:

Number of noncomplying manufacturer's Vehicles not covered by a certificate = ((Total number of Vehicles exceeding five-percent cap) × (number of the noncomplying manufacturer's Tier 1 Vehicles and TLEVs sold in the NTR in excess of five percent of its Vehicle sales in the NTR) / (Sum of the numbers of each noncomplying manufacturer's Tier 1 Vehicles and TLEVs sold in the NTR in excess of five percent of its Vehicle sales in the NTR)).

(iv) EPA will determine the number of vehicles not covered by a certificate based on data reported by manufacturers under § 86.1712(b), § 86.085-37(b) and subsequent model year provisions, and other information provided to EPA by a manufacturer.

(5) EPA will determine which vehicles were not covered by a certificate by designating vehicles in those engine families with the highest certification NMOG emission values first and continuing until a number of vehicles equal to the calculated number of vehicles not covered by a certificate as determined above is reached. If this calculation determines that only a portion of vehicles in an engine family contributes to the debit situation, then EPA will, starting with the last vehicle produced and counting backwards, designate actual vehicles in that engine family as sold without a certificate.

(6) Low volume manufacturers are exempt from the requirements in this paragraph (b) and vehicles produced by low volume manufacturers shall not be included in calculations of industry-wide compliance under the provisions of this paragraph (b).

(7) For the time period that a manufacturer has opted-out under § 86.1705 and the validity of the opt-out is unresolved, that manufacturer is exempt from the requirements in this paragraph (b) and vehicles produced by such manufacturer shall not be included in calculations of industry-wide compliance under the provisions of this paragraph (b), regardless of EPA or a court's determination regarding the validity of the opt-out.

**§ 86.1712-97 Maintenance of records; submittal of information.**

(a) *Maintenance of records.* (1) The manufacturer producing any light-duty vehicles and/or light light-duty trucks subject to the provisions in this subpart shall establish, maintain, and retain the following information in adequately

organized and indexed records for each averaging set of each model year:

- (i) Model year;
- (ii) Averaging set;
- (iii) Fleet average NMOG value achieved; and
- (iv) All values used in calculating the fleet average NMOG value achieved.

(2) The manufacturer producing any light-duty vehicles and/or light light-duty trucks subject to the provisions in this subpart shall establish, maintain, and retain the following information in adequately organized and indexed records for each vehicle or truck subject to this subpart:

- (i) Model year;
- (ii) Averaging set;
- (iii) EPA engine family;
- (iv) Assembly plant;
- (v) Vehicle identification number;
- (vi) NMOG standard to which the vehicle or truck is certified; and
- (vii) Information on the point of first sale, including the purchaser, city, and state.

(3) The manufacturer shall retain all records required to be maintained under this section for a period of eight years from the due date for the annual report. Records may be retained as hard copy or reduced to microfilm, ADP diskettes, and so forth, depending on the manufacturer's record retention procedure; provided, that in every case all information contained in the hard copy is retained.

(4) Nothing in this section limits the Administrator's discretion to require the manufacturer to retain additional records or submit information not specifically required by this section.

(5) Pursuant to a request made by the Administrator, the manufacturer shall submit to the Administrator the information that the manufacturer is required to retain.

(6) EPA may void *ab initio* a certificate of conformity for a vehicle certified to National LEV certification standards as set forth or otherwise referenced in § 86.1708 or § 86.1709 for which the manufacturer fails to retain the records required in this section or to provide such information to the Administrator upon request.

(b) *Reporting.* (1) Each covered manufacturer shall submit an annual report. Except as provided in paragraph (b)(2) of this section, the annual report shall contain, for each averaging set, the fleet average NMOG value achieved, all values required to calculate the NMOG value, the number of credits generated or debits incurred, and all the values required to calculate the credits or debits. For each region (NTR and 37 States), the annual report shall contain the resulting balance of credits or debits.

(2) When a manufacturer calculates compliance with the fleet average NMOG standards using the provisions in § 86.1710(a)(3)(iii) or § 86.1710(a)(4)(iii), then the annual report shall state that the manufacturer has elected to use such provision and shall contain, for each averaging set, the fleet average NMOG values as specified in § 86.1710(a)(3)(iii) or § 86.1710(a)(4)(iii).

(3) The annual report shall also include documentation on all credit transactions the manufacturer has engaged in since those included in the last report. Information for each transaction shall include:

- (i) Name of credit provider;
- (ii) Name of credit recipient;
- (iii) Date the transfer occurred;
- (iv) Quantity of credits transferred;
- (v) Model year in which the credits were earned; and

(vi) Region (NTR or 37 States) to which the credits belong.

(4) Unless a manufacturer reports the data required by this section in the annual production report required under § 86.085-37(b) and subsequent model year provisions, a manufacturer shall submit an annual report for each model year after production ends for all affected vehicles and trucks produced by the manufacturer subject to the provisions of this subpart and no later than May 1 of the calendar year following the given model year. Annual reports shall be submitted to: Director, Vehicle Programs and Compliance Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, Michigan, 48105.

(5) Failure by a manufacturer to submit the annual report in the specified time period for all vehicles and trucks subject to the provisions in this section is a violation of section 203(a)(1) of the Clean Air Act for each subject vehicle and truck produced by that manufacturer.

(6) If EPA or the manufacturer determines that a reporting error occurred on an annual report previously submitted to EPA, the manufacturer's credit or debit calculations will be recalculated. EPA may void erroneous credits, unless transferred, and shall adjust erroneous debits. In the case of transferred erroneous credits, EPA shall adjust the manufacturer's credit or debit balance to reflect the sale of such credits and any resulting generation of debits.

(c) *Notice of opportunity for hearing.* Any voiding of the certificate under paragraph (a)(6) of this section will be made only after EPA has offered the manufacturer concerned an opportunity for a hearing conducted in accordance with § 86.614 for light-duty vehicles or

§ 86.1014 for light-duty trucks and, if a manufacturer requests such a hearing, will be made only after an initial decision by the Presiding Officer.

**§ 86.1713–97 Light-duty exhaust durability programs.**

The provisions of § 86.094–13 and subsequent model year provisions apply to this subpart, except that: Section 86.094–13(f) and subsequent model year provisions does not apply to this subpart.

**§ 86.1714–97 Small volume manufacturers certification procedures.**

The provisions of § 86.096–14 and subsequent model year provisions apply to this subpart, except that: Section 86.096–14(c)(7)(i)(A) and subsequent model year provisions does not apply to this subpart.

**§ 86.1715–97 [Reserved]**

**§ 86.1716–97 Prohibition of defeat devices.**

(a) The provisions of § 86.094–16 and subsequent model year provisions apply to this subpart.

(b) In addition to the provisions of § 86.094–16 and subsequent model year provisions, the following requirements shall apply to this subpart:

(1) For each engine family certified to TLEV, LEV, or ULEV standards, manufacturers shall submit with the certification application, an engineering evaluation demonstrating that a discontinuity in emissions of non-methane organic gases, carbon monoxide, oxides of nitrogen and formaldehyde measured on the Federal Test Procedure (subpart B of this part) does not occur in the temperature range of 20 to 86° F. For diesel vehicles, the engineering evaluation shall also include particulate emissions.

(2) [Reserved]

**§ 86.1717–97 Emission control diagnostic system for 1997 and later light-duty vehicles and light-duty trucks.**

(a) The provisions of § 86.094–17 and subsequent model year provisions do not apply to this subpart.

(b) The requirements in Chapter 6 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) (these requirements are incorporated by reference; see § 86.1) apply to this subpart.

(c) No vehicle shall be certified under the provisions of this subpart unless such vehicle complies with the requirements of section 202(m)(1), (2), (4), and (5) of the Clean Air Act (42 U.S.C. 7521(m)(1), (2), (4) and (5)).

**§ 86.1718–97 through § 86.1720–97 [Reserved]**

**§ 86.1721–97 Application for certification.**

The provisions of § 86.096–21 and subsequent model year provisions apply to this subpart, with the following exceptions and additions:

(a) The provisions of § 86.096–21(b)(2) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) For TLEVs, LEVs, and ULEVs not certified exclusively on gasoline, projected U.S. sales data and fuel economy data 19 months prior to January 1 of the calendar year with the same numerical designation as the model year for which the vehicles are certified, and projected U.S. sales data for all vehicles, regardless of operating fuel or vehicle emission category, sufficient to enable the Administrator to select a test fleet representative of the vehicles (or engines) for which certification is requested at the time of certification.

(2) [Reserved]

(b) For ZEVs and hybrid electric vehicles, the certification application shall include the following:

(1) Identification and description of the vehicle(s) covered by the application.

(2) Identification of the vehicle weight category to which the vehicle is certifying: LDV, LDT 0–3750 lbs LVW, LDT 3751–5750 lbs LVW (state test weight range), and the curb weight and gross vehicle weight rating of the vehicle.

(3) Identification and description of the propulsion system for the vehicle.

(4) Identification and description of the climate control system used on the vehicle.

(5) Projected number of vehicles sold in the U.S., and projected U.S. sales.

(6) For electric and hybrid electric vehicles, identification of the energy usage in kilowatt-hours per mile from the point when electricity is introduced from the electrical outlet and the operating range in miles of the vehicle when tested in accordance with the All-Electric Range Test provisions in § 86.1770.

(7) If the vehicle is equipped with a fuel fired heater, a description of the control system logic of the fuel fired heater, including an evaluation of the conditions under which the fuel fired heater can be operated and an evaluation of the possible operational modes and conditions under which evaporative emissions can exist. Vehicles which utilize fuel fired heaters which can be operated at ambient

temperatures above 40° F or which cannot be demonstrated to have zero evaporative emissions under any and all possible operation modes and conditions shall not be certified as ZEVs.

(8) For ZEVs and HEVs which use fuel fired heaters, the manufacturer shall provide the exhaust emissions value per mile produced by the auxiliary fuel fired heater. This shall be accomplished by determining heater emissions in grams per minute when operating at a maximum heating capacity for a period of 20 minutes, and multiplying that number by 3.6 minutes per mile. At the time of certification, manufacturers shall submit their test plan which describes the procedure used to determine the mass emissions of the fuel fired heater.

(9) All information necessary for proper and safe operation of the vehicle, including information on the safe handling of the battery system, emergency procedures to follow in the event of battery leakage or other malfunctions that may affect the safety of the vehicle operator or laboratory personnel, method for determining battery state-of-charge, battery charging capacity and recharging procedures, and any other relevant information as determined by the Administrator.

(c) For all vehicles subject to the provisions of § 86.1717, with its application for certification a description of the malfunction and diagnostic system to be installed on the vehicles. (The vehicles shall not be certified unless the Administrator finds that the malfunction and diagnostic system complies with the requirements of § 86.1717.).

**§ 86.1722–97 [Reserved]**

**§ 86.1723–97 Required data.**

The provisions of § 86.096–23 and subsequent model year provisions apply to this subpart, with the following additions to the provisions of § 86.096–23(c)(1) and subsequent model year provisions:

(a) For all TLEVs, LEVs, and ULEVs certifying on a fuel other than conventional gasoline, manufacturers shall multiply the NMOG exhaust certification level for each emission-data vehicle by the appropriate reactivity adjustment factor listed in § 86.1777(d)(2)(i) or established by the Administrator pursuant to Appendix XVII of this part to demonstrate compliance with the applicable NMOG emission standard. For all TLEVs, LEVs, and ULEVs certifying on natural gas, manufacturers shall multiply the NMOG exhaust certification level for each

emission-data vehicle by the appropriate reactivity adjustment factor listed in § 86.1777(d)(2)(i) or established by the Administrator pursuant to Appendix XVII of this part and add that value to the product of the methane exhaust certification level for each emission-data vehicle and the appropriate methane reactivity adjustment factor listed in § 86.1777(d)(2)(ii) or established by the Administrator pursuant to Appendix XVII of this part to demonstrate compliance with the applicable NMOG emission standard. Manufacturers requesting to certify to existing standards utilizing an adjustment factor unique to its vehicle/fuel system must follow the data requirements described in Appendix XVII of this part. A separate formaldehyde exhaust certification level shall also be provided for demonstrating compliance with emission standards for formaldehyde.

(b)(1) The manufacturer shall submit to the Administrator a statement that those vehicles for which certification is requested have driveability and performance characteristics which satisfy that manufacturer's customary driveability and performance requirements for vehicles sold in the United States. This statement shall be based on driveability data and other evidence showing compliance with the manufacturer's performance criteria. This statement shall be supplied with the manufacturer's final application for certification, and with all running changes for which emission testing is required.

(2) If the Administrator has evidence to show that in-use vehicles demonstrate poor performance that could result in wide-spread tampering with the emission control systems, he or she may request all driveability data and other evidence used by the manufacturer to justify the performance statement.

#### § 86.1724-97 Test vehicles and engines.

The provisions of § 86.096-24 and subsequent model year provisions apply to this subpart, with the following exceptions and additions:

(a) The provisions of § 86.096-24(a)(1) and subsequent model year provisions apply to this subpart, with the following addition:

(1) All engines classified in the same engine family shall be certified to identical exhaust emission standards.

(2) [Reserved]

(b) The provisions of § 86.0096-24(b) and subsequent model year provisions apply to this subpart with the following addition:

(1) For TLEVs, LEVs, ULEVs, and ZEVs certifying according to the provisions of this subpart, a manufacturer may substitute emission data vehicles selected by the California Air Resources Board criteria instead of using the criteria specified in § 86.096-24(b)(1) (i), (ii), and (iv) and subsequent model year provisions.

(2) [Reserved]

#### § 86.1725-97 Maintenance.

The provisions of § 86.094-25 and subsequent model year provisions apply to this subpart, with the following additions:

(a) Hybrid electric vehicles that use Otto-cycle or diesel engines are subject to the applicable Otto-cycle or diesel engine maintenance requirements of § 86.094-25 (b) through (e) and subsequent model year provisions.

(b) Manufacturers of series hybrid electric vehicles and parallel hybrid electric vehicles shall be required to incorporate into the vehicles a separate odometer or other device subject to the approval of the Administrator that can accurately gauge the mileage accumulation on the engines that are used in these vehicles.

(c)(1) The manufacturer shall equip the vehicle with a maintenance indicator consisting of a light that shall activate automatically by illuminating the first time the minimum performance level is observed for all battery system components. Possible battery system components requiring monitoring are:

- (i) Battery water level;
- (ii) Temperature control;
- (iii) Pressure control;
- (iv) Other parameters critical for determining battery condition.

(2) The manufacturer of a hybrid electric vehicle shall equip the vehicle with a useful life indicator for the battery system consisting of a light that shall illuminate the first time the battery system is unable to achieve an all-electric operating range (starting from a full state-of-charge) that is at least 75% of the range determined for the vehicle in the All-Electric Range Test (see § 86.1770) and submitted in the certification application.

(3) Hybrid electric vehicle battery system. Manufacturers shall maintain the battery system according to the requirements in paragraph (c)(1) of this section.

#### § 86.1726-97 Mileage and service accumulation; emission measurements.

The provisions of § 86.096-26 and subsequent model year provisions apply to this subpart, with the following exceptions and additions:

(a) The provisions of § 86.096-26(a)(1) and subsequent model year provisions

do not apply to this subpart. The following shall instead apply to this subpart:

(1) Section 86.096-26(a) and subsequent model year provisions applies to light-duty vehicles and light-duty trucks, except ZEVs which shall be exempt from all mileage and service accumulation, durability-data vehicle, and emission-data vehicle testing requirements.

(2) [Reserved]

(b) The provisions of § 86.096-26(a)(2) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) The procedure for mileage accumulation shall be the Durability Driving Schedule as specified in Appendix IV of this part. A modified procedure (Alternative Service Accumulation Durability Program, § 86.094-13(e) and subsequent model year provisions) may also be used if approved in advance by the Administrator. All light-duty vehicles and light-duty trucks shall accumulate mileage at a measured curb weight that is within 100 pounds of the estimated curb weight. If the vehicle weight is within 100 pounds of being included in the next higher inertia weight class as specified in § 86.129, the manufacturer may elect to conduct the respective emission tests at the higher weight. All mileage accumulation of hybrid electric vehicles shall be conducted with the battery pack at the manufacturer's indicated lowest state-of-charge at the beginning of the test cycle. At no time throughout mileage accumulation shall the battery pack be charged using any off-board charging source.

(2) [Reserved]

(c) The provisions of § 86.096-26(a)(3)(i) and (ii) and subsequent model year provisions apply to this subpart, with the following addition:

(1) The Administrator will accept the manufacturer's determination of the mileage at which the engine-system combination is stabilized for emission data testing if (prior to testing) a manufacturer determines that the interval chosen yields emissions performance that is stable and representative of design intent. Sufficient mileage should be accumulated to reduce the possible effects of any emissions variability that is the result of insufficient vehicle operation. Of primary importance in making this determination is the behavior of the catalyst, EGR valve, trap oxidizer or any other part of the ECS which may have non-linear aging characteristics. In the alternative, the manufacturer may elect to accumulate

4,000 mile  $\pm$  250 mile on each test vehicle within an engine family without making a determination.

(2) [Reserved]

(d) The provisions of § 86.096–26(a)(4)(i) and (ii) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) For Otto-cycle and diesel vehicles and battery assisted combustion engine vehicles that use Otto-cycle or diesel engines:

(i) Prior to initiation of mileage accumulation in a durability-data vehicle, manufacturers must establish the mileage test interval for durability-data vehicle testing of the engine family. Once testing has begun on a durability-data vehicle, the durability test interval for that family may not be changed. At a minimum, multiple tests must be performed at 5,000 miles, 50,000 miles, and the final mileage point as long as they meet the requirements of Appendix XV of this part. The Administrator will accept durability test interval schedules determined by the manufacturer. The testing must provide a DF confidence level equal to or better than the confidence level using the former fixed mileage test and scheduled maintenance intervals. The procedure for making this determination is specified in Appendix XV of this part. The mileage intervals between test points must be approximately of equal length. The  $\pm$  250 mile test point tolerance and the requirement that tests be conducted before and after scheduled maintenance is still mandatory. Emission control systems for Otto-cycle engines that have step function changes designed into the control system must use the 5,000 mile test interval schedule.

(ii) Testing before and after scheduled (or unscheduled) maintenance points must be conducted, and these data are to be included in the deterioration factor calculation. Testing before unscheduled maintenance may be omitted with the prior consent of the Administrator when testing would be dangerous to a vehicle or an operator. The number of tests before and after scheduled maintenance and the mileage intervals between test points should be approximately equal. Durability test interval schedules with multiple testing at test points within 10,000 miles of or at the 50,000 mile and the final mileage test point must be submitted for approval. Multiple testing at maintenance mileage tests points within 10,000 miles of the 50,000 mile and the final mileage test points may be approved if it can be demonstrated by previously generated data that the emission effects of the maintenance are insignificant.

(iii) For engine families that are to be certified to the full useful life emission standards, each exhaust emission durability-data vehicle shall be driven with all emission control systems installed and operating, for the full useful life or such lesser distance as the Administrator may agree to as meeting the objective of this procedure.

Durability tests shall be at every 5,000 miles, from 5,000 miles to the full useful life, however, the above procedures may be used to determine alternate test intervals subject to the following:

(A) For engine families that are to be certified to the full useful life emission standards, durability vehicles may accumulate less than the full useful life if the manufacturer submits other data or information sufficient to demonstrate that the vehicle is capable of meeting the applicable emission standards for the full useful life. At a minimum, 75% of the full useful life shall be accumulated.

(B) For the purpose of conducting mileage accumulation on light-duty hybrid electric vehicles, the full useful life of the auxiliary power unit shall be defined as 50,000 miles for a Type A hybrid electric vehicle, 75,000 miles for a Type B hybrid electric vehicle, and 100,000 miles for a Type C hybrid electric vehicle.

(iv) Alternative durability plans may also be used if the manufacturer provides a demonstration that the alternative plan provides equal or greater confidence that the vehicles will comply in-use with the emission standards. All alternative durability plans are subject to approval in advance by the Administrator.

(2) For diesel vehicles equipped with periodically regenerating trap oxidizer systems, at least four regeneration emission tests (see §§ 86.106 through 86.145) shall be made. The pollutant mass emission calculation procedures for vehicles equipped with periodically regenerating trap oxidizer systems are included in Appendix XVI of this part. With the advance approval of the Administrator, the manufacturer may install: A manual override switch capable of preventing (i.e., delaying until the switch is turned off) the start of the regeneration process; and a light which indicates when the system would initiate regeneration if it had no override switch. Upon activation of the override switch the vehicle will be operated on a dynamometer to precondition it for the regeneration emission test in accordance with §§ 86.132 and 86.1772. The Urban Dynamometer Driving Schedule (UDDS) that is in progress at the time when the light comes on shall be completed and

the vehicle shall proceed to the prescribed soak period followed by testing. With the advance approval of the Administrator, the manual override switch will be turned off at some predetermined point in the testing sequence, permitting the regeneration process to proceed without further manual interaction. The mileage intervals between test points shall be approximately equal. The first regeneration emission test shall be made at the 5,000 mile point. The regeneration emission tests must provide a deterioration factor confidence level equal to or better than the confidence level achieved by performing regeneration emission tests at the following mileage points: 5,000; 25,000; 50,000; 75,000; and 100,000. The procedure for making this determination is shown in Appendix XV of this part.

(3) For gasoline-, gaseous-, and alcohol-fueled vehicles that are certified by a whole-vehicle durability protocol, the specified evaporative durability test points are at 5,000, 40,000, 75,000, and 100,000 miles. These requirements are also applicable to hybrid electric vehicles. With the exception of flexible-fuel vehicles, a manufacturer may conduct evaporative testing at test points used for exhaust emission durability testing, provided that the same deterioration confidence level for the evaporative emission DF determination is retained (see Appendix XIV of this part).

(4) For flexible-fuel vehicles certifying to TLEV, LEV, or ULEV standards, the test schedule shall include exhaust emission tests at 5,000 miles, 10,000 miles, and every 10,000 miles thereafter to the final mileage point using M85 or E85 and certification gasoline. For all flexible-fuel vehicles, if evaporative emission testing is conducted, exhaust and evaporative emission tests shall also be conducted using M35 or E10, or another approved fuel, at the mileage points where M85 or E85 testing is conducted. The results of these exhaust and evaporative emission tests will be used by the Administrator to evaluate the vehicle's emission control deterioration with various fuels (M85, M35, and unleaded gasoline; See fuel specifications in § 86.1771). Only the M85 or E85 and certification gasoline exhaust emission results and the M35 or E10 evaporative emission results will be used to determine applicable exhaust and evaporative emission deterioration factors, respectively, as required in § 86.1728 (Compliance with Emission Standards).

(e) The provisions of § 86.096–26(a)(5)(i) and subsequent model year

provisions apply to this subpart, with the following addition:

(1) In addition, the emission tests performed on emission-data vehicles and durability-data vehicles shall be non-regeneration emission tests for diesel light-duty vehicles and light-duty trucks equipped with periodically regenerating trap oxidizer systems. For any of these vehicles equipped with continually regenerating trap oxidizer systems, manufacturers may use the provisions applicable to periodically regenerating trap oxidizer systems as an option. If such an option is elected, all references in these procedures to vehicles equipped with periodically regenerating trap oxidizer systems shall be applicable to the vehicles equipped with continually regenerating trap oxidizer systems.

(2) [Reserved]

(f) The provisions of § 86.096–26(a)(8) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) Once a manufacturer submits the information required in § 86.096–26(a)(7) and subsequent model year provisions for a durability-data vehicle, the manufacturer shall continue to run the vehicle to 50,000 miles if the family is certified to 50,000 mile emission standards or to the full useful life if it is certified to emission standards beyond 50,000 miles (or to a lesser distance that the Administrator may have previously agreed to), and the data from the vehicle will be used in the calculations under § 86.094–28 and subsequent model year provisions. Discontinuation of a durability-data vehicle shall be allowed only with the consent of the Administrator.

(2) [Reserved]

(g) The provisions of § 86.096–26(b) and subsequent model year provisions do not apply to this subpart.

(h)(1) The exhaust emissions shall be measured from all exhaust emission data vehicles tested in accordance with the federal Highway Fuel Economy Test (HWFET; 40 CFR part 600, subpart B). The oxides of nitrogen emissions measured during such tests shall be multiplied by the oxides of nitrogen deterioration factor computed in accordance with § 86.094–28 and subsequent model year provisions, and then rounded and compared with the applicable emission standard in §§ 86.1708 and 86.1709. All data obtained pursuant to this paragraph (h)(1) shall be reported in accordance with procedures applicable to other exhaust emissions data required pursuant to these procedures. Hybrid electric vehicles shall be tested with the

battery state-of-charge set such that one of the following two conditions is satisfied:

(i) The state-of-charge is at the lowest level allowed by the control unit of the auxiliary power unit; or

(ii) The state-of-charge is set such that auxiliary power unit operation will be at its maximum level at the beginning and throughout the emission test.

(2) In the event that one or more of the manufacturer's emission data vehicles fail the applicable HWFET standard in §§ 86.1708 and 86.1709, the manufacturer may submit to the Administrator engineering data or other evidence showing that the system is capable of complying with the standard. If the Administrator finds, on the basis of an engineering evaluation, that the system can comply with the HWFET standard, he or she may accept the information supplied by the manufacturer in lieu of vehicle test data.

**§ 86.1727–97 [Reserved]**

**§ 86.1728–97 Compliance with emission standards.**

The provisions of § 86.094–28 and subsequent model year provisions apply to this subpart, with the following exceptions and additions:

(a) The provisions of § 86.094–28(a)(1) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) The provisions of § 86.094–28(a) and subsequent model year provisions apply to light-duty vehicles and light light-duty trucks, except ZEVs.

(2) [Reserved]

(b) The provisions of § 86.094–28(a)(4)(i) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) Separate emission deterioration factors shall be determined from the exhaust emission results of the durability-data vehicle(s) for each engine-system combination. A separate factor shall be established for exhaust HC (non-alcohol vehicles, non-TLEVs, non-LEVs, and non-ULEVs), exhaust OMHCE or OMNMHCE (alcohol vehicles that are not TLEVs, LEVs, or ULEVs), exhaust NMOG (all TLEVs, LEVs, ULEVs), exhaust formaldehyde (alcohol vehicles, TLEVs, LEVs, ULEVs), exhaust CO, exhaust NO<sub>x</sub>, and exhaust particulate (diesel vehicles only) for each engine-system combination. A separate evaporative emission deterioration factor shall be determined for each evaporative emission family- evaporative emission control system combination from the testing conducted

by the manufacturer (gasoline- and alcohol-fueled vehicles only). Separate emission correction factors (diesel light-duty vehicles and light-duty trucks equipped with periodically regenerating trap oxidizer systems only) shall be determined from the exhaust emission results of the durability-data vehicle(s) for each engine-system combination. A separate factor shall be established for exhaust HC (non-alcohol vehicles, non-TLEVs, non-LEVs, and non-ULEVs), exhaust OMHCE or OMNMHCE (alcohol vehicles that are not TLEVs, LEVs, or ULEVs), exhaust NMOG (TLEVs, LEVs, ULEVs), exhaust CO, exhaust NO<sub>x</sub>, and exhaust particulate for each engine-system combination.

(2) [Reserved]

(c) The provisions of § 86.094–28(a)(4)(i)(A)(4) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) The manufacturer must use the outlier identification procedure set forth in Appendix VIII of this part to test for irregular data from a durability-data set. If any data point is identified as a statistical outlier, the Administrator shall determine, on the basis of an engineering analysis of the causes of the outlier submitted by the manufacturer, whether the outlier is to be rejected. The outlier shall be rejected only if the Administrator determines that the outlier does not reflect representative characteristics of the emission control system, *i.e.*, the outlier is a result of an emission control system anomaly, test procedure error, or an extraordinary circumstance not expected to recur. Only the identified outlier shall be eliminated; other data at that test point (*i.e.*, data for other pollutants) shall not be eliminated unless the Administrator determines, based on the engineering analysis, that they also do not reflect representative characteristics of the emission control system. Where the manufacturer chooses to apply both the outlier procedure and averaging to the same data set, the outlier procedure shall be completed prior to applying the averaging procedure. All durability test data, including any outliers and the manufacturer's engineering analysis, shall be submitted with the final application.

(2) [Reserved]

(d) The provisions of § 86.094–28(a)(4)(i)(B) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) All applicable exhaust emission results shall be plotted as a function of the mileage on the system, rounded to the nearest mile, and the best fit straight

lines, fitted by the method of least squares, shall be drawn through all these data points. The emission data will be acceptable for use in the calculation of the deterioration factor only if the interpolated 4,000-mile, 50,000-mile, and full useful life points on this line are within the applicable emission standards in §§ 86.1708 and 86.1709. For hybrid electric vehicles, the emission data will be acceptable for use in the calculation of the deterioration factor only if the engine mileage points corresponding to the interpolated 4,000 mile, 50,000 mile, and full useful life points of the vehicle on this line are within the applicable emission standards in §§ 86.1708 and 86.1709. The engine mileage points shall be determined based on the test schedule submitted to the Administrator as required in § 86.096–26. As an exception, the Administrator will review the data on a case-by-case basis and may approve its use in those instances where the best fit straight line crosses an applicable standard but no data point exceeds the standard or when the best fit straight line crosses the applicable standard at the 4,000-mile point but the 5,000-mile actual test point and the 50,000 mile and full useful life interpolated points are both below the standards. A multiplicative exhaust emission deterioration factor shall be calculated for each engine system combination as follows:

(i) For engine families certified to 50,000 mile emissions standards:

Factor=Exhaust emissions interpolated to 50,000 miles divided by exhaust emissions interpolated to 4,000 miles.

(ii) For engine families certified to full useful life emissions standards beyond 50,000 miles:

Factor = Exhaust emissions interpolated to the full useful life divided by exhaust emissions interpolated to 4,000 miles.

(2) [Reserved]

(e) The following requirements shall be in addition to the provisions of § 86.094–28(a)(4) and subsequent model year provisions:

(1)(i) The regeneration exhaust emission data (diesel light-duty vehicles and light-duty trucks equipped with periodically regenerating trap oxidizer systems only) from the tests required under § 86.096–26(a)(4) and subsequent model year provisions shall be used to determine the regeneration exhaust emissions interpolated to the 50,000-mile point. The regeneration exhaust emission results shall be plotted as a function of the mileage on the system, rounded to the nearest mile, and the best fit straight lines, fitted by the method of least squares, shall be drawn

through all these data points. The interpolated 50,000-mile point of this line shall be used to calculate the multiplicative exhaust emission correction factor for each engine-system combination as follows:

$$\text{Factor} = 1 + \frac{R-1}{4505}n$$

where:

R = the ratio of the regeneration exhaust emissions interpolated to 50,000 miles to the non-regeneration exhaust emissions interpolated to 50,000 miles.

n = the number of complete regenerations which occur during the durability test.

(ii) The interpolated values determined in paragraph (e)(1)(i) of this section shall be carried out to a minimum of four places to the right of the decimal point before dividing one by the other to determine the correction factor. The results shall be rounded to three places to the right of the decimal point in accordance with the Rounding-Off Method specified in ASTM E 29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications (incorporated by reference; see § 86.1). For applicability to gaseous emission standards under the 100,000 mile option, R will be determined based upon projected 100,000 mile emissions.

(2) [Reserved]

(f) The provisions of § 86.094–28(a)(4)(ii)(A) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) The official exhaust emission test results for each emission-data vehicle at the 4,000 mile test point shall be multiplied by the appropriate deterioration factor, and correction factor (diesel light-duty vehicles and light-duty trucks equipped with periodically regenerating trap oxidizer systems only): Provided: that if a deterioration factor as computed in § 86.094–28(a)(4)(i)(B) and subsequent model year provisions or a correction factor as computed in paragraph (e) of this section is less than one, that deterioration factor or correction factor shall be one for the purposes of this paragraph (f).

(2) [Reserved]

(g) The provisions of § 86.094–28(a)(4)(iii) and subsequent model year provisions do not apply to this subpart. The following shall instead apply to this subpart:

(1) The emissions to compare with the standard (or the family particulate emission limit, as appropriate) shall be

the adjusted emissions of § 86.094–28(a)(4)(ii)(A) and (B) and subsequent model year provisions for each emission-data vehicle. Before any emission value is compared with the standard (or the family particulate limit, as appropriate), it shall be rounded to one significant figure beyond the number of significant figures contained in the standard (or the family particulate emission limit, as appropriate) in accordance with the Rounding-Off Method specified in ASTM E 29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications (incorporated by reference; see § 86.1). The rounded emission values may not exceed the standard (or the family particulate emission limit, as appropriate). Fleet average NMOG value calculations shall be rounded to four significant figures in accordance with the Rounding-Off Method specified in ASTM E 29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications (incorporated by reference; see § 86.1) before comparing with fleet average NMOG requirements.

(2) [Reserved]

(h) The provisions of § 86.094–28(b) and subsequent model year provisions do not apply to this subpart.

**§ 86.1729–97 through § 86.1733–97**  
[Reserved]

**§ 86.1734–97 Alternative procedure for notification of additions and changes.**

The provisions of § 86.082–34 and subsequent model year provisions apply to this subpart, with the following exceptions and additions:

(a) The provisions of § 86.082–34(a) and subsequent model year provisions apply to this subpart, with the following addition:

(1) A manufacturer must notify the Administrator within 10 working days of making an addition of a vehicle to a certified engine family or a change in a vehicle previously covered by certification. The manufacturer shall also submit, upon request of the Administrator, the following items:

- (i) service bulletin;
- (ii) driveability statement;
- (iii) test log;
- (iv) maintenance log.

(2) All running changes and field fixes that do not adversely affect the system durability are deemed approved unless disapproved by the Administrator within 30 days of the receipt of the running change or field fix request. A change not specifically identified in the manufacturer's application must also be reported to the Administrator if the

change may adversely affect engine or emission control system durability. Examples of such changes include any change that could affect durability, thermal characteristics, deposit formation, or exhaust product composition, i.e., combustion chamber design, cylinder head material, camshaft profile, computer modifications, turbocharger, intercooler wastegate characteristics, and transmission or torque converter specifications. The manufacturer is required to update and submit to the Administrator the "supplemental data sheet" for all running changes and field fixes implemented with the change notification. The manufacturer shall submit, on a monthly basis, by engine family, a list of running changes/field fixes giving the document number date submitted and a brief description of the change.

(b) [Reserved]

**§ 86.1735-97 Labeling.**

The following requirements shall apply to TLEVs, LEVs, ULEVs, and ZEVs certified under the provisions of this subpart:

(a) The requirements in § 86.096-35 and subsequent model year provisions do not apply to this section.

(b) The requirements in Chapter 7 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) shall apply. These requirements are incorporated by reference (see § 86.1).

**§ 86.1736-97 through § 86.1769-97 [Reserved]**

**§ 86.1770-97 All-Electric Range Test requirements.**

(a) ZEVs and Type A and Type B hybrid electric vehicles shall be subject to the All-Electric Range Test specified below for the purpose of determining the energy efficiency and operating range of a ZEV or of a hybrid electric vehicle operating without the use of its auxiliary power unit. For hybrid electric vehicles, the manufacturer may elect to conduct the All-Electric Range Test prior to vehicle preconditioning in the exhaust and evaporative emission test sequence specified in subpart B of this part.

(1) Cold soak. The vehicle shall be stored at an ambient temperature not less than 68° F (20° C) and not more than 86° F (30° C) for 12 to 36 hours. During this time, the vehicle's battery shall be charged to a full state-of-charge.

(2) Driving schedule. At the end of the cold soak period, the vehicle shall be placed, either driven or pushed, onto a dynamometer and operated through a

Highway Fuel Economy Driving Schedule, found in 40 CFR part 600, Appendix I, followed immediately by an Urban Dynamometer Driving Schedule, found in Appendix I of this part 86, followed by another Highway Fuel Economy Driving Schedule and an Urban Dynamometer Driving Schedule. This sequence of driving schedules shall be repeated until the vehicle is no longer able to maintain within 5 miles per hour of the speed requirements or within 2 seconds of the time requirements of the driving schedules in the case of a ZEV, or unable to maintain within 5 miles per hour of the speed requirements or within 2 seconds of the time requirement of the driving schedules without the use of the auxiliary power unit in the case of a hybrid electric vehicle.

(3) Recording requirements. Once the vehicle is no longer able to maintain the speed and time requirements specified in paragraph (a)(2) of this section, or once the auxiliary power unit turns on, in the case of a hybrid electric vehicle, the accumulated mileage and energy usage of the vehicle from the point where electricity is introduced from the electrical outlet shall be recorded, and the vehicle shall be brought to an immediate stop, thereby concluding the All-Electric Range Test.

(4) Regenerative braking. Regenerative braking systems may be utilized during the range test. The braking level, if adjustable, shall be set according to the manufacturer's specifications prior to the commencement of the test. The driving schedule speed and time tolerances specified in paragraph (a)(2) of this section shall not be exceeded due to the operation of the regenerative braking system.

(b) [Reserved]

**§ 86.1771-97 Fuel specifications.**

(a) The provisions of § 86.113 apply to this subpart, with the following exceptions and additions.

(1) For light-duty vehicles and light light-duty trucks, gasoline having the specifications listed below may be used in exhaust emission testing as an option to the specifications in § 86.113(a)(1). If a manufacturer elects to utilize this option, exhaust emission testing shall be conducted by the manufacturer with gasoline having the specifications listed in the table in this paragraph (a)(1), and the Administrator shall conduct exhaust emission testing with gasoline having the specifications listed in the table in this paragraph (a)(1). Specifications for non-gasoline fuels and all fuel property test methods are contained in Chapter 4 of the California Regulatory Requirements Applicable to the

National Low Emission Vehicle Program (October, 1996). These requirements are incorporated by reference (see § 86.1). The table follows:

Fuel property	Limit
Octane, (R+M)/2 (min).	91.
Sensitivity (min) .....	7.5.
Lead, g/gal (max) (No lead added).	0-0.01
Distillation Range, °F	
10 pct. point, .....	130-150.
50 pct. point, .....	200-210.
90 pct. point, .....	290-300.
EP, maximum .....	390.
Residue, vol % (max)	2.0.
Sulfur, ppm by wt. ....	30-40.
Phosphorous, g/gal (max).	0.005.
RVP, psi .....	6.7-7.0.
Olefins, vol % .....	4.0-6.0.
Total Aromatic Hydrocarbons (vol %).	22-25.
Benzene, vol % .....	0.8-1.0.
Multi-Substituted Alkyl Aromatic Hydrocarbons, vol %.	12-14.
MTBE, vol % .....	10.8-11.2.
Additives .....	See Chapter 4 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These procedures are incorporated by reference (see § 86.1).
Copper Corrosion .....	No. 1.
Gum, Washed, mg/100 ml (max).	3.0.
Oxidation Stability, minutes (min).	1,000.
Specific Gravity .....	No limit; report to purchaser required.
Heat of Combustion ..	No limit; report to purchaser required.
Carbon, wt % .....	No limit; report to purchaser required.
Hydrogen, wt % .....	No limit; report to purchaser required.

(2) [Reserved]

(b) [Reserved]

**§ 86.1772-97 Road load power test weight and inertia weight class determination.**

(a) The provisions of § 86.129 apply to this subpart.

(b) The following requirements shall also apply to this subpart:

(1) For electric and hybrid electric vehicle lines where it is expected that more than 33 percent of a vehicle line will be equipped with air conditioning, per § 86.096-24(g)(2), that derives power from the battery pack, the road load shall be increased by the incremental horsepower required to operate the air conditioning unit. The

incremental increase shall be determined by recording the difference in energy required for a hybrid electric vehicle under all-electric power to complete the running loss test fuel tank temperature profile test sequence without air conditioning and the same vehicle tested over the running loss test fuel tank temperature profile test sequence with the air conditioning set to the "NORMAL" air conditioning mode and adjusted to the minimum discharge air temperature and high fan speed over the time period needed to perform the test sequence, and converting this value into units of horsepower. Vehicles equipped with automatic temperature controlled air conditioning systems shall be operated in "AUTOMATIC" temperature and fan modes with the system set at 72° F. The running loss test fuel tank temperature profile test sequence is found in § 86.129(d).

(2) [Reserved]

**§ 86.1773-97 Test sequence; general requirements.**

(a) The provisions of § 86.130 apply to this subpart.

(b) The following additional requirements shall also apply to this subpart:

(1) For purposes of determining conformity with 50° F test requirements, the procedures set forth in paragraph (c) of this section shall apply. For all hybrid electric vehicles and all 1995 and subsequent model-year vehicles certifying to running loss and useful life evaporative emission standards, the test sequence specified in subpart B of this part shall apply.

(2) [Reserved]

(c)(1) Following a 12 to 36 hour cold soak at a nominal temperature of 50° F, emissions of CO and NO<sub>x</sub> measured on the Federal Test Procedure (subpart B of this part), conducted at a nominal test temperature of 50° F, shall not exceed the standards for vehicles of the same emission category and vehicle type subject to a cold soak and emission test at 68 to 86° F. For all TLEVs, emissions of NMOG and formaldehyde at 50° F shall not exceed the 50,000 mile certification standard multiplied by a factor of 2.0. For all LEVs, emissions of NMOG and formaldehyde at 50° F shall not exceed the 50,000 mile certification standard multiplied by a factor of 2.0. Emissions of NMOG shall be multiplied by a reactivity adjustment factor, if any, prior to comparing with the 50,000 certification standard multiplied by the

specified factor. The test vehicles shall not be subject to a diurnal heat build prior to the cold start exhaust test or evaporative emission testing.

(i) For the 50° F emission test, the nominal preconditioning, soak, and test temperatures shall be maintained within 3° F of the nominal temperature on an average basis and within 5° F of the nominal temperature on a continuous basis. The temperature shall be sampled at least once every 15 seconds during the preconditioning and test periods and at least once each 5 minutes during the soak period. A continuous strip chart recording of the temperature with these minimum time resolutions is an acceptable alternative to employing a data acquisition system.

(ii) The test site temperature shall be measured at the inlet of the vehicle cooling fan used for testing.

(iii) The test vehicle may be fueled before the preconditioning procedure in a fueling area maintained within a temperature range of 68 to 86° F. The preconditioning shall be conducted at a nominal temperature of 50° F. The requirement to saturate the evaporative control canister(s) shall not apply.

(iv) If a soak area remote from the test site is used, the vehicle may pass through an area maintained within a temperature range of 68 to 86° F during a time interval not to exceed 10 minutes. In such cases, the vehicle shall be restabilized to 50° F by soaking the vehicle in the nominal 50° F test area for six times as long as the exposure time to the higher temperature area, prior to starting the emission test.

(v) The vehicle shall be approximately level during all phases of the test sequence to prevent abnormal fuel distribution.

(2) Manufacturers shall demonstrate compliance with this requirement each year by testing at least three LDV or LDT emission data and/or engineering development vehicles (with at least 4000 miles) which are representative of the array of technologies available in that model year. Only TLEVs, LEVs, and ULEVs are to be considered for testing at 50° F. It is not necessary to apply deterioration factors (DFs) to the 50° F test results to comply with this requirement. Testing at 50° F shall not be required for fuel-flexible and dual-fuel vehicles when operating on gasoline. Natural gas, hybrid electric and diesel-fueled vehicles shall also be exempt from 50° F testing.

(3) The following schedule outlines the parameters to be considered for vehicle selection:

(i) Fuel control system (e.g., multiport fuel injection, throttle body electronic

fuel injection, sequential multiport electronic fuel injection, etc.);

(ii) Catalyst system (e.g., electrically heated catalyst, close-coupled catalyst, underfloor catalyst, etc.);

(iii) Control system type (e.g., mass-air flow, speed density, etc.);

(iv) Vehicle category (e.g., TLEV, LEV, ULEV);

(v) Fuel type (e.g., gasoline, methanol, etc.).

(4) The same engine family shall not be selected in the succeeding two years unless the manufacturer produces fewer than three engine families. If the manufacturer produces more than three TLEV, LEV, or ULEV engine families per model year, the Administrator may request 50° F testing of specific engine families. If the manufacturer provides a list of the TLEV, LEV, and ULEV engine families that it will certify for a model year and provides a description of the technologies used on each engine family (including the vehicle selection parameters information in paragraphs (c)(3) (i) through (v) of this section), the Administrator shall select the engine families subject to 50° F testing within a 30 day period after receiving such a list and description. The Administrator may revise the engine families selected after the 30 day period if the information provided by the manufacturer does not accurately reflect the engine families actually certified by the manufacturer.

(5) For the purposes of this section, the Administrator will accept vehicles selected and tested in accordance with the 50° F testing procedures specified by the California Air Resources Board.

**§ 86.1774-97 Vehicle preconditioning.**

The provisions of § 86.132 apply to this subpart, with the following exceptions and additions:

(a) The provisions of § 86.132 (a) through (e) apply to this subpart, with the following additional requirements:

(1) The UDDS performed prior to a non-regeneration emission test shall not contain a regeneration (diesel light-duty vehicles and light-duty trucks equipped with periodically regenerating trap oxidizer systems only). A gasoline fueled test vehicle may not be used to set dynamometer horsepower.

(2) [Reserved]

(b) [Reserved]

**§ 86.1775-97 Exhaust sample analysis.**

The following requirements shall apply to TLEVs, LEVs, ULEVs, and ZEVs certified under the provisions of this subpart:

(a) The requirements in § 86.140;

(b) The requirements in Chapter 5 of the California Regulatory Requirements

Applicable to the National Low Emission Vehicle Program (October, 1996). These requirements are incorporated by reference (see § 86.1).

**§ 86.1776-97 Records required.**

(a) The provisions of § 86.142 apply to this subpart.

(b) In addition to the provisions of § 86.142, the following provisions apply to this subpart:

(1) The manufacturer shall record in the durability-data vehicle logbook, the number of regenerations that occur during the 50,000 mile durability test of each diesel light-duty vehicle and light-duty truck equipped with a periodically regenerating trap oxidizer system. The manufacturer shall include, for each regeneration: the date and time of the start of regeneration, the duration of the regeneration, and the accumulated mileage at the start and the end of regeneration. The number of regenerations will be used in the calculation of the correction factor in § 86.096-28 and subsequent model year provisions.

(2) The requirements in Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These requirements are incorporated by reference (see § 86.1).

(3) For additional record requirements see §§ 86.1770, 86.1771, 86.1772, 86.1773, 86.1774, and 86.1777.

**§ 86.1777-97 Calculations; exhaust emissions.**

The provisions of § 86.144 apply to this subpart, with the following exceptions and additions:

(a) The provisions of § 86.144(b) apply to this subpart, with the following additional requirement:

(1) Organic material non-methane hydrocarbon equivalent mass for ethanol vehicles:

$$\text{OMNMHCE}_{\text{mass}} = \text{NMHC}_{\text{mass}} + (13.8756/32.042) \times (\text{CH}_3\text{OH})_{\text{mass}} + (13.8756/46.064) \times (\text{CH}_3\text{CH}_2\text{OH})_{\text{mass}} + (13.8756/30.0262) \times (\text{HCHO})_{\text{mass}} + (13.8756/44.048) \times (\text{CH}_3\text{CHO})_{\text{mass}}$$

(2) [Reserved]

(b) The requirements in Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) apply to this subpart. These requirements are incorporated by reference (see § 86.1).

(c) The provisions in Appendix XV of this part and Appendix XVI of this part apply to this subpart.

(d) Reactivity adjustment factors. (1) For the purpose of complying with the NMOG exhaust emission standards in

§§ 86.1708 and 86.1709, the mass of NMOG emissions from a vehicle certified to operate on a fuel other than conventional gasoline, including fuel-flexible and dual-fuel vehicles when operated on a fuel other than conventional gasoline, shall be multiplied by the reactivity adjustment factor applicable to the vehicle emission control technology category and fuel. The product of the NMOG mass emission value and the reactivity adjustment factor shall be compared to the NMOG exhaust emission standards to determine compliance with the standards. In addition to the above requirements, vehicles operating on natural gas shall add to the product of the NMOG mass emission value and the reactivity adjustment factor, the product of the methane mass emission value and the methane reactivity adjustment factor. This result shall be compared to the NMOG exhaust emission standards to determine compliance with the standards for natural gas-fueled vehicles.

(2) The following reactivity adjustment factors have been established pursuant to the criteria in Appendix XVII of this part:

(i) Light-duty vehicles and light-duty trucks:

Vehicle emission control technology category	Fuel	Reactivity adjustment factor
TLEVs .....	85% methanol, 15% gasoline blends .....	0.41
LEVs and ULEVs through model year 2000 .....	85% methanol, 15% gasoline blends .....	0.41
TLEVs through model year 2000 .....	Gasoline meeting the specifications of § 86.1771(a)(1) .....	0.98
LEVs and ULEVs through model year 2000 .....	Gasoline meeting the specifications of § 86.1771(a)(1) .....	0.94
TLEVs through model year 2000 .....	Fuel meeting the specifications for liquefied petroleum gas specified in Chapter 4 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996).	1.00
LEVs and ULEVs through model year 2000 .....	Fuel meeting the specifications for liquefied petroleum gas specified in Chapter 4 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996).	0.50
TLEVs through model year 2000 .....	Fuel meeting the specifications for natural gas specified in Chapter 4 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996).	1.00
LEVs and ULEVs through model year 2000 .....	Fuel meeting the specifications for natural gas specified in Chapter 4 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996).	0.43

(ii) Natural gas light-duty vehicles and light-duty trucks:

Vehicle emission control technology category	Methane reactivity adjustment factor
TLEVs .....	0.0043
LEVs and ULEVs .....	0.0047

(3) The Administrator may establish new reactivity adjustment factors pursuant to Appendix XVII of this part

in addition to those listed in paragraph (d)(2) of this section. The Administrator shall notify manufacturers in writing of the new reactivity adjustment factors within 30 days of their establishment.

(4) The Administrator may revise any reactivity adjustment factor listed in paragraph (d)(2) of this section or established by the Administrator pursuant to Appendix XVII of this part if he or she determines that the revised reactivity adjustment factor is more representative of the ozone-forming

potential of vehicle NMOG emissions based on the best available scientific knowledge and sound engineering judgment. The Administrator shall notify manufacturers in writing of any such reactivity adjustment factor at least 3 years prior to January 1 of the calendar year which has the same numerical designation as the model year for which the revised reactivity adjustment factor first becomes effective. However, manufacturers may use the revised reactivity adjustment factor in certifying

any new engine family whose certification application is submitted following such notification, if they so choose. Manufacturers may also continue to use the original reactivity adjustment factor for any existing engine family previously certified with that reactivity adjustment factor until a new durability-data vehicle is tested for that engine family.

(5) Manufacturers may request the use of a unique reactivity adjustment factor for a specific vehicle emission control technology category and fuel. The Administrator shall approve such requests in accordance with the conditions and procedures of Appendix XVII of this part. For the purpose of calculating the reactivity adjustment factor as specified in Appendix XVII of this part, the "g ozone potential per g NMOG" value for the vehicle emission control technology category and fuel system for which the manufacturer is requesting the use of a unique reactivity adjustment factor shall be divided by the "g ozone potential per g NMOG" value for a conventional gasoline-fueled vehicle established for the vehicle emission control technology category. The following "g ozone potential per g NMOG" values for conventional gasoline-fueled vehicle emission control technology categories have been established:

(i) Light-duty vehicles and light-duty trucks:

Vehicle emission control technology category	"g ozone potential per g NMOG" for conventional gasoline
All TLEVs .....	3.42
All 1993 and subsequent model-year LEVs and ULEVs .....	3.13

(ii) [Reserved]

**§ 86.1778-97 Calculations; particulate emissions.**

The provisions of § 86.145 and Appendix XVI of this part apply to this subpart.

**§ 86.1779-97 General enforcement provisions.**

(a) The provisions of sections 203-208 of the Clean Air Act, as amended, (42 U.S.C. 7522-7525, 7541-7542) apply to all motor vehicles manufactured by a covered manufacturer under this program, and to all covered manufacturers and all persons with respect to such vehicles.

(b) Violation of the requirements of this subpart shall subject a person to the

jurisdiction and penalty provisions of sections 204-205 of the Clean Air Act (42 U.S.C. 7522-7523).

(c) EPA may not issue a certificate of conformity to a covered manufacturer, as defined in § 86.1702, except based on compliance with the standards and requirements in this part 86 and 40 CFR part 85.

**§ 86.1780-97 Prohibited acts.**

(a) The following acts and the causing thereof are prohibited:

(1) In the case of a covered manufacturer, as defined by § 86.1702, of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States of any new motor vehicle or new motor vehicle engine subject to this subpart, unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations found in this subpart (except as provided in sec. 203(b) of the Clean Air Act (42 U.S.C. 7522(b)) or regulations promulgated thereunder).

(2)(i) For any person to fail or refuse to permit access to or copying of records or to fail to make reports or provide information required under sec. 208 of the Clean Air Act (42 U.S.C. 7542) with regard to covered vehicles.

(ii) For a person to fail or refuse to permit entry, testing, or inspection authorized under sec. 206(c) (42 U.S.C. 7525(c)) or sec. 208 of the Clean Air Act (42 U.S.C. 7542) with regard to covered vehicles.

(iii) For a person to fail or refuse to perform tests, or to have tests performed as required under sec. 208 of the Clean Air Act (42 U.S.C. 7542) with regard to covered vehicles.

(iv) For a person to fail to establish or maintain records as required under §§ 86.1723 and 86.1776 with regard to covered vehicles.

(v) For any manufacturer to fail to make information available as provided by regulation under sec. 202(m)(5) of the Clean Air Act (42 U.S.C. 7521(m)(5)) with regard to covered vehicles.

(3)(i) For any person to remove or render inoperative any device or element of design installed on or in a covered vehicle or engine in compliance with regulations under this subpart prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser.

(ii) For any person to manufacture, sell or offer to sell, or install, any part or component intended for use with, or as part of, any covered vehicle or engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a covered vehicle or engine in compliance with regulations issued under this subpart, and where the person knows or should know that the part or component is being offered for sale or installed for this use or put to such use.

(4) For any manufacturer of a covered vehicle or engine subject to standards prescribed under this subpart:

(i) To sell, offer for sale, introduce or deliver into commerce, or lease any such vehicle or engine unless the manufacturer has complied with the requirements of sec. 207 (a) and (b) of the Clean Air Act (42 U.S.C. 7541 (a), (b)) with respect to such vehicle or engine, and unless a label or tag is affixed to such vehicle or engine in accordance with sec. 207(c)(3) of the Clean Air Act (42 U.S.C. 7541(c)(3)).

(ii) To fail or refuse to comply with the requirements of sec. 207 (c) or (e) of the Clean Air Act (42 U.S.C. 7541 (c) or (e)).

(iii) Except as provided in sec. 207(c)(3) of the Clean Air Act (42 U.S.C. 7541(c)(3)), to provide directly or indirectly in any communication to the ultimate purchaser or any subsequent purchaser that the coverage of a warranty under the Clean Air Act is conditioned upon use of any part, component, or system manufactured by the manufacturer or a person acting for the manufacturer or under its control, or conditioned upon service performed by such persons.

(iv) To fail or refuse to comply with the terms and conditions of the warranty under sec. 207 (a) or (b) of the Clean Air Act (42 U.S.C. 7541 (a) or (b)).

(b) For the purposes of enforcement of this subpart, the following apply:

(1) No action with respect to any element of design referred to in paragraph (a)(3) of this section (including any adjustment or alteration of such element) shall be treated as a prohibited act under paragraph (a)(3) of this section if such action is in accordance with sec. 215 of the Clean Air Act (42 U.S.C. 7549);

(2) Nothing in paragraph (a)(3) of this section is to be construed to require the use of manufacturer parts in maintaining or repairing a covered vehicle or engine. For the purposes of the preceding sentence, the term "manufacturer parts" means, with respect to a motor vehicle engine, parts produced or sold by the manufacturer of

the motor vehicle or motor vehicle engine;

(3) Actions for the purpose of repair or replacement of a device or element of design or any other item are not considered prohibited acts under paragraph (a)(3) of this section if the action is a necessary and temporary procedure, the device or element is replaced upon completion of the procedure, and the action results in the proper functioning of the device or element of design;

(4) Actions for the purpose of a conversion of a motor vehicle or motor vehicle engine for use of a clean alternative fuel (as defined in title II of the Clean Air Act) are not considered prohibited acts under paragraph (a) of this section if:

(i) The vehicle complies with the applicable standard when operating on the alternative fuel; and

(ii) In the case of engines converted to dual fuel or flexible use, the device or element is replaced upon completion of the conversion procedure, and the action results in proper functioning of the device or element when the motor vehicle operates on conventional fuel.

33. Appendix XIII is added to part 86 to read as follows:

**Appendix XIII to Part 86—State Requirements Incorporated by Reference in Part 86 of the Code of Federal Regulations**

The following is an informational list of the California regulatory requirements applicable to the National Low Emission Vehicle program (October, 1996) incorporated by reference in part 86 of the Code of Federal Regulations (see § 86.1). California State Regulations

(a) State of California; Air Resources Board: California Assembly-Line Test Procedures for 1983 Through 1997 Model-Year Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles, adopted November 24, 1981, amended June 24, 1996.

(b) State of California; Air Resources Board: California Assembly-Line Test Procedures for 1998 and Subsequent Model-Year Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles, adopted June 24, 1996.

(c) California Code of Regulations, Title 13, Division 3, Sections 2108, 2109, 2110.

(d) State of California; Air Resources Board: California Exhaust Emission Standards and Test Procedures for 1988 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles, adopted May 20, 1987, amended June 24, 1996, Section 9.a.

(e) State of California; Air Resources Board: California Non-Methane Organic Gas Test Procedures, adopted July 12, 1991, amended June 24, 1996.

(f) State of California; Air Resources Board: Regulations Regarding Malfunction and Diagnostic System Requirements—1994 and Later Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles and Engines (OBD II),

California Mail Out #95-34, September 26, 1995, excluding paragraphs (d), (m)(4), and (m)(5).

(g) State of California; Air Resources Board: California Motor Vehicle Emission Control Label Specifications, adopted March 1, 1978, amended June 24, 1996, excluding paragraphs 2(b), 3.5, and 10.

34. Appendix XIV is added to part 86 to read as follows:

**Appendix XIV to Part 86—Determination of Acceptable Durability Test Schedule for Light-Duty Vehicles and Light Light-Duty Trucks Certifying to the Provisions of Part 86, Subpart R**

A manufacturer may determine mileage test intervals for durability-data vehicles subject to the conditions specified in § 86.1726. The following procedure shall be used to determine if the schedule is acceptable to the Administrator:

1. Select exhaust system mileage test points and maintenance mileage test points for proposed (prop) schedule.
2. Calculate the sums of the squares corrected to the mean of the system mileages at the proposed test points:

$$A_{prop} = [\sum (X_p)^2 - ((\sum X_p)^2 / N_p)]_{prop}$$

Where:

$X_p$  = Individual mileages at which the vehicle will be tested.

$N_p$  = Total number of tests (including before and after maintenance tests).

(Subscript "p" refers to proposed test schedule).

3. Determine exhaust system mileage test points and maintenance mileage test points based on testing at five thousand mile intervals from 5,000 miles through the final testing point and maintenance mileage test points selected for the proposed schedule in step 1 of this appendix. This schedule will be designated as the standard (std) test schedule.

4. Calculate the sums of squares corrected to the mean of the standard schedule:

$$B_{std} = [\sum (X_s)^2 - ((\sum X_s)^2 / N_s)]_{std}$$

Where:

$X_s$  = Individual mileages at which the vehicle will be tested.

$N_s$  = Total number of tests (including before and after maintenance).

(Subscript "s" refers to standard test schedule).

5. Refer to Table I and determine  $t_p$  at  $(N_p - 2)_{prop}$  degrees of freedom and  $t_s$  at  $(N_s - 2)_{std}$ .

6. If  $(A_{prop})^{1/2} \geq t_p / t_s \times (B_{std})^{1/2}$  the proposed plan is acceptable.

TABLE I TO APPENDIX XIV

Degrees of freedom (N-2)	t
1	6.314
2	2.920
3	2.353
4	2.132
5	2.015
16	1.943
7	1.895
8	1.860

TABLE I TO APPENDIX XIV—Continued

Degrees of freedom (N-2)	t
9	1.833
10	1.812
11	1.796
12	1.782
13	1.771
14	1.761
15	1.753
6	1.746
17	1.740
18	1.734
19	1.729
20	1.725
21	1.721
22	1.717
23	1.714
24	1.711
25	1.708

35. Appendix XV is added to part 86 to read as follows:

**Appendix XV to Part 86—Procedure for Determining an Acceptable Exhaust Regeneration Durability-Data Test Schedule for Diesel Cycle Vehicles Equipped With Periodically Regenerating Trap Oxidizer Systems Certifying to the Provisions of Part 86, Subpart R**

1. Select exhaust system mileage test points for proposed (prop) schedule.
2. Calculate the sums of the squares corrected to the mean of the system mileages at the proposed test points:

$$A_{prop} = [\sum (X_p)^2 - ((\sum X_p)^2 / N_p)]_{prop}$$

Where:

$X_p$  = Individual mileages at which the vehicle will be tested.

$N_p$  = Total number of tests (including before and after maintenance tests).

(Subscript "p" refers to proposed test schedule).

3. The exhaust system mileage tests points at 5,000, 25,000, 50,000, 75,000, and 100,000 miles will be designated as the standard (std) test schedule.

4. Calculate the sums of square corrected to the mean of the standard tests schedule:

$$B_{std} = [\sum (X_s)^2 - ((\sum X_s)^2 / N_s)]_{std}$$

Where:

$X_s$  = Individual mileages at which the vehicle will be tested.

$N_s$  = Total number of regeneration emission tests.

(Subscript "s" refers to standard test schedule)

5. Refer to Table I and determine  $t_p$  at  $(N_p - 2)_{prop}$  degrees of freedom and  $t_s$  at  $(N_s - 2)_{std}$  degrees of freedom.

6. If  $(A_{prop})^{1/2} \geq t_p / t_s \times (B_{std})^{1/2}$  the proposed plan is acceptable.

TABLE I TO APPENDIX XV

Degrees of freedom (N-2)	t
1	6.314
2	2.920
3	2.353
4	2.132

TABLE I TO APPENDIX XV—Continued

Degrees of freedom (N-2)	t
5	2.015
6	1.943
7	1.895
8	1.860
9	1.833
10	1.812
11	1.796
12	1.782
13	1.771
14	1.761
15	1.753

36. Appendix XVI is added to part 86 to read as follows:

**Appendix XVI to PART 86—Pollutant Mass Emissions Calculation Procedure for Gaseous-Fueled Vehicles and for Vehicles Equipped With Periodically Regenerating Trap Oxidizer Systems Certifying to the Provisions of Part 86, Subpart R**

(a) Gaseous-Fueled Vehicle Pollutant Mass Emission Calculation Procedure.

(1) For all TLEVs, LEVs, and ULEVs, the calculation procedures specified in Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996) shall apply. These procedures are incorporated by reference (see § 86.1).

(b) Pollutant Mass Emissions Calculation Procedure for Vehicles Equipped with Periodically Regenerating Trap Oxidizer Systems.

(1) Exhaust Emissions. (i) The provisions of § 86.1777 apply to vehicles equipped with periodically regenerating trap oxidizer systems, except that the following shall apply instead of the requirements in § 86.144-94(a):

(ii) The final reported test results shall be computed by the use of the following formula:

(iii) For light-duty vehicles and light-duty trucks:

$$Y_{wm} = 0.43 ((Y_{ct} + Y_s) / (D_{ct} + D_s)) + 0.57 ((Y_{ht} + Y_s) / (D_{ht} + D_s)).$$

(iv) For purposes of adjusting emissions for regeneration:

$$Re = ((Yr1 - Y_{ct}) + (Yr2 - Y_s) + (Yr3 - Y_{ht})) / (D_{ct} + D_s + D_{ht}).$$

$$Y_r = Y_{wm} + Re.$$

Where:

$Y_{wm}$  = Weighted mass emissions of each pollutant, i.e., HC, CO, NO<sub>x</sub> or CO, in grams per vehicle mile.

$Y_{ct}$  = Mass emissions as calculated from the "transient" phase of the cold start test, in grams per test phase.

$Y_{ht}$  = Mass emissions as calculated from the "transient" phase of the hot start test in grams per test phase.

$Y_s$  = Mass emissions as calculated from the "stabilized" phase of the cold start test, in grams per test phase.

$D_{ct}$  = The measured driving distance from the "transient" phase of the cold start test, in miles.

$D_{ht}$  = The measured distance from the "transient" phase of the hot start test, in miles.

$D_s$  = The measured driving distance from the "stabilized" phase of the cold start test, in miles.

$Y_r$  = Regeneration emission test.

$Re$  = Mass emissions of each pollutant attributable to regeneration in grams per mile.

$Yr1$  = Mass emissions, during a regeneration emission test, as calculated from the "transient" phase of the cold start test, in grams per test phase.

$Yr2$  = Mass emissions, during a regeneration emission test, as calculated from the "stabilized" phase of the cold start test, in grams per test phase.

$Yr3$  = Mass emissions, during a regeneration emission test, as calculated from the "transient" phase of the hot start test in grams per test phase.

(2) Particulate Emissions. (i) The provisions of § 86.1778 apply to vehicles equipped with periodically regenerating trap oxidizer systems, except that the following shall apply instead of the requirements § 86.145-82(a):

(ii) The final reported test results for the mass particulate (Mp) in grams/mile shall be computed as follows.

(iii) For purposes of adjusting emissions for regeneration:

$$Mp = 0.43(Mp1 + Mp2) / (D_{ct} + D_s) + 0.57 (Mp3 + Mp2) / (D_{ht} + D_s)$$

$$Re = ((Mpr1 - Mp1) + (Mpr2 - Mp2) + (Mpr3 - Mp3)) / (D_{ct} + D_s + D_{ht})$$

$$Mpr = Mp + Re$$

Where:

(1)  $Mp1$  = Mass of particulate determined from the "transient" phase of the cold start test, in grams per test phase. (See § 86.110-94(d)(1) for determination.)

(2)  $Mp2$  = Mass of particulate determined from the "stabilized" phase of the cold start test, in grams per test phase. (See § 86.110-94(d)(1) for determination.)

(3)  $Mp3$  = Mass of particulate determined from the "transient" phase of the hot start test, in grams per test phase. (See § 86.110-94(d)(1) for determination.)

(4)  $D_{ct}$  = The measured driving distance from the "transient" phase of the cold start test, in miles.

(5)  $D_s$  = The measured driving distance from the "stabilized" phase of the cold start test, in miles.

(6)  $D_{ht}$  = The measured driving distance from the "transient" phase of the hot start test, in miles.

(7)  $Mpr$  = Regeneration emission test

(8)  $Re$  = Mass of particulate attributable to regeneration in grams/mile.

(9)  $Mpr1$  = Mass of particulate determined, during a regeneration emission test, from the "transient" phase of the cold start test in grams per test phase. (See § 86.110-94(d)(1) for determination.)

(10)  $Mpr2$  = Mass of particulate determined, during a regeneration emission test, from "stabilized" phase of the cold start test, in grams per test phase. (See § 86.110-94(d)(1) for determination.)

(11)  $Mpr3$  = Mass of particulate determined, during a regeneration emission test, from the "transient" phase of the hot start test, in grams per test phase. (See § 86.110-94(d)(1) for determination.)

(c) Fuel Economy Calculations for Gaseous Fuels Based on the Cold Start CVS-1975 Federal Test Procedure.

(1) Assume the fuel meets HD-5 specifications (95% C<sub>3</sub>H<sub>8</sub>, 5% nC<sub>4</sub>H<sub>10</sub>, by volume).

(i) Physical constants of Propane and Normal Butane:

Component	Mol. Wt.	Sp. Gr.	Liquid density (lb/gal @ 60° F)	Liquid density of Hd-5 (lb/gal at 60° F)
C <sub>3</sub> H <sub>8</sub> .....	44.094	0.508	4.235 ×	0.95 = 4.0233
nC <sub>4</sub> H <sub>10</sub> .....	58.12	0.584	4.868 ×	0.05 = 0.2434
				4.2667

(ii) Density of the HD-5 fuel:

$$(0.95 \times 4.235) + (0.05 \times 4.868) = 4.267 \text{ lb/gal @ } 60^\circ \text{ F}$$

(iii) Molecular Weights:

(A)

Species	Mol. Wt.
C	12.01115

Species

Mol. Wt.

H	1.00797
O	15.9994
CO	28.01055
CO <sub>2</sub>	44.00995
CH <sub>2.658</sub> *	14.6903

\* Average ratio of Hydrogen to carbon atoms in HD-5 fuel.

(B)

$$C_3H_8 \quad 8/3 = 2.666 \times 0.95 \text{ (\% propane)} = 2.533$$

$$nC_4H_{10} \quad 10/4 = 2.5 \times 0.05 \text{ (\% Butane)} = 0.125$$

2.568

(iv) Weight of Carbon in:

$$\text{CO} = \text{wt. of CO} \times (12.01115/28.01055) = \text{wt CO} \times (0.429)$$

$$\text{CO}_2 = \text{wt. of CO}_2 \times (12.01115/44.00995) = \text{wt CO}_2 \times (0.273)$$

$$\text{CH}_{2.658} = \text{wt. of CH}_{2.658} \times (12.01115/14.6903) = \text{wt CH}_{2.658} \times (0.818)$$

(v) Wt. of Carbon per gallon of LPG:

$$\text{wt. of carbon} = 4.2667 \text{ lbs/gal} \times 453.59 \text{ gms/lb} \times 0.818 = 1583 \text{ grams C/gal HD-5}$$

(vi) Fuel economy:

$$\frac{\text{grams C/gal}}{\text{grams C in exhaust/mi}} = \text{miles/gal}$$

$$\text{LPG} = \frac{1583 \text{ gms C/gal}}{(0.818)(\text{HC}) + (0.429)(\text{CO}) + (0.273)(\text{CO}_2)}$$

Where:

HC=CVS HC in grams/mile

CO=CVS CO in grams/mile

CO<sub>2</sub>=CVS CO<sub>2</sub> in grams/mile

For gasoline:

$$= 2421 / ((0.866)(\text{HC}) + (0.429)(\text{CO}) + (0.273)(\text{CO}_2))$$

For Natural Gas:

$$= 1535 / ((0.759)(\text{HC}) + (0.429)(\text{CO}) + (0.273)(\text{CO}_2))$$

37. Appendix XVII is added to part 86 to read as follows:

**Appendix XVII to Part 86—Procedure for Determining Vehicle Emission Control Technology Category/Fuel Reactivity Adjustment Factors for Light-Duty Vehicles and Light Light-Duty Trucks Certifying to the Provisions of Part 86, Subpart R**

The following procedure shall be used by the Administrator to establish the reactivity adjustment factor for exhaust emissions of non-methane organic gases (NMOG) and establish the "methane reactivity adjustment factor" for exhaust methane emissions from natural gas vehicles, for the purpose of certifying a vehicle of specific emission control technology category and fuel for the National LEV program provisions of subpart R of this part.

(a) The Administrator shall determine representative speciated NMOG exhaust emission profiles for light-duty conventional gasoline-fueled TLEVs, LEVs, and ULEVs according to the following conditions:

(1) All testing will be conducted using a specified gasoline blend representative of commercial gasoline and having the specifications listed in § 86.1771.

(2) Speciated NMOG profiles shall be obtained from a statistically valid number of TLEVs, LEVs, and ULEVs.

(3) The speciated NMOG profiles shall identify and quantify, in units of g/mile or mg/mile, as many constituents as possible in accordance with the procedures specified in Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These procedures are incorporated by reference (see § 86.1).

(b) The "g ozone potential per mile" of each NMOG identified in the speciated profile shall be determined by multiplying

the "g/mile NMOG" emission value of the constituent NMOG by its maximum incremental reactivity in paragraph (j) of this appendix.

(c) The "total g ozone potential per mile" of NMOG exhaust emissions from the vehicle/fuel system shall be the sum of all the constituent NMOG "g ozone potential per mile" values calculated in paragraph (b) of this appendix.

(d) The "g ozone potential per g NMOG" for the vehicle/fuel system shall be determined by dividing the "total g ozone potential per mile" value calculated in paragraph (c) of this appendix by the "total g/mile of NMOG emissions".

(e) For light-duty candidate vehicle/fuel systems not powered by conventional gasoline, the Administrator shall establish "reactivity adjustment factors" calculated from exhaust emission profiles derived according to the same conditions specified in paragraphs (a)(1) and (a)(2) of this appendix.

(f) The "g ozone potential per g NMOG" for candidate vehicle/fuel systems not powered by conventional gasoline shall be determined according to paragraphs (b), (c), and (d) of this appendix.

(g)(1) The candidate vehicle/fuel "reactivity adjustment factor" shall be determined by dividing the "g ozone potential per g NMOG" calculated in paragraph (f) of this appendix by the "g ozone potential per g NMOG" value for the vehicle in the same emission control technology category operated on conventional gasoline. The "g ozone potential per g NMOG" values for conventional gasoline vehicles are listed in § 86.1777(b)(5) or shall be established by the Administrator pursuant to this appendix. For candidate vehicle/fuel systems powered by methanol or liquefied petroleum gas, the quotient calculated above shall be multiplied by 1.1. The resulting value shall constitute the "reactivity adjustment factor" for the methanol or liquefied petroleum gas-powered vehicle/fuel system.

(2) For candidate vehicle/fuel systems operating on natural gas, a "methane reactivity adjustment factor" shall be calculated by dividing the maximum incremental reactivity value for methane given in paragraph (j) of this appendix by the "g ozone potential per g NMOG" value for the vehicle in the same emission control technology category operated on conventional gasoline as listed in § 86.1777(b)(5) or established by the Administrator pursuant to this appendix.

(h) The Administrator shall assign a reactivity adjustment factor unique to a specific engine family at the request of a vehicle manufacturer provided that each of the following occurs:

(1)(i) The manufacturer submits speciated NMOG exhaust emission profiles to the Administrator obtained from emission testing a minimum of four different vehicles representative of vehicles that will be certified in the engine family. The test vehicles shall include the official emission-data vehicle(s) for the engine family, and the mileage accumulation of each vehicle shall be at or greater than 4000 miles. One speciated profile shall be submitted for each

test vehicle. Emission levels of each constituent NMOG shall be measured according to Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These procedures are incorporated by reference (see § 86.1). For the emission-data vehicle(s), the speciated profile(s) shall be obtained from the same test used to obtain the official exhaust emission test results for the emission-data vehicle at the 4,000 mile test point. The manufacturer shall calculate "g ozone potential per g NMOG" values for each speciated NMOG exhaust emission profile in accordance with the procedures specified in paragraphs (b), (c), and (d) of this appendix. By using these "g ozone potential per g NMOG" values, the manufacturer shall calculate a "reactivity adjustment factor" for each test vehicle in accordance with the procedure specified in paragraph (g) of this appendix. A "reactivity adjustment factor" for the engine family shall be calculated by taking the arithmetic mean of the "reactivity adjustment factor" obtained for each test vehicle. The 95 percent upper confidence bound (95% UCB) shall be calculated according to the equation:

$$95\% \text{ UCB} = \text{RAF}_m + 1.96 \times \left[ \frac{\sum_{i=1}^n (\text{RAF}_i - \text{RAF}_m)^2}{(n-1)} \right]^{1/2}$$

where:

RAF<sub>m</sub> = mean "reactivity adjustment factor" calculated for the engine family.

RAF<sub>i</sub> = "reactivity adjustment factor" calculated for the i<sup>th</sup> test vehicle.

n = number of test vehicles.

(ii) The 95 percent upper confidence bound of the "reactivity adjustment factor" for the engine family shall be less than or equal to 115 percent of the engine family "reactivity adjustment factor."

(2) The manufacturer submits an "ozone deterioration factor" for the engine family. To determine the "ozone deterioration factor," the manufacturer shall perform two tests at each mileage interval for one or more durability vehicle(s) tested in accordance with the procedures and conditions specified in subpart R of this part for calculating mass deterioration factors. The Administrator shall approve the use of other mileage intervals and procedures if the manufacturer can demonstrate that equivalently representative "ozone deterioration factors" are obtained. One speciated profile shall be submitted for each test. Emission levels of each constituent NMOG shall be measured according to Chapter 5 of the California Regulatory Requirements Applicable to the National Low Emission Vehicle Program (October, 1996). These procedures are incorporated by reference (see § 86.1). A mean g/mi NMOG mass value and a mean "g ozone per g NMOG" value shall be calculated by taking the arithmetic mean of each measurement from the speciated profiles. These results shall be multiplied together to obtain a mean "total g ozone potential per mile" value at each mileage interval. A mean "ozone deterioration factor" shall be calculated in accordance with the procedures in § 86.1777

and this appendix except that the mean total "g ozone potential per mile" value determined at each mileage interval shall be used in place of measured mass emissions. If the "ozone deterioration factor" is determined to be less than 1.00, the "ozone deterioration factor" shall be assigned a value of 1.00. The "ozone deterioration factor" shall be multiplied by the product of the official exhaust NMOG mass emission results at the 4000 mile test point and the mean "reactivity adjustment factor" for the engine family to obtain the NMOG certification levels used to determine compliance with the NMOG emission standards.

(3) The speciated profiles, mean "reactivity adjustment factor" for the engine family, and "ozone deterioration factor" are provided to the Administrator with the certification application for the engine family.

(i) Gasoline meeting the specifications listed in the following tables shall be used to determine the "g ozone potential per g

NMOG" of conventional gasoline (the test methods used for each fuel property shall be the same as the test method for the identical fuel property listed in § 86.1771):

Fuel property	Limit
Sulfur, ppm by weight .....	300 ± 50
Benzene, volume percent .....	1.6 ± 0.3
Reid vapor pressure, psi .....	8.7 ± 0.3
Distillation, D-86 degrees F	
10% .....	115-135
50%, maximum .....	240
90% .....	323-333
EP, maximum .....	420

Hydrocarbon Type, volume per cent	Limit
Total Aromatics .....	32 ± 3.0

Hydrocarbon Type, volume per cent	Limit
Multi-substituted alkyl aromatics	21 ± 3.0
Olefins .....	12 ± 3.0
Saturates .....	remainder

(j) The maximum incremental reactivities to be used in paragraph (b) of this appendix are provided in the table in this paragraph (j). Any manufacturer which intends to use the table shall submit to the Administrator a list which provides the specific organic gases measured by the manufacturer and the maximum incremental reactivity value assigned to each organic gas prior to or with the submittal of a request for the use of a reactivity adjustment factor unique to a specific engine family. The Administrator may deny such requests if he or she determines that the maximum incremental reactivity value assignments are made incorrectly. The table follows:

**MAXIMUM INCREMENTAL REACTIVITY (MIR) VALUES**  
[Units: grams ozone/gram organic gas]

CAS#	Compound	MIR
<b>Alcohols</b>		
00067-56-1 ....	methanol .....	0.56
00064-17-5 ....	ethanol .....	1.34

**Light End and Mid-Range Hydrocarbons (Listed in approximate elution order)**

	methane .....	0.0148
00074-85-1 ....	ethene .....	7.29
00074-86-2 ....	ethyne .....	0.50
00074-84-0 ....	ethane .....	0.25
00115-07-1 ....	propene .....	9.40
00074-98-6 ....	propane .....	0.48
00463-49-0 ....	1,2-propadiene .....	10.89
00074-99-7 ....	1-propyne .....	4.10
00075-28-5 ....	methylpropane .....	1.21
00115-11-7 ....	2-methylpropene .....	5.31
00106-98-9 ....	1-butene .....	8.91
00106-99-0 ....	1,3-butadiene .....	10.89
00106-97-8 ....	n-butane .....	1.02
00624-64-6 ....	trans-2-butene .....	9.94
00463-82-1 ....	2,2-dimethylpropane .....	0.37
00107-00-6 ....	1-butyne .....	9.24
00590-18-1 ....	cis-2-butene .....	9.94
00563-45-1 ....	3-methyl-1-butene .....	6.22
00078-78-4 ....	2-methylbutane .....	1.38
00503-17-3 ....	2-butyne .....	9.24
00109-67-1 ....	1-pentene .....	6.22
00563-46-2 ....	2-methyl-1-butene .....	4.90
00109-66-0 ....	n-pentane .....	1.04
00078-79-5 ....	2-methyl-1,3-butadiene .....	9.08
00646-04-8 ....	trans-2-pentene .....	8.80
00558-37-2 ....	3,3-dimethyl-1-butene .....	4.42
00627-20-3 ....	cis-2-pentene .....	8.80
00689-97-4 ....	1-buten-3-yne .....	9.24
00513-35-9 ....	2-methyl-2-butene .....	6.41
00542-92-7 ....	1,3-cyclopentadiene .....	7.66
00075-83-2 ....	2,2-dimethylbutane .....	0.82
00142-29-0 ....	cyclopentene .....	7.66
00691-37-2 ....	4-methyl-1-pentene .....	4.42
00760-20-3 ....	3-methyl-1-pentene .....	4.42
00287-92-3 ....	cyclopentane .....	2.38
00079-29-8 ....	2,3-dimethylbutane .....	1.07
01634-04-4 ....	1-methyl-tert-butyl-ether .....	0.62
00691-38-3 ....	4-methyl-cis-2-pentene .....	6.69
00107-83-5 ....	2-methylpentane .....	1.53
00674-76-0 ....	4-methyl-trans-2-pentene .....	6.69

## MAXIMUM INCREMENTAL REACTIVITY (MIR) VALUES—Continued

[Units: grams ozone/gram organic gas]

CAS#	Compound	MIR
00096-14-0	3-methylpentane	1.52
00763-29-1	2-methyl-1-pentene	4.42
00592-41-6	1-hexene	4.42
00110-54-3	n-hexane	0.98
13269-52-8	trans-3-hexene	6.69
07642-09-3	cis-3-hexene	6.69
04050-45-7	trans-2-hexene	6.69
00616-12-6	3-methyl-trans-2-pentene	6.69
00625-27-4	2-methyl-2-pentene	6.69
01120-62-3	3-methylcyclopentene	5.65
07688-21-3	cis-2-hexene	6.69
00637-92-3	1-ethyl-tert-butyl-ether	1.98
00922-62-3	3-methyl-cis-2-pentene	6.69
00590-35-2	2,2-dimethylpentane	1.40
00096-37-7	methylcyclopentane	2.82
00108-08-7	2,4-dimethylpentane	1.78
00464-06-2	2,2,3-trimethylbutane	1.32
07385-78-6	3,4-dimethyl-1-pentene	3.48
00693-89-0	1-methylcyclopentene	7.66
00071-43-2	benzene	0.42
03404-61-3	3-methyl-1-hexene	3.48
00562-49-2	3,3-dimethylpentane	0.71
00110-82-7	cyclohexane	1.28
00591-76-4	2-methylhexane	1.08
00565-59-3	2,3-dimethylpentane	1.51
00110-83-8	cyclohexene	5.67
00589-34-4	3-methylhexane	1.40
02532-58-3	cis-1,3-dimethylcyclopentane	2.55
00617-78-7	3-ethylpentane	1.40
00822-50-4	trans-1,2-dimethylcyclopentane	1.85
00592-76-7	1-heptene	3.48
00540-84-1	2,2,4-trimethylpentane	0.93
14686-14-7	trans-3-heptene	5.53
00142-82-5	n-heptane	0.81
02738-19-4	2-methyl-2-hexene	5.53
03899-36-3	3-methyl-trans-3-hexene	5.53
14686-13-6	trans-2-heptene	5.53
00816-79-5	3-ethyl-2-pentene	5.53
00107-39-1	2,4,4-trimethyl-1-pentene	2.69
10574-37-5	2,3-dimethyl-2-pentene	5.53
06443-92-1	cis-2-heptene	5.53
00108-87-2	methylcyclohexane	1.85
00590-73-8	2,2-dimethylhexane	1.20
00107-40-4	2,4,4-trimethyl-2-pentene	5.29
01640-89-7	ethylcyclopentane	2.31
00592-13-2	2,5-dimethylhexane	1.63
00589-43-5	2,4-dimethylhexane	1.50
00563-16-6	3,3-dimethylhexane	1.20
00565-75-3	2,3,4-trimethylpentane	1.60
00560-21-4	2,3,3-trimethylpentane	1.20
00108-88-3	toluene	2.73
00584-94-1	2,3-dimethylhexane	1.32
00592-27-8	2-methylheptane	0.96
00589-53-7	4-methylheptane	1.20
00589-81-1	3-methylheptane	0.99
15890-40-1	(1a,2a,3b)-1,2,3-trimethylcyclopentane	1.94
00638-04-0	cis-1,3-dimethylcyclohexane	1.94
02207-04-7	trans-1,4-dimethylcyclohexane	1.94
03522-94-9	2,2,5-trimethylhexane	0.97
00111-66-0	1-octene	2.69
14850-23-8	trans-4-octene	5.29
00111-65-9	n-octane	0.61
13389-42-9	trans-2-octene	5.29
02207-03-6	trans-1,3-dimethylcyclohexane	1.94
07642-04-8	cis-2-octene	5.29
01069-53-0	2,3,5-trimethylhexane	1.14
02213-23-2	2,4-dimethylheptane	1.34
02207-01-4	cis-1,2-dimethylcyclohexane	1.94
01678-91-7	ethylcyclohexane	1.94
00926-82-9	3,5-dimethylheptane	1.14
00100-41-4	ethylbenzene	2.70

## MAXIMUM INCREMENTAL REACTIVITY (MIR) VALUES—Continued

[Units: grams ozone/gram organic gas]

CAS#	Compound	MIR
03074-71-3	2,3-dimethylheptane	1.14
00108-38-3	m-&p-xylene	7.64
02216-34-4	4-methyloctane	1.14
03221-61-2	2-methyloctane	1.14
02216-33-3	3-methyloctane	1.14
00100-42-5	styrene(ethenylbenzene)	2.22
00095-47-6	o-xylene	6.46
00124-11-8	1-nonene	2.23
00111-84-2	n-nonane	0.54
00098-82-8	(1-methylethyl)benzene	2.24
15869-87-1	2,2-dimethyloctane	1.01
04032-94-4	2,4-dimethyloctane	1.01
00103-65-1	n-propylbenzene	2.12
00620-14-4	1-methyl-3-ethylbenzene	7.20
00622-96-8	1-methyl-4-ethylbenzene	7.20
00108-67-8	1,3,5-trimethylbenzene	10.12
00611-14-3	1-methyl-2-ethylbenzene	7.20
00095-63-6	1,2,4-trimethylbenzene	8.83
00124-18-5	n-decane	0.47
00538-93-2	(2-methylpropyl)benzene	1.87
00135-98-8	(1-methylpropyl)benzene	1.89
00535-77-3	1-methyl-3-(1-methylethyl)benzene	6.45
00526-73-8	1,2,3-trimethylbenzene	8.85
00099-87-6	1-methyl-4-(1-methylethyl)benzene	6.45
00496-11-7	2,3-dihydroindene(indan)	1.06
00527-84-4	1-methyl-2-(1-methylethyl)benzene	6.45
00141-93-5	1,3-diethylbenzene	6.45
00105-05-5	1,4-diethylbenzene	6.45
01074-43-7	1-methyl-3-n-propylbenzene	6.45
01074-55-1	1-methyl-4-n-propylbenzene	6.45
00135-01-3	1,2-diethylbenzene	6.45
01074-17-5	1-methyl-2-n-propylbenzene	6.45
01758-88-9	1,4-dimethyl-2-ethylbenzene	9.07
00874-41-9	1,3-dimethyl-4-ethylbenzene	9.07
00934-80-5	1,2-dimethyl-4-ethylbenzene	9.07
02870-04-4	1,3-dimethyl-2-ethylbenzene	9.07
01120-21-4	n-undecane(hendecane)	0.42
00933-98-2	1,2-dimethyl-3-ethylbenzene	9.07
00095-93-2	1,2,4,5-tetramethylbenzene	9.07
03968-85-2	(2-methylbutyl)benzene	1.07
00527-53-7	1,2,3,5-tetramethylbenzene	9.07
01074-92-6	1-(1,1-dimethylethyl)-2-methylbenzene	5.84
00488-23-3	1,2,3,4-tetramethylbenzene	9.07
00538-68-1	n-pentylbenzene	1.70
00098-19-1	1-(1,1-dimethylethyl)-3,5-DMbenzene	7.50
00091-20-3	naphthalene	1.18
00112-40-3	n-dodecane	0.38

## Carbonyl Compounds

00050-00-0	formaldehyde	7.15
00075-07-0	acetaldehyde	5.52
00107-02-8	acrolein	6.77
00067-64-1	acetone	0.56
00123-33-6	propionaldehyde	6.53
00123-72-8	butyraldehyde	5.26
00066-25-1	hexanaldehyde	3.79
00100-52-7	benzaldehyde	-0.55
00078-93-3	methyl ethyl ketone (2-butanone)	1.18
00078-85-3	methacrolein	6.77
04170-30-3	crotonaldehyde	5.42
00110-62-3	valeraldehyde	4.41
00620-23-5	m-tolualdehyde	-0.55

38. Appendix XVIII is added to part 86 to read as follows:

**Appendix XVIII to Part 86—Statistical Outlier Identification Procedure for Light-Duty Vehicles and Light Light-Duty Trucks Certifying to the Provisions of Part 86, Subpart R**

Residual normal deviates to indicate outliers are used routinely and usefully in analyzing regression data, but suffer theoretical deficiencies if statistical significance tests are required. Consequently, the procedure for testing for outliers outlined by Snedecor and Cochran, 6th ed., *Statistical Methods*, PP. 157-158, will be used. The method will be described generally, then by appropriate formulae, and finally a numerical example will be given.

(a) Linearity is assumed (as in the rest of the deterioration factor calculation procedure), and each contaminant is treated separately. The procedure is as follows:

(1) Calculate the deterioration factor regression as usual, and determine the largest residual in absolute value. Then recalculate the regression with the suspected outlier omitted. From the new regression line calculate the residual at the deleted point,

(x is calculated without the suspected outlier)

$$S_2 = \frac{\sum_{j=1}^n (y_j - \bar{y}_j)^2}{n-3}, j \neq i$$

(iii) Find p from the t-statistic table

Where:

$p = \text{prob} (|t(n-3)| \geq t)$   
 $t(n-3)$  is a t-distributed variable with n-3 degrees of freedom.

(iv)  $y_i$  is an outlier if  $1 - (1-p)^n < .05$

x	y	$\hat{y}$	$y - \hat{y}$
8	59	56.14	2.86

denoted as  $(y_i - y_i')$ . Obtain a statistic by dividing  $(y_i - y_i')$  by the square root of the estimated variance of  $(y_i - y_i')$ . Find the tailed probability, p, from the t-distribution corresponding to the quotient (double-tailed), with n-3 degrees of freedom, with n the original sample size.

(2) This probability, p, assumes the suspected outlier is randomly selected, which is not true. Therefore, the outlier will be rejected only if  $1 - (1-p)^n < 0.05$ .

(3) The procedure will be repeated for each contaminant individually until the above procedure indicates no outliers are present.

(4) When an outlier is found, the vehicle test-log will be examined. If an unusual vehicle malfunction is indicated, data for all contaminants at that test-point will be rejected; otherwise, only the identified outlier will be omitted in calculating the deterioration factor.

(b) Procedure for the calculation of the t-Statistic for Deterioration Data Outlier Test.

(1) Given a set of n points,  $(x_1, y_1), (x_2, y_2) \dots (x_n, y_n)$ .

Where:

$x_i$  is the mileage of the  $i^{\text{th}}$  data point.  
 $y_i$  is the emission of the  $i^{\text{th}}$  data point.

Assume model:

$$y = a + \beta(x - \bar{x}) + \epsilon$$

(2)(i) Calculate the regression line.

$$\hat{y} = a + b(x - \bar{x})$$

(ii) Suppose the absolute value of the  $i^{\text{th}}$  residual

$(y_i - \hat{Y}_i)$  is the largest.

(3)(i) Calculate the regression line with the  $i^{\text{th}}$  point deleted.

$$\hat{y} = a^1 + b^1(x - \bar{x})$$

$$\text{Let } t = \frac{(y_i - \hat{y}_i')}{\sqrt{\hat{\text{var}}(y_i - \hat{y}_i')}}}$$

Where:

$y^1$  is the observed suspected outlier.

$\hat{y}_i$  is the predicted value with the suspected outlier deleted.

$$\hat{\text{var}}(y_i - \hat{y}_i') = S_2 \left( 1 + \frac{1}{n-1} + \frac{(x_i - \bar{x})^2}{\sum_{j=1}^n (x_j - \bar{x})^2} \right), j \neq i$$

(3)(i) Assume model:

$$y = a + \beta(x - \bar{x}) + \epsilon$$

$$y = 45 - 1.013(x - \bar{x})$$

(ii) Suspected point out of regression:

$$y = 44.273 - 1.053(x - \bar{x})$$

$$y = 44.273 - 1.053(22 - 18.727) = 40.827$$

$$y_i - y_i = 12.173$$

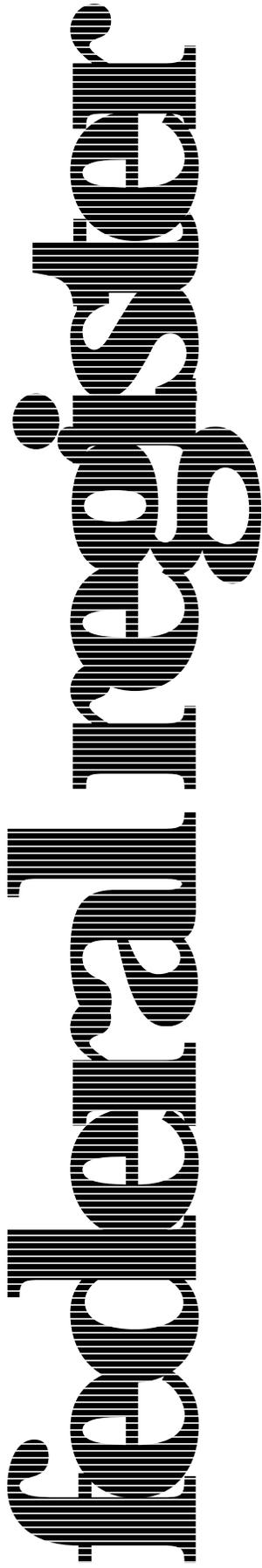
$$\hat{\text{var}}(y_i - \hat{y}_i') = S^2 \left( 1 + \frac{1}{11} + \frac{10.711}{914.182} \right)$$

[FR Doc. 97-12366 Filed 6-5-97; 8:45 am]

BILLING CODE 6560-50-P

x	y	$\hat{y}$	$y - \hat{y}$
6	58	58.17	-0.17
11	56	53.10	2.90
22 <sup>1</sup>	53	41.96	11.04
14	50	50.06	-0.06
17	45	47.03	-2.03
18	43	46.01	-3.01
24	42	39.94	2.06
19	39	45.00	-6.00
23	38	40.95	-2.95
26	30	37.91	-7.91
40	27	23.73	3.27

<sup>1</sup> Suspected outlier.



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Friday  
June 6, 1997

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**Part III**

**Department of  
Housing and Urban  
Development**

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**Combined Notices of Funding Availability  
for FY 1997 for the Public and Indian  
Housing Economic Development and  
Supportive Services Program and the  
Tenant Opportunities Program; Notice**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

[Docket No. FR-4196-N-01]

**Combined Notices of Funding  
Availability for FY 1997 for the Public  
and Indian Housing Economic  
Development and Supportive Services  
Program and the Tenant Opportunities  
Program**

**AGENCY:** Office of the Assistant  
Secretary for Public and Indian  
Housing, HUD.

**ACTION:** Notices of Funding Availability  
(NOFAs) for Fiscal Year (FY) 1997.

**SUMMARY:** Through this announcement HUD is making a total of \$62.225 million in grant funds available for two programs: the Public and Indian Housing Economic Development and Supportive Services Program (ED/SS) and the Tenant Opportunities Program (TOP). Applicants will continue to submit separate applications for either program. The announcements have been combined to highlight HUD's parallel restructuring of these complementary programs. The restructuring represents a major HUD initiative to improve the targeting and management of limited resources for public and Indian housing resident self-sufficiency. The goal is to most effectively focus these resources on "welfare to work" and on independent living for the elderly and persons with disabilities.

**DATES:** Applications for funding under the TOP NOFA must be physically received at the correct local HUD Field Office or Area Office of Native American Programs (AONAP) as applicable on or before August 13, 1997, at 3:00 pm, local time. This application deadline is firm as to date and hour.

Applications for funding under the ED/SS NOFA must be physically received at the correct local HUD Field Office or Area Office of Native American Programs (AONAP) as applicable on or before August 18, 1997, at 3:00 pm, local time. This application deadline is firm as to date and hour.

In the interest of fairness to all competing applicants, HUD will treat any application that is received after the respective program deadlines as ineligible for consideration. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by any unanticipated or delivery-related problems. Delivery of applications by Facsimile (FAX) is not acceptable.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning either the ED/SS

or TOP programs contact: the local HUD Field Office, Director, Office of Public Housing (Appendix "A" of this NOFA) or HUD's Resident Initiative Clearinghouse, telephone 1-800-955-2232.

For questions concerning Native Americans programs contact: the local HUD Field Office, AONAP Administrator (Appendix "A" of this NOFA), or HUD's Resident Initiative Clearinghouse, telephone 1-800-955-2232.

Hearing-or-speech impaired persons may access these numbers via TTY by calling the Federal Information Relay Service at 1-800-877-8339. (Except for the "800" numbers, these telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The recent passage of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104-193; 110 Stat. 2105; approved August 22, 1996), transformed the former Aid to Families with Dependent Children (AFDC) program into the Temporary Assistance to Needy Families (TANF) program. This change confronts the public housing and Native American communities with a profound challenge and opportunity. Approximately forty percent (40%) of families residing in public housing list AFDC as their primary source of income.

The rewards of moving this substantial segment of public and Indian housing residents from welfare dependency to work and self-sufficiency are clear. The potential consequences of failure are equally clear and threaten not only the economic well being of individual families, but of entire public housing and Native American communities that could experience significant losses of rental income as residents become ineligible for further welfare assistance. HUD believes that it is imperative that housing authorities and residents work together to meet the challenge of welfare reform.

These combined NOFAs announce the availability of a total of \$62.225 million for two programs: The Public and Indian Housing Economic Development and Supportive Services Program (ED/SS) and the Tenant Opportunities Program (TOP). With these revised NOFAs, HUD has restructured both of these programs to: (1) Maximize their effectiveness in helping the public housing and Native American communities meet the challenge of welfare reform; and (2) direct funding to public housing and

Native American communities that have the best prospects for success.

In order for housing authorities to succeed in moving a substantial number of welfare dependent families to work and self-sufficiency, they must have a sound ED/SS implementation plan that is based on meeting valid community needs. The plan must be based on an examination of the public and Native American housing community's needs and resources. It must include a Section 3 component and in the case of Indian Housing Authorities (IHAs), Indian preference requirements as stated in 950.175, must be implemented. The plan must also include measurable goals that can be achieved within 24 months. It is important to emphasize two additional components of the plan that are critical to success.

First, although housing authorities need to direct a meaningful portion of their internal resources to increase the self-sufficiency of residents, HUD recognizes that housing authorities will have to utilize resources outside of public and Indian housing in the local community in order to succeed. HUD is requiring that housing authorities secure partnerships in advance of applying for an ED/SS grant as well as a one for one (100%) match of grant funds. Secondly, HUD also maintains that services for residents must be anchored in the local community to be effective. HUD is therefore requiring that a majority of resident services to be provided under the ED/SS implementation plan must be based in a community facility that is accessible to the resident recipients of the services. The community facility can be provided by the housing authority (HA) (many already exist in public and Indian housing communities) or provided by another organization, as long as it is easily accessible to the residents to be assisted.

Just as HUD has revised the ED/SS program to improve its effectiveness, HUD has made similar revisions to the TOP program. In order to apply for TOP, applicants (Resident Associations (RAs) includes RCs, RMCs, ROs, etc. see definitions in Section IV of this Announcement) will have to include an implementation plan with specific measurable goals that can be achieved within 24 months. HUD is requiring that TOP applicants have a signed partnership agreement (Memorandum of Understanding or Agreement) with the HA prior to submitting their application. A provision in the partnership agreement must give TOP applicants access to a community facility to anchor the residents' activities. In the conference report for HUD's 1997 appropriations bill, the

Congress specifically required that HUD improve program effectiveness prior to awarding further funding (See H.R. Conf. Rep. No. 812, 104th Cong., 2d Sess. 54 (1996)). HUD examined the TOP program and concluded its major weaknesses were: (1) A lack of partnership between the TOP grantees and their HAs; (2) a need for enhanced financial management controls; (3) a need to expedite grantee program implementation; (4) a lack of a clear focus on performance objectives; and (5) a failure to target TOP grants toward the basic self-sufficiency needs of residents.

HUD believes that the measures it is putting in place to address these problems would also benefit the ED/SS program and would address the need to restructure the programs to promote self-sufficiency. Therefore, this NOFA adds the following additional threshold requirements for both programs:

1. Applicants in either program now must certify that grants previously received under one of HUD's Community Relations and Involvement grants (such as Public Housing Drug Elimination, ED/SS, TOP, Family Investment Center, Elderly Service Coordinator, etc.) are not in default.

2. All ED/SS applicants that are designated as "troubled" are now required to provide for a qualified contract administrator. All TOP applicants except those whose financial management system and procurement procedures have been determined to comply (by HUD or an independent accountant) with 24 CFR Part 84 are required to provide for a qualified contract administrator.

3. Applications must include a sound assessment of resident needs and resources to meet the needs.

4. Applications (other than Elderly and Disabled Supportive Services Category ED/SS applications) must also include an ED/SS implementation plan for the two year period after which many residents will lose benefits if they fail to find work. The implementation plan must be coordinated with the state welfare plan.

5. Programs proposed in applications (other than Elderly and Disabled Supportive Services Category ED/SS applications) must aim primarily at residents directly affected by potential loss of benefits.

In addition to modifying application threshold requirements, the NOFA contains restructured selection factors designed to emphasize performance capability. Applicants must specifically describe the following elements to obtain the maximum number of points: (1) Staffing; (2) budget; (3) timetable; (4) project management structure; (5) fiscal

management structure; and (6) program assessment provisions. Reviewers will also assess the previous experience of applicants in carrying out previously awarded public housing grants that support resident services and (for ED/SS) will consider the applicant's Public Housing Management Assessment Program (PHMAP) score in the case of housing authority applicants in the ED/SS program.

It should also be noted that HUD has taken steps to improve the implementation of current TOP grants. HUD has placed 64 grantees in default for failing to comply with program requirements. Grantees currently in default are not eligible for funding under this announcement.

HUD believes that the steps outlined above will increase the effectiveness of both of these grant programs. HUD also believes that the two programs can complement one another in many instances. To encourage grantees to coordinate the activities of these programs, HUD is allocating a portion of the points in the selection factors for ED/SS grantees and TOP grantees that agree to work together (see selection factor at Section VI(h)(3)(i)(A)). While there is no guarantee that applicants that have agreed to coordinate their grant activities will both be funded, HUD believes that both TOP and ED/SS applicants will have a higher chance of success in implementing their programs if they enter into such an arrangement. Such a sharing of resources should benefit both the housing authority ED/SS applicant and the Resident Association TOP applicant.

#### *Promoting Comprehensive Approaches to Housing and Community Development*

HUD is interested in promoting comprehensive, coordinated approaches to housing and community development. Economic development, community development, public housing revitalization, homeownership, assisted housing for special needs populations, supportive services, and welfare-to-work initiatives can work better if linked at the local level. Toward this end, HUD in recent years has developed the Consolidated Planning process designed to help communities undertake such approaches.

In this spirit, it may be helpful for applicants under this NOFA to be aware of other related HUD NOFAs that have recently been published or are expected to be published in the near future. By reviewing these NOFAs with respect to their program purposes and the eligibility of applicants and activities,

applicants may be able to relate the activities proposed for funding under this NOFA to the recent and upcoming NOFAs and to the community's Consolidated Plan.

With respect to community and economic development, the following related NOFAs have been published: (1) The NOFA for the HUD-Administered Small Cities Community Development Block Grant Program—Development Grants for Fiscal Year 1997 and the Section 108 Loan Guarantee Program for Small Communities in New York State (December 3, 1996, at 61 FR 64196); (2) the NOFA for the Community Outreach Partnership Centers (March 20, 1997, at 62 FR 13506); (3) the NOFA for the Youthbuild Program (April 23, 1997, at 62 FR 19860); and (4) the NOFA for Historically Black Colleges (May 12, 1997, at 62 FR 26180). The NOFA for the Joint HUD/HHS/ED Community Partnership will be published in the near future. To foster comprehensive, coordinated approaches by communities, HUD intends for the remainder of FY 1997 to continue to alert applicants to upcoming and recent NOFAs as each NOFA is published. In addition, a complete schedule of NOFAs to be published during the fiscal year and those already published appears under the HUD Homepage on the Internet, which can be accessed at <http://www.hud.gov/nofas.html>. Additional steps on NOFA coordination may be considered for FY 1998.

For help in obtaining a copy of your community's Consolidated Plan, please contact the community development office of your municipal government.

#### **II. Funding Amounts**

(a) *FY 1997 Appropriations.* HUD is making a total of \$62.225 million in grant funds available for two programs: ED/SS funded at \$42.25 million and TOP funded at \$19.975 million. Under the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (Pub. L. 104-204, 110 Stat. 2874; approved September 26, 1996) (FY 1997 Appropriations) sixty (\$60) million was set aside for the ED/SS program.

(b) *TOP Funding.* Five (\$5) million of the sixty (\$60) million available under the ED/SS set-aside was further allocated to fund the TOP program for FY 1997. HUD has carried over fifteen (\$15) million appropriated in FY 1996 for the TOP program pursuant to the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Pub. L. 104-134, 110 Stat. 1321; approved April 26, 1996). HUD has allocated \$25,000 from the fifteen million carried over to

fund an applicant which, due to a technical error, was not awarded a grant pursuant to a previous TOP NOFA. HUD is adding the remaining \$14,975,000 carried over from FY 1996 to the five (\$5) million available under the FY 1997 Appropriations to make a total of \$19.975 million available under this NOFA for TOP.

Of the total amount available for TOP, \$5 million will be competitively awarded to National Resident Organizations (NROs), Regional Resident Organizations (RROs) and Statewide Resident Organizations (SROs) to provide training and technical assistance, and coordinate linkages to appropriate supportive services for public and Indian housing resident organizations who have not been awarded RM/TOP funds. The remainder of the funds (\$14,975,000) is being made available on a competitive basis under this NOFA to applicants other than National Resident Organizations (NROs), Regional Resident Organizations (RROs) and Statewide Resident Organizations (SROs) that submit timely applications and are selected for funding. This financial assistance may not exceed \$100,000 with respect to any public and Indian housing project.

HUD encourages housing authorities to notify their RAs of this funding opportunity. It is important for residents to be advised that, even in the absence of a RA, the opportunity exists to establish a RA before applying for funding. If no RA exists for any of the developments, HUD encourages every HA to post this NOFA in a prominent location within the HA's main office, as well as in each development's office.

(c) *ED/SS funding.* Of the remaining fifty five (\$55) million available for the ED/SS program, the following has been set aside:

(1) Five (\$5) million for the Moving to Work Demonstration;

(2) \$250,000 to the community of St. Petersburg, Florida for a self-sufficiency program for public housing residents (part of a package of assistance in response to the civil disturbances in St. Petersburg); and

(3) \$2.5 million to be used in conjunction with funding from the Department of Health and Human Services for a Resident Uplift and Economic Development Program.

(4) \$5 million for service coordinators, which will be administered by the Office of Housing and that will be made available separately.

(5) HUD is making the remaining \$42.25 million available under this NOFA.

### III. Application Submission Requirements

Applicants must apply using application kits that HUD has provided. Application kits for either the ED/SS or TOP programs may be obtained, and assistance provided from: (1) The local HUD Field Office with delegated public housing responsibilities over an applying public housing agency or RA; (2) The Area Offices of Native American Programs (AONAPs) having jurisdiction over an Indian housing authority, Resident Organization or Native American Resident Management Corporation making an application; (3) By calling HUD's Resident Initiatives Clearinghouse, telephone (800) 955-2232; or (4) by consulting the *Funding* cross reference under HUD's Business and Community Partner HomePage on the Internet's World Wide Web (<http://www.hud.gov/bushome.html>): look under *Funding* then under Public Housing and then under the reference for either *ED/SS* or *TOP*. The application kit contains information on all exhibits and certifications required under this NOFA as well as additional guidance.

For the ED/SS program, an HA may submit one application under the Family Economic Development and Supportive Services grant category and/or one application under the Elderly and Disabled Supportive Services grant category to assist the Elderly and/or Persons with Disabilities. The maximum number of applications that an HA may submit is two. If the HA submits two applications, the total amount requested must not exceed the maximum permitted for the Family Economic Development and Supportive Services category.

Joint applications ARE NOT PERMITTED under the ED/SS program with the following EXCEPTION: HAS under a single administration (such as HAs managing another HA under contract or HAs sharing a common executive director) may submit a single application, even though each HA has its own operating budget. For TOP, only one Basic or Additional Grant application will be considered for funding from an individual project (See Section VII(d) of this Announcement for explanation of types of grants). If two such applications are received from a project, only the application from the duly elected RA will be considered. In addition, for all funding years, the sum total of TOP and Resident Management Program financial assistance for any single public or Indian housing project, including all project-based Basic and Additional Grants and any portion of an

Intermediary Grant which benefits the project, may not exceed \$100,000 (See Section VII(d) of this Announcement for explanation of types of grants).

With respect to both the ED/SS and TOP programs, an original application and two identical copies of the original application must be received by the deadline at the local HUD Field Office with responsibilities over the applying HA or RA (exclusive of Resident Organizations and Native American Resident Management Corporations), and addressed Attention: Director, Office of Public Housing or (in the case of Indian housing authorities, Resident Organizations or Native American Resident Management Corporations) to the local HUD AONAP, Attention: Administrator, AONAPs with jurisdiction over the applying Indian housing authorities, Resident Organization or Native American Resident Management Corporations, as appropriate. A complete listing of these offices is provided in Appendix "A" of this NOFA.

It is not sufficient for an application to bear a postage date within the submission time period. APPLICATIONS RECEIVED AFTER THE DEADLINE DATES/TIMES LISTED ABOVE, WILL NOT BE CONSIDERED. Applications submitted by facsimile (FAX) are not acceptable.

### IV. Common Definitions

*Community Facility* means a non-dwelling structure that provides space for multiple supportive services for the benefit of public and Indian housing residents (as well as others eligible for the services provided) that may include but are not limited to:

- (1) Child care;
- (2) After-school activities for youth;
- (3) Job training;
- (4) Campus of Learner activities; and
- (7) English as a Second Language (ESL) classes.

*Contract Administrator* means an overall administrator and/or a financial management agent that oversees the financial aspects of a grant and assists in the entire implementation of the grant. Examples of qualified organizations that can serve as a Contract Administrator are:

- (1) Local housing authorities; and
- (2) Community based organizations such as Community Development Corporations (CDCs), community churches, and State/Regional Associations/Organizations.

*Development* has the same meaning as the term "Project" below.

*Elderly person* means a person who is at least 62 years of age.

*Jurisdiction-Wide Resident*

*Organization* means an incorporated nonprofit organization or association that meets the following requirements:

(1) Most of its activities are conducted within the jurisdiction of a single housing authority;

(2) There are no incorporated Resident Councils, Resident Management Corporations, Resident Organizations or Native American Resident Management Corporations within the jurisdiction of the single housing authority;

(3) It has experience in providing start-up and capacity-building training to residents and resident organizations; and

(4) Public or Indian housing residents representing unincorporated Resident Councils within the jurisdiction of the single housing authority must comprise the majority of the board of directors.

*Intermediary Resident Organizations* means Jurisdiction-Wide Resident Organizations, State-wide Resident Organizations, Regional Resident Organizations and National Resident Organizations.

*National Resident Organization (NRO)* means an incorporated nonprofit organization or association for public and Indian housing that meets each of the following requirements:

(1) It is national (i.e., conducts activities or provides services in at least two HUD Areas or two States);

(2) It has experience in providing start-up and capacity-building training to residents and resident organizations; and

(3) Public or Indian housing residents representing different geographical locations in the country must comprise the majority of the board of directors.

*Native American Resident Management Corporation (RMC)* (as defined in 24 CFR 950.962) means an entity that proposes to enter into, or enters into, a contract to manage IHA property. The corporation shall have each of the following characteristics:

(1) It shall be a nonprofit organization that is incorporated under the laws of the State or Indian tribe in which it is located;

(2) It may be established by more than one resident organization, so long as each such organization both approves the establishment of the corporation and has representation on the Board of Directors of the corporation;

(3) It shall have an elected Board of Directors;

(4) Its by-laws shall require the Board of Directors to include representatives of each resident organization involved in establishing the corporation;

(5) Its voting members are required to be residents of the project or projects it manages; and

(6) It shall be approved by the resident organization. If there is no organization, a majority of the households of the project or projects shall approve the establishment of such an organization.

*Person with disabilities* means an adult person who:

(1) Has a condition defined as a disability in section 223 of the Social Security Act;

(2) Has a developmental disability as defined in section 102 of the Developmental Disabilities Assistance Bill of Rights Act. Such a term shall not exclude persons who have the disease of acquired immunodeficiency syndrome (AIDs) or any conditions arising from the etiologic agent for acquired immunodeficiency syndrome; or

(3) Is determined, pursuant to regulations issued by the Secretary, to have a physical, mental, or emotional impairment which:

(i) Is expected to be of long-continued and indefinite duration;

(ii) Substantially impedes his or her ability to live independently; and

(iii) Is of such a nature that such ability could be improved by more suitable housing conditions.

*Project* is the same as "low-income housing project" as defined in section 3(b)(1) of the United States Housing Act of 1937 (42 U.S.C. 1437 *et. seq.*) (1937 Act).

*Resident Association (RA)* means any or all of the forms of resident organizations as they are defined elsewhere in this Definitions section and includes Resident Councils (RC), Resident Management Corporations (RMC), Resident Organizations (RO), Native American Resident Management Corporations, Regional Resident Organizations (RRO), Statewide Resident Organizations (SRO), and National Resident Organizations (NRO).

*Resident Council (RC)* means (as provided in 24 CFR 964.115) an incorporated or unincorporated nonprofit organization or association that shall consist of persons residing in public housing and must meet each of the following requirements in order to receive official recognition from the HA/ HUD, and be eligible to receive funds for RC activities and stipends for officers for their related costs for volunteer work in public housing. (Although 24 CFR part 964 defines an RC as an incorporated or unincorporated nonprofit organization, HUD requires the RC to be registered with the State at the time of application submission.)

(1) It must adopt written procedures such as by-laws, or a constitution which provides for the election of residents to the governing board by the voting membership of the public housing residents. The elections must be held on a regular basis, but at least once every 3 years. The written procedures must provide for the recall of the resident board by the voting membership. These provisions shall allow for a petition or other expression of the voting membership's desire for a recall election, and set the percentage of voting membership ("threshold") which must be in agreement in order to hold a recall election. This threshold shall not be less than 10 percent of the voting membership.

(2) It must have a democratically elected governing board that is elected by the voting membership. At a minimum, the governing board should consist of five elected board members. The voting membership must consist of heads of households (any age) and other residents at least 18 years of age or older and whose names appear on a lease for the unit in the public housing that the resident council represents.

(3) It may represent residents residing in:

(i) Scattered site buildings in areas of contiguous row houses;

(ii) One or more contiguous buildings;

(iii) A development; or

(iv) A combination of the buildings or developments described above.

*Regional Resident Organization (RRO)* means an incorporated nonprofit organization or association for public or Indian housing that meets each of the following requirements:

(1) It is regional (i.e., not limited by HUD Areas, including Tribal Areas);

(2) It has experience in providing start-up and capacity-building training to residents and resident organizations; and

(3) Public or Indian housing residents representing different geographical locations in the region must comprise the majority of the board of directors.

*Resident Organization (RO)* means an RC for an Indian housing authority (24 CFR 950.962).

*Resident Management Corporation (RMC)* (See 24 CFR 964.7, 964.120) means an entity that consists of residents residing in public housing and must have each of the following characteristics in order to receive official recognition by the HA and HUD:

(1) It shall be a nonprofit organization that is validly incorporated under the laws of the State in which it is located;

(2) It may be established by more than one RC, so long as each such council:

(i) Approves the establishment of the corporation; and

(ii) Has representation on the Board of Directors of the corporation.

(3) It shall have an elected Board of Directors, and elections must be held at least once every 3 years;

(4) Its by-laws shall require the Board of Directors to include resident representatives of each RC involved in establishing the corporation; include qualifications to run for office, frequency of elections, procedures for recall, and term limits if desired;

(5) Its voting members shall be heads of households (any age) and other residents at least 18 years of age and whose names appear on the lease of a unit in public housing represented by the RMC;

(6) Where an RC already exists for the development, or a portion of the development, the RMC shall be approved by the RC board and a majority of the residents. If there is no RC, a majority of the residents of the public housing development it will represent must approve the establishment of such a corporation for the purposes of managing the project; and

(7) It may serve as both the RMC and the RC, so long as the corporation meets the requirements of this part for an RC.

*Secretary* means the Secretary of Housing and Urban Development.

*Statewide Resident Organization (SRO)* means an incorporated nonprofit organization or association for public or Indian housing that meets the following requirements:

- (1) It is Statewide or Tribe-wide;
- (2) It has experience in providing start-up and capacity-building training to residents and resident organizations; and

(3) Public or Indian housing residents representing different geographical locations in the State or Tribe must comprise the majority of the board of directors.

## V. Common Requirements

(a) *Selection Processing.* (1) *Corrections to Deficient Applications.* After the submission deadline date, HUD will screen each application to determine whether it is complete, consistent, and contains correct computations.

(i) HUD will notify an applicant, in writing, of any curable technical deficiencies in the application. The applicant must submit corrections in accordance with the information specified in HUD's letter within 14 calendar days from the date of HUD's letter notifying the applicant of any such deficiency.

(ii) Curable technical deficiencies relate to items that are not necessary for HUD review under selection factors and would not improve the quality of the applicant's program proposal.

(iii) An example of a curable technical deficiency would be the failure of an applicant to submit a required assurance, budget narrative, certification, applicant data form, summaries of written resident comments, incomplete forms such as the SF-424 or lack of required signatures, appendixes and documentation referenced in the application or a computational error based on the use of an incorrect number(s) such as incorrect unit counts. These items are discussed in the application kit and samples, as appropriate, are provided.

(iv) An example of a non-curable defect or deficiency would be a missing SF-424A (Budget Information).

(2) *Scoring.* HUD will review each application that it determines meets the requirements of these NOFAs and evaluate it by assigning points in accordance with the selection factors for the program for which the applicant applied. (HUD may utilize non-HUD staff reviewers to assist in scoring applications.) The number of points that an application receives will depend on the extent to which the application is responsive to the information requested in the selection factors. An application must receive a score of at least 75 points (or in the case of Elderly and Disabled Supportive Service Category applications in the ED/SS program—60 points) out of the maximum of 100 points that may be awarded under either of these NOFAs to be eligible for funding.

After applications have been scored, Headquarters will rank the applications in accordance with the ranking procedures for each program. Awards will be made in ranked order until all funds are expended. HUD will select the highest ranking applications that can be fully funded. In the event that two eligible applications receive the same score, and both cannot be funded because of insufficient funds, the application with the highest score in Selection Factor 3 will be selected. If Selection Factor 3 is scored identically for both applications, the scores in Selection Factors 1, 2, and 4 (for TOP) will be compared in this order, one at a time, until one application scores higher in one of the factors and is selected. If the applications score identically in all factors, the application that requests less funding will be selected. In the event that the remaining applications contain equal funding,

selections will be made among the remaining applications by lottery.

(b) *Post Selection Administration Funding—Reduction of Requested Grant Amounts and Special Conditions.* All awards will be made to fund fully an application, except as follows. HUD may approve an application for an amount lower than the amount requested, withhold funds after approval, adjust line items in the proposed grant budget within the amount requested and/or the grantee will be required to comply with special conditions added to the grant agreement, in accordance with 24 CFR 85.12 (public housing agencies), and 24 CFR 950.135 (Indian housing authorities) as applicable, and the requirements of this NOFA, or where:

(1) HUD determines the amount requested for one or more eligible activities is not supported in the application, and/or is unreasonable or unnecessary;

(2) The application does not otherwise meet applicable cost limitations established for the program;

(3) The applicant has requested an ineligible activity; An activity proposed for funding does not qualify as an eligible activity and can be separated from the budget;

(4) Insufficient amounts remain in that funding round to fund the full amount requested in the application and HUD determines that partial funding is a viable option; or

(5) For any other reason where good cause exists.

(c) *General Grant Requirements.* In addition to the requirements set forth in this NOFA, grantees are responsible for ensuring that grant funds are administered in accordance with all applicable laws and regulations, OMB circulars, HUD fiscal and audit controls, grant agreements, grant special conditions, the grantee's approved budget (SF 424A), and supporting budget narrative, plan and activity timetable. Applicable Federal laws include but are not limited to those related to fair housing and equal opportunity and the following:

(1) *Grant Administration.* The policies, guidelines, and requirements of the following apply to this NOFA:

(i) *For HAs and any governmental subgrantees:* 24 CFR part 85, OMB Circular A-87 and 24 CFR part 44;

(ii) *For private non-profit grantees or subgrantees:* 24 CFR part 84, OMB Circulars A-122 or A-21, as applicable, and 24 CFR part 45; and

(iii) *For for-profit participants using Federal funds:* 24 CFR part 84 and Federal Acquisition Requirements (FAR).

(2) *Cost Principles.* The cost principles of OMB Circulars A-87, A-21, or A-122, as applicable to the specific entity incurring the cost, apply to grantees and subgrantees funded under this NOFA.

(3) *Ineligible Contractors.* The provisions of 24 CFR part 24 apply and relate to the employment, engagement of services, awarding of contracts, or funding of any contractors or subcontractors during any period of debarment, suspension, or placement in ineligibility status.

(4) *Freedom of Information Act.* Applications submitted in response to this NOFA are subject to disclosure under the Freedom of Information Act (FOIA).

(5) *Grant Staff Personnel.* All persons or entities compensated by grants for services provided under an ED/SS or TOP grant must meet all applicable personnel or procurement requirements and shall be required, as a condition of employment, to meet relevant State, local and Tribal government, insurance, training, licensing, civil rights or other similar standards and requirements.

(6) *Grant Agreement.* After an application has been approved, HUD and the applicant shall enter into a grant agreement (Form 1044) setting forth the amount of the grant and its applicable terms, conditions, financial controls, payment mechanism (which except under extraordinary conditions will operate under HUD's Line of Credit Control System (LOCCS)) and special conditions, including sanctions for violation of the agreement. Except as otherwise specified in the Grant Agreement, the applicant's entire application, including but not limited to the budget, timetable, and narrative will be incorporated in the Grant Agreement.

(7) *Duplication of Funds.* Under OMB Cost Circulars (A-87, A-21, and A-122), grantees may not duplicate funding from (i.e., charge the same costs to) the ED/SS or TOP grant and any other funding sources, although the costs of budget line items may be shared between the grant and other funding sources in accordance with allocation criteria in the applicable OMB Cost circular. Adequate financial controls must be in place to assure compliance with these requirements.

(8) *Risk Management.* Grantees and subgrantees are required to implement, administer and monitor programs so as to minimize the risk of fraud, waste, abuse, and liability for losses from adversarial legal action. The following requirements address these concerns:

(i) *Insurance/Indemnification.* Each grantee shall obtain adequate insurance coverage to protect itself against any

potential liability arising out of the eligible activities under this part. Subgrantees shall obtain their own liability insurance. For the TOP program, section 20(b)(3) of the 1937 Act states that bonding and insurance, or its equivalent, shall be available to protect the Secretary and the Public Housing Agency against loss, theft, embezzlement or fraudulent acts on or behalf of the RMC or its grantees.

(ii) *Failure to implement program(s).* If the grant plan, approved budget, and timetable, as described in the approved application, are not operational within 90 days of the grant agreement date, the grantee must report by letter to the local HUD Field Office or the local AONAPs the steps being taken to initiate the plan and timetable, the reason for the delay, and the expected starting date. Any timetable revisions that resulted from the delay must be included. The local HUD Field Office or AONAPs will determine if the delay is acceptable, approve/disapprove the revised plan and timetable, and take any additional appropriate action.

(iii) *Default.* HUD may impose sanctions, subject to HUD notice and Grantee opportunity to respond/correct as described in the program grant agreement if the grantee:

(A) Is not complying with the requirements of this part or of other applicable Federal laws or requirements;

(B) Fails to make satisfactory progress toward its program goals, as specified in its plan and as reflected in its performance, financial status reports or through other information available to HUD;

(C) Does not establish procedures that will minimize the time elapsing between drawdowns and disbursements;

(D) Does not adhere to grant agreement requirements or special conditions;

(E) Proposes substantial plan changes to the extent that, if originally submitted, the applications would not have been selected for funding;

(F) Engages in the improper award or administration of grant subcontracts;

(G) Does not submit reports; or

(H) Files a false certification.

(iv) *Sanctions.* The sanctions that HUD may impose include but are not limited to:

(A) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee;

(B) Disallow all or part of the cost of the activity or action not in compliance;

(C) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program;

(D) Require that some or all of the grant amounts be remitted to HUD;

(E) Condition a future grant and elect not to provide future grant funds to the grantee until appropriate actions are taken to ensure compliance;

(F) Withhold further awards for the program; or

(G) Take other remedies that may be legally available.

(10) *Treatment of Income.* For public housing only, annual income does not include the earnings and benefits to any family member resulting from the participation in a program providing employment training and supportive services in accordance with the Family Support Act of 1988, section 22 of the 1937 Act (See 24 CFR part 5), or any comparable Federal, State, or local authority during the exclusion period. For purposes of this paragraph, the following definitions apply:

(i) *Comparable Federal, State, local or tribal law* means a program providing employment training and supportive services that:

(A) Is authorized by a Federal, State, local or tribal law;

(B) Is funded by the Federal, State, local or tribal government;

(C) Is operated or administered by a public agency;

(D) Has as its objective to assist participants in acquiring employment skills.

(ii) *Exclusion period* means the period during which the resident participates in a program described in this NOFA, plus 18 months from the date the resident begins the first job acquired by the resident after completion of such program that is not funded by public housing assistance under the 1937 Act. If the resident is terminated from employment based on good cause, the exclusion shall end.

(iii) *Earnings and benefits* means the incremental earnings and benefits resulting from a qualifying employment program or subsequent job.

(11) *Reports and Closeout* (i) *Semiannual reports.* Each applicant receiving a grant shall submit to HUD a semi-annual progress report in a format prescribed by HUD that indicates program expenditures and measures performance in achieving program milestones and goals. No grant payments will be approved for grantees with overdue progress reports.

(ii) *Final reports and closeout.* As part of a grant closeout process, each applicant receiving a grant shall submit to HUD a final report in a format prescribed by HUD that reports final program expenditures and measures performance in achieving program goals.

(iii) *Audits and closeouts.* HUD will make maximum use of audits required under 24 CFR parts 44 and 45 as applicable in conducting grant closeout. At grant closeout, grantees shall make the latest audit available to HUD along with the final report. TOP Grantees shall time their final audit to reflect grant completion and to be available at closeout.

(12) *LOCCS/VRS* All grantees will access the grant funds through the LOCCS/VRS.

## **VI. Public Housing Economic Development and Supportive Services Program (ED/SS) NOFA**

(a) *Purpose and Description.* (1) *Authority.* The ED/SS program is authorized pursuant to the 1997 Appropriations Act.

(2) *Funding Available.* The Department is making a total of \$42.25 million available for award pursuant to this NOFA. The Department is setting aside 10% of this amount to fund applications from IHAs with the remainder (90%) available to fund applications from PHAs. Both the amount for IHAs and the amount for PHAs will be allocated as follows: 80% will be allocated to Family Economic Development and Supportive Services category grants; and the remaining 20% will be allocated to Elderly and Disabled Supportive Services category grants.

(3) *Program Description.* The ED/SS program provides grants to HAs to enable them to establish and implement programs that increase resident self-sufficiency and support continued independent living for elderly and disabled residents.

(b) *Eligible Applicants* (1) *Primary Applicants.* Public and Indian Housing Authorities that have not received a previous ED/SS grant are eligible primary applicants. Public and Indian Housing Authorities are required to establish partnerships with eligible co-applicants as described below.

(2) *Co-Applicants.* Eligible Co-Applicants are:

(i) Corporations (including non-profit and for profit corporations) are eligible co-applicants; and

(ii) Public bodies, including an agency or instrumentality thereof, are eligible co-applicants.

(3) *Co-Applicant Roles and*

*Requirements.* (i) Co-Applicants capabilities will be considered in reviewing applications.

(ii) Co-Applicants are considered an integral part of the application and cannot be changed once applications are submitted and under review without disqualifying an application. If an applicant HA is awarded a grant, it must

obtain HUD approval prior to dissolving a partnership with a Co-Applicant or significantly changing its role.

(iii) Co-Applicants can be designated subgrantees if appropriate, but in such an instance become subject to Federal requirements applicable to subgrantees.

(c) *Eligible Participants.* (1) Residents of conventional public or Indian housing are eligible to participate in and/or receive the benefits of a Family ED/SS category grant. A grantee may designate that up to twenty five percent (25%) of the total number of persons eligible to participate in and/or receive the benefits of a Family ED/SS category grant may be recipients of assistance under the Section 8 Program rather than residents of conventional public housing.

(2) A grantee may designate that up to twenty five percent (25%) of the total number of persons eligible to participate in and/or receive the benefits of a Disabled Supportive Services category grant may be recipients of assistance under the Section 8 Program rather than residents of conventional public housing.

(3) A grantee may plan for assistance for elderly persons or persons with disabilities on a waiting list for either public housing or Section 8 assistance in advance of their becoming public housing residents or securing Section 8 assistance.

(d) *Maximum Grant Amounts.* The maximum grant awards are limited as follows:

(1) *For Family Economic Development and Supportive Services category*—no more than \$250 per unit up to the below listed maximums:

(i) For HAs with 1 to 780 units, the maximum grant award is \$150,000.

(ii) For HAs with 781 to 7,300 units the maximum grant award is \$500,000.

(iii) For HAs with 7,301 or more units, the maximum grant award is \$1,000,000.

(2) *For Elderly or Disabled Supportive Services category*—no more than \$100 per unit up to the below listed maximums:

(i) For HAs with 1 to 217 units occupied by Elderly residents or persons with disabilities, the maximum grant award is \$100,000.

(ii) For HAs with 218 to 1,155 units occupied by Elderly residents or persons with disabilities, the maximum grant award is \$200,000.

(iii) For HAs with 1,156 or more units occupied by Elderly residents or persons with disabilities, the maximum grant award is \$300,000.

(3) An HA may submit one application under the Family Economic Development and Supportive Services

grant category and/or one application under the Elderly or Disabled Supportive Services grant. The maximum number of applications that an HA may submit is two. If an HA submits two applications, the total amount requested must not exceed the maximum grant amount available for its size under the Family Economic Development and Supportive Services category (as listed above).

(e) *Eligible activities.* Program funds may be used for the following:

(1) *Family Economic Development and Supportive Services category.*

(i) *Economic Development activities.* Activities essential to facilitate economic uplift and provide access to the skills and resources needed for self-development and business development. Economic development activities may include:

(A) *Entrepreneurship Training* (literacy training, computer skills training, business development planning).

(B) *Entrepreneurship Development* (entrepreneurship training curriculum, entrepreneurship courses).

(C) *Micro/Loan Fund.* Developing a strategy for establishing a revolving micro/loan fund and/or capitalizing a loan fund. A loan fund (from non-grant funds and/or grant funds) must be included as part of a comprehensive entrepreneurship training program if applicable.

(D) *Developing credit unions.* Developing a strategy to establish and/or creating on-site credit union(s) to provide financial and economic development initiatives to HA residents. (ED/SS grant funds cannot be used to capitalize a credit union.) The credit union could support the normal financial management needs of the community (i.e., check cashing, savings, consumer loans, micro-businesses and other revolving loans).

(E) *Employment training and counseling* (e.g., job training (such as Step-Up programs), preparation and counseling, job search assistance, job development and placement, and continued follow-up assistance).

(F) *Employer linkage and job placement.*

(ii) *Supportive Services.* The provision of services to assist eligible residents to become economically self-sufficient, particularly families with children where the head of household would benefit from the receipt of supportive services and is working, seeking work, or is preparing for work by participating in job-training or educational programs. Supportive services may include:

(A) Child care, of a type that provides sufficient hours of operation and serves appropriate ages as needed to facilitate parental access to education and job opportunities.

(B) Computer based educational opportunities, skills training, and entrepreneurial activities.

(C) Homeownership training and counseling, development of feasibility studies and preparation of homeownership plans/proposals.

(D) Education including but not limited to:

(1) Remedial education;

(2) Literacy training;

(3) Assistance in the attainment of certificates of high school equivalency;

(4) Two-year college tuition assistance;

(5) Trade school assistance;

(6) Youth leadership skills and related activities (activities may include peer leadership roles training for youth counselors, peer pressure reversal, life skills, goal planning).

(E) Youth mentoring of a type that mobilizes a potential pool of role models to serve as mentors to public or Indian housing youth. Mentor activities may include after-school tutoring, drug abuse treatment, job counseling or mental health counseling.

(F) Transportation costs, as necessary to enable any participating family member to receive available services to commute to his or her training or supportive services activities or place of employment.

(G) Personal welfare (e.g., family/parental development counseling, parenting skills training for adult and teenage parents, substance/alcohol abuse treatment and counseling, and self-development counseling, etc.).

(H) Supportive health care services (e.g., outreach and referral services).

(1) The employment of case managers.

(2) *Elderly or Disabled Supportive Services Category*. Supportive Services for the elderly and for persons with disabilities include:

(i) Meal service adequate to meet nutritional need;

(ii) Personal assistance (which may include, but is not limited to, aid given to eligible residents in grooming, dressing, and other activities which maintain personal appearance and hygiene);

(iii) Housekeeping aid;

(iv) Transportation services;

(v) Wellness programs, preventive health education, referral to community resources;

(vi) Personal emergency response; and

(vii) Congregate services—includes supportive services that are provided in a congregate setting at a conventional HA development.

(3) *For both Family Economic Development and Supportive Services category and Elderly or Disabled Supportive Services category grants:*

(i) The employment of service coordinators. For the purposes of this NOFA, a service coordinator is any person who is responsible for one or more of the following functions:

(A) Assessing the training and supportive service needs of eligible residents (for Family Economic Development and Supportive Service category grants);

(B) Working with community service providers to coordinate the provision of services and to tailor the services to the needs and characteristics of eligible residents;

(C) Establishing a system to monitor and evaluate the delivery, impact, effectiveness and outcomes of supportive services under this program;

(D) Coordinating this program with other independent living or self-sufficiency, education and employment programs;

(E) Performing other duties and functions that are appropriate to assist eligible public and Indian housing residents to become economically self-sufficient;

(F) Performing other duties and functions to assist residents to remain independent, and to prevent unnecessary institutionalization; and

(G) Mobilizing other national and local public/private resources and partnerships.

(ii) Any other services and resources, proposed by the applicant and approved by HUD and authorized by the 1997 Appropriations Act that are determined to be appropriate in assisting eligible residents.

(4) Administrative costs not to exceed 15% of the grant amount.

(f) *Term of Grant*. All funds must be expended within 36 months after the effective date of grant agreement. Grant implementation progress must be evident and documented within the first six months of grant award. Grantees must have completed all but grant closeout activities within 30 months after the effective date of the grant agreement. Grant terms may not be extended without substantial good cause (circumstances reasonably unforeseen and reasonably beyond the grantee's control) and subject to HUD approval.

(g) *Program Requirements—Threshold Criteria*. The following threshold requirements are considered essential for an application to be complete and acceptable for rating and ranking:

(1) *General Submission Requirements*. A complete application as prescribed in

the Application Kit must be submitted to the appropriate field office by the deadline as specified in this NOFA.

(2) *Needs Assessment Report*. The applicant must provide a needs assessment report dealing with the proposed recipient population that contains, at minimum, sections containing statistical or survey information on the needs of the recipient population that addresses the needs of different projects to be served relative to the needs of the overall housing authority and an identification of resources to meet the needs.

(3) *Grant Implementation Plan*. (i) The applicant must provide a grant implementation plan, in a format prescribed by the application kit, that reduces the level of needs identified in the needs assessment report.

(ii) This plan must, at minimum, list specific measurable objectives to be achieved as a result of grant activities (such as an objective of 100 residents becoming employed, 10 resident businesses starting, or 150 residents completing GED requirements) and list major milestones necessary to accomplish the goals. Milestones shall include the number of participants to be served, types of services, outcomes, and dollar amounts to be allocated over the two year period.

(iii) The plan must also include a detailed budget, activities and timetable.

(iv) In addition, the plan must describe how resources and/or services firmly committed by partners/co-applicants are effectively directed to support the residents' self-sufficiency efforts. To be considered "firmly committed" there must be a written agreement to provide the resources. The written agreement may be contingent upon an applicant receiving a grant award. These resources must be provided for a period two years.

(4) *For Family Economic Development and Supportive Service Applications*. The applicant must provide evidence that the proposed grant implementation plan is consistent with the State or Tribal Welfare Plan. Applicants must, however, comply with the restrictions of the ED/SS program if its requirements conflict with those of the State or Tribal Welfare Plan. For example the State or Tribal plan may give TANF recipients five years to leave public assistance; but, the ED/SS program is to be completed within two and a half years regardless. In order to be consistent with the State or Tribal Welfare Plan, the implementation plan must have a performance objective that would result in a majority of the participants becoming self sufficient by the deadline for termination of TANF assistance set

by the State. In addition, the applicant's plan must be guided by the goals, milestones and schedules set by the State TANF plan both overall and to the extent that such goals, milestones and schedules are set for individual families.

(5) *Focus on Residents Affected by Welfare Reform.* The application must contain written evidence from the HA that at least 75% or more of the public or Indian housing residents to be included in the proposed program and served by ED/SS grant funds are affected by the welfare reform legislation, including TANF recipients, legal immigrants, and disabled SSI recipients. This requirement is not applicable to applications dealing with elderly persons and/or persons with disabilities.

(6) *Accessible Community Facility.* The application must provide evidence (e.g. through an executed use agreement) that a preponderance of the proposed activities will be administered at community facilities in or within easy access of the specific public or Indian housing development(s). These facilities and these programs must be accessible to persons with disabilities. These facilities may include deprogrammed units, existing community space or off-site facilities. If units have to be converted from dwelling use into a community facility or the facility is to be constructed, the applicant must submit a plan for the conversion or construction that provides for adequate resourcing and a time schedule. If the proposed community facility is to be provided by an entity other than the applicant, the application must include an agreement with the proper authority (owner or operator of the site) for use of the proposed facility. The community facilities must be operational within nine (9) months of the grant awards. In the case of applications for programs to be implemented for the primary benefit of residents in housing that is dispersed in a rural setting, the applicant must provide evidence that participants will have access to transportation to the community facility that is convenient. This community facility requirement also shall not apply to reverse community activities that provide transportation to jobs that are distant from the dwellings of participants.

(7) *Leveraging Other Resources (Matching Requirement).* The budget, the narrative described in paragraph (3) above, and commitments from resources and services other than the grant for which the applicant is applying to support the grant (including Comprehensive Grant, and other grants or assistance from governmental units/agencies of any type and/or private

sources, whether for-profit or not-for-profit) must clearly evidence that these resources are firmly committed, will support the proposed grant activities and will, in combined amount (including in-kind contributions of personnel, space and/or equipment) equal the ED/SS grant amount proposed in this application. At least half of the match amount must consist of a monetary contribution of funds rather than in-kind or other types of contributions. Salaries paid for with ED/SS funds do not qualify as funds from sources outside HUD. The following are guidelines for valuing certain types of contributions:

(i) The value of volunteer time and services shall be computed at a rate of five dollars per hour except that the value of volunteer time and service involving professional and other special skills shall be computed on the basis of the usual and customary hourly rate paid for the service in the community where the ED/SS activity is located.

(ii) The value of any donated material, equipment, building, or lease shall be computed based on the fair market value at time of donation. Such value shall be documented by bills of sales, advertised prices, appraisals, or other information for comparable property similarly situated not more than one year old taken from the community where the item or ED/SS activity is located, as appropriate.

(8) *Compliance with Current Programs.* The applicant must provide certification in the format provided in the Application Kit that it is not in default at the time of application submission with respect to grants for the programs listed below:

(i) The Family Investment Center Program;

(ii) The Youth Development Initiative under the Family Investment Center Program;

(iii) The Youth Apprenticeship Program;

(iv) The Apprenticeship Demonstration in the Construction Trades Program;

(v) The Urban Youth Corps Program;

(vi) The HOPE 1 Program;

(vii) The Public Housing Service Coordinator Program;

(viii) The Public Housing Drug Elimination Program; and

(ix) The Youth Sports Program.

(x) In the case of an HA that is designated as "troubled" as a result of its PHMAP score or "High Risk" IHAs, the HA must provide certification that a Contract Administrator (or equivalent qualified organization) will be deployed in the administration of this proposed grant.

(9) *Automated Capability.* The application must provide certification that the applicant will secure access to on-line computer/INTERNET capability as a means of communication with HUD on grant matters.

(10) *Audit Findings and Equal Opportunity Requirements.* An applicant cannot have unresolved, outstanding Inspector General audit findings or fair housing and equal opportunity monitoring and compliance review findings or Field Office management review findings relating to discriminatory housing practices. In addition, the applicant must be in compliance with civil rights laws and equal opportunity requirements. An applicant will be considered to be in compliance if:

(i) As a result of formal administrative proceedings, there are no outstanding findings of noncompliance with civil rights laws or the applicant is operating in compliance with a HUD-approved compliance agreement designed to correct the area(s) of noncompliance.

(ii) There is no adjudication of a civil rights violation in a civil action brought against it by a private individual, or the applicant demonstrates that it is operating in compliance with a court order, or implementing a HUD-approved tenant selection and assignment plan or compliance agreement, designed to correct the area(s) of noncompliance.

(iii) There is no deferral of Federal funding based upon civil rights violations;

(iv) HUD has not deferred application processing by HUD under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1) (Title VI), the Attorney General's Guidelines (28 CFR 50.3) and HUD's Title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1) [PHAs only] or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (Section 504) and HUD's implementing regulations (24 CFR 8.57) [PHAs and IHAs];

(v) There is no pending civil rights suit brought against the applicant by the Department of Justice; and

(vi) There is no unresolved charge of discrimination against the applicant issued by the Secretary under section 810(g) of the Fair Housing Act (42 U.S.C. 3601-3619), as implemented at 24 CFR 103.400.

(11) *PHMAP Score.* An applicant cannot have a PHMAP score of less than a C for either Indicator #6, component (1), Financial Management/Cash Reserves, or Indicator #7, Resident Services and Community Building, on its most recent PHMAP. If an applicant's most recent PHMAP score is derived from the predecessor PHMAP regulation

(24 CFR Part 901, published December 30, 1996), the applicant cannot have a PHMAP score of less than a C for either Indicator 9, Operating Reserves, or Indicator 11, Resident Initiatives.

(h) *Selection Factors.* Each application for a grant award that is submitted in a timely manner, as specified in the Application Kit, to the local HUD field office or AONAP as applicable and that otherwise meets the threshold and other requirements of this NOFA will be evaluated competitively using a point scale.

The number of points that an application receives will depend on how well it addresses the selection factors described below. An application must receive a score of at least 75 points (or in the case of Elderly and Disabled Supportive Service Category applications in the ED/SS program—60 points) out of the maximum of 100 points that may be awarded under this competition to be eligible for funding. Applications for both Family Economic Development and Supportive Services and Elderly and Disabled Supportive Services Grants will be scored on the following factors.

(1) *Quality of Planning for Self-sufficiency* (for Family Economic Development and Supportive Services Category applications) and *Independence for the Elderly and Persons with Disabilities* (for Elderly and Disabled Supportive Services Category applications). (Maximum Points: 40) In assessing this factor, HUD will consider the following:

(i) *Needs Assessment* (Maximum Points: 10): HUD will award up to 10 points based on the quality and comprehensiveness of the needs assessment document.

(A) In order to obtain maximum points for Family Economic Development and Supportive Services Category applications, this document must contain statistical data which provides:

(1) A thorough socioeconomic profile of the eligible residents in relationship to HA-wide and national public and Indian housing data on residents:

(a) Who are on TANF, SSI benefits, or other fixed income arrangements;

(b) In job training, entrepreneurship, or community service programs; and

(c) Who are employed.

(d) Specific information should be provided on training, contracting and employment through the HA.

(5) An assessment of the current service delivery system as it relates to the needs of the target population, including the number and type of services, the location of services, and community facilities currently in use.

(B) In order to obtain maximum points for Elderly and Disabled Supportive Services Category applications, this document must contain statistical data which provides:

(1) the numbers of elderly, disabled and Supplemental Security Income recipient residents that are residing in the targeted development(s).

(2) An assessment of the current service delivery system as it relates to the needs of the target population, including the number and type of services, the location of services, and community facilities currently in use,

(3) A description of the goals, objectives, and program strategies that will result in increased independence for proposed program participants.

(ii) *Viability and comprehensiveness of the strategies to address the needs of residents* (Maximum Points: 20): The score in this factor will be based on the viability and comprehensiveness of strategies to address the needs of residents. HUD will award up to 20 points based on the following:

(A) *Services* (Maximum Points: 10): The score in this factor will be based on the extent and comprehensiveness of the services that will be provided.

(1) For Family Economic Development and Supportive Services Category applications a high score is received if there is a comprehensive description of how the applicant's plan provides services that specifically address the successful transition from welfare to work of non-elderly families. To receive a high score, the applicant must commit to a whole family approach, whereby children and adult members of the same household are provided with comprehensive services, along with case management that tracks the provision of those services: services would include counseling, job training/development/placement (and/or business training/development/start-up), child care and transportation.

(2) For Elderly and Disabled Supportive Services Category applications, a high score is received if the applicant includes case management, health and personal care, congregate services and transportation. To obtain maximum points the services must be located in a community facility and be available on a 12 hour basis or as needed by the eligible residents.

(B) *Resident Contracting and Employment* (Maximum Points: 5): The score in this factor will be based on the extent to which residents will achieve self-sufficiency through the applicant contracting with resident owned businesses and through resident employment. A high score will be awarded where there is documentation

(letter or resolution) describing the HA's commitment to hire a substantial number of residents or contract with a substantial number of resident owned businesses and a narrative describing the reasonable number of jobs or contracts, as well as the training processes related to the comprehensive plan. Elderly and Disabled Supportive Services Category applications will not be scored on this criterion.

(C) *Rent Reform and Occupancy Incentives* (Maximum Points: 5): The score in this factor will be based on the degree to which the applicant has implemented, proposes to implement or collaborates with a public welfare department to implement incentives designed to promote resident self-sufficiency including but not limited to: ceiling rents, rent exclusions, rent escrows, occupancy preferences for applicants who work or who are in a self-sufficiency program, stipends, or income disregards. A high score is received if the applicant can show how the incentives complement other aspects of the applicant's implementation plan. Elderly and Disabled Supportive Services Category applications will not be scored on this criterion.

(iii) *Budget appropriateness/efficient use of grant* (Maximum Points: 5): Up to 5 points based on the extent to which the proposed ED/SS program will result in a lower total ED/SS program cost per dwelling unit to be served in the program in comparison to other applications under ED/SS. For the purposes of this selection factor, applicants may only count dwelling units currently under an annual contributions contract at the time of application submission. The procedure for determining the score is outlined below.

(A) HUD will combine all of the per-unit amounts, rounded to the nearest whole dollar, into a single nationwide list in order from the lowest cost per unit to the highest cost per unit. HUD will take the total number of grant applications that have met the prerequisites to be scored and divide them by the score for this factor (i.e. 5) to establish a scoring increment.

(B) HUD will start at the lowest per-unit amount and count one scoring increment into the list (i.e. 1/5th of the way into the list). The per-unit amount at that location will constitute a breakpoint. HUD will count the next scoring increment into the list and establish another breakpoint. The process will be repeated to establish 5 segments of per-unit costs. In the event that multiple applications share the same per-unit cost at a breakpoint, the

breakpoint will be adjusted by \$1 higher or lower than that of the initial breakpoint to achieve as close as possible a 1/5th segment.

(C) Once all of the breakpoints have been established as outlined, HUD will enter the score. All applications with a cost per unit below that of the first breakpoint will receive a score of 5; those with a cost per unit above the first breakpoint but lower than the second breakpoint will receive a score of 4; etc.

(iv) *Reasonableness of the Timetable* (Maximum Points: 5): The score in this factor will be based on the speed at which the applicant can realistically accomplish the goals of the proposed ED/SS program. To receive a high score, the applicant must demonstrate that it will make substantial progress within the first six months after grant execution including putting staff in place, finalizing partnership arrangements, completing the development of requests for proposals and achieving other milestones that are prerequisites for implementation of the program. In addition the applicant must demonstrate that the proposed timetable for all components of the proposed program is reasonable considering the size of the grant and its activities and that it can accomplish its objectives within the first 30 months of the grant term.

(2) *Applicant Capability/Organizational Structure for Administering Grant Activities* (Maximum Points: 30): In assessing this factor, HUD will consider the following:

(i) *Proposed program staffing* (Maximum Points: 5): The score in this factor will be based on the extent to which the applicant's proposed staffing in support of the program is suited to accomplishing the program's objectives in terms of the appropriateness of staff skills, assignments and levels. In order to receive a high score an applicant must provide a comprehensive description of who will provide the services and how the services identified will be delivered. This should include an organizational chart, proposed staff/other resources/consultants proposed, and a discussion of coordination among various services providers.

(ii) *Program Administration* (Maximum Points: 5): The score in this factor will be based on the soundness of the proposed management of the proposed ED/SS program. In order to receive a high score an applicant must provide a comprehensive description of the project management structure, including the use of a contract administrator, if applicable. The narrative must provide a description of how any co-applicants, subgrantees and

other partner agencies relate to the program administrator as well as the lines of authority and accountability among all components of the proposed program.

(iii) *Fiscal Management* (Maximum Points: 5): The score in this factor will be based on the soundness of the applicant's proposed fiscal management. In order to receive a high score an applicant must provide a comprehensive description of the fiscal management structure, including but not limited to budgeting, fiscal controls and accounting. The application must describe the staff responsible for fiscal management, and the processes and timetable for implementation during the proposed grant period.

(iv) *Program Evaluation* (Maximum Points: 5): The score in this factor will be based on the soundness of the applicant's plan to evaluate the success of its proposed ED/SS program both at the completion of the program and during program implementation. In order to receive a high score the application must contain a comprehensive description of the program evaluation system (including staff designated for the program quality controls), performance measures (including use of automated systems for collecting the program data), and the timetable for undertaking this activity. The NOFA Application Kit will contain guidance on the preparation of performance measures. The performance measures must be related to the goals and objectives of the proposed program and could include but not be limited to the following based on the grant category for which the applicant is applying:

(A) The number of residents starting jobs or entrepreneurship training programs;

(B) The number of residents successfully completing job training or starting businesses;

(C) The number of residents receiving supportive services (specified by type of service);

(D) The number of community facilities used for welfare to work and other self-sufficiency/independence efforts; and

(E) The number of community partnerships executed in support of self-sufficiency for residents.

(v) *Applicant/Administrator Track Record* (Maximum Points: 10): The score in this factor will be based on the applicant's or if a Contract Administrator is proposed the Administrator's prior performance in successfully carrying out grant programs designed to assist residents in increasing their self-sufficiency, security

or independence. In order to receive a high score the applicant must demonstrate its (or the proposed Administrator's) program compliance and successful implementation of any of resident self-sufficiency, security or independence oriented grants (including those listed below) awarded to the applicant or overseen by the Administrator. Applicants or Administrators with no prior experience in operating programs that foster resident self-sufficiency, security or independence will receive a score of 0 on this factor. The applicant's past experience may include but is not limited to administering the following grants:

(A) The Family Investment Center Program;

(B) The Youth Development Initiative under the Family Investment Center Program;

(C) The Youth Apprenticeship Program;

(D) The Apprenticeship Demonstration in the Construction Trades Program;

(E) The Urban Youth Corps Program;

(F) The HOPE 1 Program;

(G) The Public Housing Service Coordinator Program;

(H) The Public Housing Drug Elimination Program; and

(I) The Youth Sports Program.

(3) *Resident and Other Partnerships* (Maximum Points: 30).

In assessing this factor, HUD will consider the following:

(i) *Applicant Partnership with Residents* (Maximum Points: 15): The score in this factor will be based on the following:

(A) *Overall Relationship/TOP Coordination* (Maximum Points: 5): For Family Economic Development and Supportive Services Category applications, the score in this factor will be based on the extent of coordination between the applicant's proposed ED/SS program and any/all existing or proposed TOP programs sponsored by RAs within the applicant's jurisdiction.

In order to receive a high score the application must contain a Memorandum(s) of Understanding (MOU) that describes collaboration between HA staff and residents on all of the specific components related to the implementation plans of both the proposed or current TOP and ED/SS Programs. If there are no existing and no proposed TOP grants within the jurisdiction of the applicant, the score for this factor will be 0. Elderly and Disabled Supportive Services Category applications will not be scored on this criterion. In addition, if all of the resident groups eligible to apply for

TOP within the applicant's jurisdiction have already received TOP grants and will have completed their activities, the applicant will not be scored on this criterion.

(B) *Resident Involvement in ED/SS Activities* (Maximum Points: 10): The score in this factor will be based on the extent of resident involvement in developing the proposed ED/SS program as well as the extent of proposed resident involvement in implementing the proposed ED/SS program. In order to receive a high score on this factor the applicant must provide documentation that describes the involvement of residents in the planning phase for this program, and a commitment to provide continued involvement in grant implementation. In order to receive maximum points a memorandum of understanding or other written agreement between the applicant and the appropriate Resident Associations must be included.

(ii) *Other Partnerships* (Maximum Points: 15): The score in this factor will be based on the successful integration of partners into implementation of the proposed ED/SS program. In order to receive a high score an applicant must provide a signed Memorandum of Understanding (MOU) (or other equivalent signed documentation provided that it delineates the roles and responsibilities of each of the parties and the benefits they will receive) that delineates specific partnerships related to the components in the comprehensive plan. In assessing this factor HUD will examine a number of aspects of the proposed partnership including:

(1) The appropriateness of the level of expertise of the partners related to activities proposed in the application;

(2) The soundness of the division of responsibilities/management structure of the proposed partnership relative to the expertise and resources of the partners;

(3) The extent of commitment of the partners (time, resources, funds, etc.); and

(4) The extent to which the partnership as a whole addresses a broader level of unmet resident needs; the extent to which the addition of the partners provides the ability to meet needs more cost effectively or efficiently than the applicant or its partners could achieve individually without forming the partnership.

(5) If located in, or serving the population of a federally designated Empowerment Zone or Enterprise community, the extent to which the program has been coordinated with the

Empowerment Zone or Enterprise Community Strategic Plan.

(4) *Bonus Points* (Maximum Points: 10): *Selection as a Job Plus Demonstration Site*—The applicant will receive 10 bonus points if it has been selected as a participant in the Department's Jobs Plus demonstration program.

(i) *Ranking Procedures*: HUD will divide the applicants that have complied with the threshold requirements and possess a score greater than or equal to the minimum score listed in Section V(a)(2) of this announcement into two lists: one list for PHA applicants and one list for IHA applicants. The applicants on these two lists will further be ranked in two lists based upon the category of grant requested. Headquarters shall fund the applications on each of the four lists in rank order pursuant to the procedure outlined in Section V(a)(2) of this announcement utilizing the funding allocated to PHAs and IHAs respectively and to each category of grant (Family Economic Development and Supportive Services category and Elderly and Disabled Supportive Services category) in Section VI(a)(2) of this announcement. If there are insufficient applications to exhaust the funding for a category, the remaining funds will be reallocated to the other category within the separate PHA or IHA allocation. After any such reallocation, if there are insufficient applications to exhaust the funding for the PHA or the IHA allocation, the remaining funds will be reallocated to the other type of applicant (PHA or IHA) list. If such a reallocation occurs, the reallocated amount is subject to the category allocations until there are insufficient applications to exhaust the funding in which case the funds can be reallocated to the other category.

(j) *General Program Requirements*. (1) Persons participating in an Elderly or Disabled Supportive Services category grant program shall not be required to provide more information than is necessary to participate in the specific services that are requested. Any and all information provided to a service coordinator or service provider must be kept confidential. Housing Authority staff are prohibited from examining participant medical records or requesting/obtaining information on the extent or nature of a participant's disability. This provision shall not prohibit grantees, service coordinators and service providers from collecting information reasonably necessary to maintain complete records of and report on program activities including: the demographic characteristics of people served, the kinds of services provided

and the results/outcomes of services provided.

(2) Grantees are required to attend HUD sponsored training specifically designated for grantees under this program. The Department intends to offer a three to four day training session within six months of awarding grants.

## VII. Tenant Opportunity Program (TOP) NOFA

(a) *Purpose and Description*. (1) *Authority*. TOP is authorized under section 20 of the 1937 Act. Section 20(a) states that "[t]he purpose of this section [section 20] is to encourage increased resident management of public housing projects \* \* \* [and the provision of funding] \* \* \* to promote formation and development of resident management entities." Further, section 20(f)(1) of the 1937 Act provides that:

[T]he Secretary shall provide financial assistance to resident management corporations or resident councils that obtain, by contract or otherwise, technical assistance for the development of resident management entities, including the formation of such entities, the development of the management capability of newly formed or existing entities, the identification of the social support needs of residents of public housing projects, and the securing of such support.

Section 20(f)(2) designates that financial assistance may not exceed \$100,000 with respect to any public or Indian housing project. HUD has implemented section 20 at 24 CFR part 950, subpart O (for Indian housing), and part 964 (for public housing).

(2) *Funding Available*. This NOFA makes \$12,975,000 available for awards to public housing Resident Associations, \$2 million for awards to Resident Organizations and Native American Resident Management Corporations and \$5 million for awards to intermediary Resident Organizations to provide technical assistance and training activities under the TOP program. (3) *Program Description*. (i) The TOP program helps meet the need in many communities for economic development and supportive services. The program enables resident entities to establish priorities, based on the efforts in their public and Indian housing communities, that are aimed at furthering economic lift and independence.

(ii) Technical assistance grants are provided by the Secretary to resident grantees and NROs/RROs/SROs (referred to as Intermediary Resident Organizations) to assist residents to improve their educational, professional, and economic levels, by obtaining skills which will make them more employable in the local community. TOP technical

assistance grants are available for the development of resident management entities, including the formation of such entities, the development of the management capability of newly formed or existing entities, the identification of the social support needs of residents of public and Indian housing projects and the securing of such support.

(b) *Eligible applicants.* (1) *Basic and Additional Grants.* Funding for Basic and Additional Grants under this program is limited to the following Resident Associations (RAs) with duly elected boards: Resident Councils (RCs), Resident Management Corporations (RMCs), Resident Organizations (ROs), and Native American Resident Management Corporations. This year, the following restrictions have been placed on applicant eligibility which differ from previous years:

(i) HUD no longer allows for the submission of city-wide/jurisdiction-wide or multiple RA applications except for Jurisdiction-Wide Resident Organizations. Subject to the previous exception for Jurisdiction-Wide Resident Organizations only applications which represent a single development may apply. Joint applications of any sort will not be considered for grant awards.

(ii) HUD no longer allows for the formation of Partnership Paradigm Technical Assistance (PPTA) organizations or Technical Assistance Organizations (TAOs). Therefore, no PPTA or TAO applications will be considered for grant awards.

(iii) Applicants must be registered as non-profit corporations with 501(c) status or have applied for such status.

(2) *Intermediary Grants.* Funding for Intermediary Grants under this program is limited to the following Intermediary Resident Organizations which must be registered as non-profit corporations with 501(c) status: Jurisdiction-Wide Resident Organizations, Statewide Resident Organizations (SROs), Regional Resident Organizations (RROs) and National Resident Organizations (NROs).

(c) *Eligible Participants.* Residents of conventional public or Indian housing are eligible to participate in and/or receive the benefits of TOP grant activities.

(d) *Eligible Grant Amounts.* (1) *Basic Grants.* Eligible Applicant RAs that have not previously received direct TOP funding or assistance from an Intermediary Resident Organization can receive up to \$100,000 in grant funds. The \$100,000 maximum grant amount of Eligible Applicants that have received assistance from an Intermediary Resident Organizations must be reduced

by the value of the assistance that they received from the Intermediary Resident Organization. Intermediary Resident Organizations that provide assistance to RAs must provide the value of the assistance to the RA upon request.

(2) *Additional Grants.* Any eligible RA selected for a Resident Management (RM) or a TOP grant in FYs 1988-1995 (including a mini grant for start-up activities) that received less than a total of \$100,000 may apply for an Additional Grant, provided that total cumulative RM/TOP funding for a project site, including Citywide or Intermediary Grant funds benefiting the project, does not exceed (including previous grants) the total statutory maximum of \$100,000.

(3) *Housing Authority Jurisdiction Maximum.* The amount of funding available for all applicants that are not Intermediary Resident Organizations, Resident Organizations or Native American Resident Management Organizations and that are located within the jurisdiction of a single housing authority is limited to the following amounts based on the size of the housing authority.

For Housing Authorities with one to 780 units the maximum funding amount is \$700,000.

For Housing Authorities with 781 to 7,300 units the maximum funding amount is \$1,400,000.

For Housing Authorities with more than 7,301 units the maximum funding amount is \$2,100,000.

(4) *Intermediary Grants.* Eligible Intermediary Resident Organizations may apply for up to \$250,000 except for Jurisdiction-Wide Resident Organizations that may only apply for up to \$100,000. Intermediary Resident Organizations must list in their application the name of the RAs that will receive training or technical assistance, and submit letters of support from each entity identified in the application. The intermediary cannot list RAs that have already received RM/TOP grants totaling \$100,000 and cannot propose to provide assistance to a given project that would result in the project exceeding its statutory maximum for RM/TOP funding.

(5) *Grant Limits.* (i) For all years combined, a public or Indian housing development (a "project") may receive a maximum of \$100,000 in TOP funds and/or TOP funded assistance by Intermediary Resident Organizations.

(ii) If an applicant was awarded a TOP grant jointly with other RAs in a previous year, HUD will prorate the total grant awarded, and the applicants can apply for the remaining balances

not to exceed the maximum of \$100,000 per public or Indian housing project.

(e) *Eligible and Ineligible Activities.*

(1) *Eligible Activities.* Activities for which funding under this NOFA may be provided to an eligible RA or Intermediary include any combination of, but are not limited to, the following:

(i) Social Support Needs (such as Self-Sufficiency and Youth Initiatives) including:

(A) Feasibility studies to determine training and social services needs;

(B) Training in management-related trade skills, computer skills, etc.;

(C) Management-related employment training and counseling including job search assistance, job development assistance, job placement assistance and follow up assistance;

(D) Coordination of support services including:

(1) child care services,

(2) educational services including remedial education, literacy training, assistance in attaining a GED,

(3) vocational training including computer training,

(4) health care outreach and referral services,

(5) meal services for the elderly or persons with disabilities,

(6) personal assistance to maintain hygiene/appearance for the elderly or persons with disabilities,

(7) housekeeping assistance for the elderly or persons with disabilities,

(8) transportation services,

(9) congregate services for the elderly or persons with disabilities, and

(10) case management;

(E) Training for programs such as child care, early childhood development, parent involvement, volunteer services, parenting skills, before and after school programs;

(F) Training programs on health, nutrition, safety and substance abuse;

(G) Workshops for youth services including: child abuse and neglect prevention, tutorial services, youth leadership skills, youth mentoring, peer pressure reversal, life skills, and goal planning. The workshops could be held in partnership with community-based organizations such as local Boys and Girls Clubs, YMCA/YWCA, Boy/Girl Scouts, Campfire and Big Brother/Big Sisters, etc.

(H) Training in the development of strategies to successfully implement a youth program. For example, assessing the needs and problems of the youth, improving youth initiatives that are currently active, and training youth, housing authority staff, resident management corporations and resident councils on youth initiatives and program activities; and

(ii) Resident Management Business Development including:

(A) Training related to resident-owned business development and technical assistance for job training and placement in RMC developments;

(B) Technical assistance and training in resident managed business development through:

(1) Feasibility and market studies;

(2) Development of business plans;

(3) Outreach activities; and

(4) Innovative financing methods including revolving loan funds and the development of credit unions; and

(C) Legal advice in establishing a resident managed business entity.

(iii) Resident Management:

(A) Training residents, as potential employees of an RMC, in skills directly related to the operation, management, maintenance and financial systems of a project;

(B) Training residents with respect to fair housing requirements; and

(C) Gaining assistance in negotiating management contracts, and designing a long-range planning system.

(iv) Homeownership Opportunity. Determining feasibility for homeownership by residents, including assessing the feasibility of other housing (including HUD owned or held single or multifamily) affordable for purchase by residents.

(v) Resident Capacity Building:

(A) Training Board members in community organizing, Board development, and leadership training;

(B) Determining the feasibility of resident management enablement for a specific project or projects; and

(C) Assisting in the actual creation of an RMC, such as consulting and legal assistance to incorporate, preparing by-laws and drafting a corporate charter.

(vi) General:

(A) Required training on HUD regulations and policies governing the operation of low-income public housing including contracting/procurement regulations, financial management, capacity building to develop the necessary skills to assume management responsibilities at the project and property management;

(B) Purchasing hardware, i.e. computers and software, office furnishings and supplies, in connection with business development. Every effort must be made to acquire donated or discounted hardware;

(C) Training in accessing other funding sources; and

(D) Hiring trainers or other experts. By law, resident grantees must ensure that all training is provided by a qualified public or Indian housing management specialist (Consultant/Trainer), HUD

Headquarters or Field/Area ONAP staff or the local HA. To ensure the successful implementation of the TOP Work Plan activities, the RAs are required to determine the need to contract for outside consulting/training services. The RA and the HA must jointly select and approve the consultant/trainer. Each RA should make maximum use of its HA, nonprofits, or other Federal, State, local or Tribal government resources for technical assistance and training needs. The amount allowed for hiring an individual consultant for this purpose shall not exceed 30 percent of the total grant award or \$30,000, whichever is less. The amount available for all individual consultants (not including training firms) and contracts shall not exceed 50% of the grant or \$50,000 whichever is less. HUD Field Offices or AONAPs will monitor this process to ensure compliance with program and OMB requirements.

(E) Rental or lease of a car, van, or bus by resident grantees to attend training;

(F) Stipends, as provided in this paragraph. Trainees and TOP program participants of a RA may only receive stipends for participating in or receiving training under the TOP to cover the reasonable costs related to participation in training and other activities in the TOP program, subject to the availability of funds. The stipends should be used for additional costs incurred during the training programs, such as child care and transportation costs. The cost of stipends may not exceed \$200 per month per trainee without written HUD authorization.

(G) Reimbursement of reasonable expenses incurred by Officers and Board members in the performance of their fiduciary duties and/or training related to the performance of their official duties.

(H) Travel directly related to the successful completion of the required TOP Work Plan. All grantees must adhere to the travel policy established by HUD. The policy sets travel costs at a maximum amount of \$5,000 per RA (not applicable to intermediaries) without special HUD approval.

(I) Child care expenses for individual staff and board members, in cases where staff or board members who need child care are involved in training-related activities associated with grant activities including welfare-to-work and economic development and other self-sufficiency initiatives.

(vii) *Administrative costs* necessary for the implementation of grant activities. Administrative costs are not to exceed 25% of the grant unless the grantee is unable to obtain the services

of a Contract Administrator without cost in which case administrative costs are not to exceed 30% of the grant. (Costs associated with the functions of a Contract Administrator are considered Administrative costs subject to the cost limitations of this paragraph.)

Appropriate administrative costs include, but are not limited to, the following items or activities:

(A) Telephone, computer, printing, copying, and sundry non-dwelling equipment (such as office supplies, software, and furniture). A grantee must justify the need for this equipment in relationship to implementing its approved grant activities.

(B) Grant contract and financial management, audit. If a grantee is unable to obtain the services of a Contract Administrator or accountant without charge, the cost for a Contract Administrator or accountant is eligible. The cost for an independent audit should be budgeted separately from this item.

(viii) Technical assistance regarding any other service and/or resource, including case management that is proposed by applicants and approved by HUD.

(2) *For Intermediary Grants only.* (i) The purpose of this grant is to provide training, technical assistance and coordinate linkages to appropriate supportive services for public and Indian housing residents who have not been awarded RM/TOP funds or have received awards less than \$100,000.

(ii) All Intermediaries must be knowledgeable and adhere to all policies that relate to the RA.

(3) *Ineligible Activities.* Ineligible items or activities include, but are not limited to, the following:

(i) Entertainment, including associated costs such as food and beverages, except normal per diem for meals related to travel performed in connection with implementing the TOP Work Plan. (See TOP Travel Notice for more specific guidance.)

(ii) Purchase or rental of land or buildings (including the community facility) or any improvements to land or buildings.

(iii) Activities not directly related to the welfare-to-work initiatives (e.g., lead-based paint testing and abatement and operating capital for economic development activities).

(iv) Purchase of any vehicle (car, van, bus, etc.) or any other property, other than as described under section VII(e)(1) (Eligible Activities) of this NOFA, unless approved by HUD Headquarters or the local HUD Field Office or AONAPs.

(v) Architectural and engineering fees.

(vi) Payment of salaries for routine project operations, such as security and maintenance, or for RA staff, except that a reasonable amount of grant funds may be used to hire a person to coordinate the TOP grant activities or coordinate on-site social services.

(vii) Payment of fees for lobbying services.

(viii) Any expenditures that are fraudulent, wasteful or otherwise incurred contrary to HUD or OMB directives.

(ix) Any cost otherwise eligible under this NOFA for which funds are being provided from any other source.

(x) Legal fees and/or expenses of any sort except for expenses directly related to establishing an RA as a 501(c) non-profit corporation or legal advice directly related to establishing resident management or business entities.

(xi) Entertainment equipment such as televisions, radios, stereos, and VCRs. A waiver of this item may be granted by the HUD Field Office or AONAP if funding is being utilized specifically and explicitly for the purposes of establishing a business directly related to radio, television or film or some other form of technical communication, and equipment is being utilized for training of residents or RAs. All such waivers must be authorized in writing by the HUD Field Office or AONAP before purchases may be made.

(4) *For Intermediaries Only.* In addition to the other ineligible activities listed in this NOFA, intermediaries cannot provide training and technical assistance to RAs that have received TOP funds of \$100,000 or that would result in exceeding the statutory ceiling by providing more than \$100,000 of training or technical assistance to a given project site.

(f) *Term of Grant.* All funds must be expended within 36 months after effective date of grant agreement. Grant implementation progress must be evident and documented within the first six months of grant award. Grantees must have completed all but grant closeout activities within 30 months after the effective date of the grant agreement. Grant terms may not be extended without substantial good cause (circumstances reasonably unforeseen and reasonably beyond the grantee's control) and subject to HUD approval. All extensions or waivers to this time frame must be authorized by the HUD Field Office or AONAP in writing. Funds not utilized during this time frame are subject to cancellation and recapture.

(g) *Program Requirements—Threshold Criteria.* The following threshold requirements are considered essential

for an application to be complete and acceptable for rating and ranking:

(1) *General Submission Requirements.*

(i) A complete application as prescribed in the Application Kit must be submitted to the appropriate field office by the deadline as specified in this NOFA.

(ii) *Needs Assessment Report.* A Needs Assessment Report dealing with the proposed recipient population that contains, at minimum, sections containing statistical or survey information on the needs of the recipient population and an identification of resources to meet the needs.

(iii) *Two Year Workplan.* A Two Year Work Plan Linked to a Resident Self-Sufficiency or Independent Living Strategy: These plans must, at minimum, include the following:

(A) Sections discussing TOP specific program goals, objectives, strategies, performance measures, staffing, timetable, and budget. The timetable must show that the plan can be implemented within 24 months.

(B) Sections describing how activities and performance standards are targeted to meet needs which are identified in the needs assessment, and advance a resident self-sufficiency and/or independent living strategy, as appropriate for resident composition.

(C) Evidence that the proposed TOP program has been coordinated with and supports the housing authority's efforts to increase resident self-sufficiency and is coordinated and consistent with the State or Tribal Welfare Plan.

(2) *Focus on Residents Affected by Welfare Reform.* The application must contain written evidence provided by the HA to the RA that at least 75% or more of the public or Indian housing residents to be included in the proposed program are affected by the welfare reform legislation, including TANF recipients, legal immigrants, and disabled SSI recipients.

(3) *Partnership between the Resident Association and the Housing Authority.*

(i) The application must contain a signed MOU between the RA and the HA which describes the specific roles, responsibilities and activities to be undertaken between the two entities.

(ii) The MOU, at a minimum, must identify the principal parties (i.e. the name of the HA and RA), the terms of the agreement (expectations or terms for each party), and an indication that the agreement pertains to the support of the RA TOP grant application. This document is the basis for foundation of the relationship between the RA and HA. It must be precise and outline the specific duties and objectives to be

accomplished under the grant. All MOUs must be finalized, dated and signed by duly authorized officials of both the RA and HA upon submission of the application. A sample MOU will be provided in the Application Kit.

(iii) This threshold requirement is not applicable to Intermediary Resident Organization applicants.

(4) *Accessible Community Facility.* The applicant must provide evidence (e.g., through an executed use agreement and/or in the MOU with the HA) that a preponderance of the proposed activities will be administered at community facilities in or within easy access of the property represented by the RA within nine months of the grant award. If units have to be converted from dwelling use into a community facility or the facility is to be constructed, the applicant must submit a plan for the conversion or construction that provides for adequate resourcing and a time schedule. If the proposed community facility is to be provided by an entity other than the applicant, the application must include an agreement with the proper authority (owner or operator of the site) for use of the proposed facility. These facilities and these programs must be accessible to persons with disabilities. The center must also offer other types of services such as education, employment readiness/placement, child care, health and other appropriate social services to prepare and support the participating residents' efforts. In the case of applications for programs to be implemented for the primary benefit of residents in housing that is dispersed in a rural setting, the applicant must provide evidence that participants will have access to transportation to the community facility that is convenient. This community facility requirement also shall not apply to reverse community activities that provide transportation to jobs that are distant from the dwellings of participants.

(5) *Contract Administrator.* Unless HUD or an Independent Public Accountant has determined that the applicant's financial management system and procurement procedures comply with 24 CFR part 84, the application must contain evidence that the RA will use the services of a Contract Administrator in administering the grant. Troubled HAs are not eligible to be Contract Administrators. In the event that an applicant is unable to obtain the services of a Contract Administrator without having to pay for the services the Contract Administrator would provide, the applicant may enter into an agreement with a capable entity (e.g., subrecipient) to serve the function

of a Contract Administrator. If an applicant selects such an option, the applicant would either have to follow the competitive procurement procedures established in 24 CFR part 84 or alternatively select a proposed Contract Administrator subject to the following terms and conditions without being subject to the competitive procurement requirements of 24 CFR part 84. First the applicant must enter into a written agreement with the proposed Contract Administrator that would not obligate the applicant to pay the proposed Contract Administrator any compensation for expenses incurred in advance of the applicant entering into a grant agreement with HUD. In cases where the Contract Administrator is the HA, the contract administration responsibilities can be incorporated into the MOU discussed in paragraph (g)(3) above. This requirement does not apply to Intermediary Resident Organization applicants.

(6) *Applicant Non-Profit Status and Democratic Board Elections.* The applicant must provide:

(i) Evidence that the applicant is registered as a nonprofit corporation with 501(c) or (for RAs other than Intermediary Resident Organizations) has applied for 501(c) status; and

(ii) *For RAs other than Intermediary Resident Organizations.* Certification of the RA board election as required by HUD, notarized by the local HA and/or an independent third-party monitor.

(7) *Compliance with Current Programs.* The applicant must provide certification on the format provided in the Application Kit that it is not in default at the time of application submission with respect to any previous HUD funded grant programs the applicant has received.

(8) *Automated Capability.* The application must provide certification that the applicant will secure access to on-line computer/INTERNET capability as a means of communication with HUD on grant matters.

(9) *Audit Findings and Equal Opportunity Requirements.* An applicant cannot have unresolved, outstanding Inspector General audit findings, or fair housing and equal opportunity monitoring review findings or Field Office management review findings relating to discriminatory housing practices. In addition, the applicant must be in compliance with civil rights laws and equal opportunity requirements. An applicant will be considered to be in compliance if:

(i) As a result of formal administrative proceedings, there are no outstanding findings of noncompliance with civil rights laws or the applicant is operating

in compliance with a HUD-approved compliance agreement designed to correct the area(s) of noncompliance;

(ii) There is no adjudication of a civil rights violation in a civil action brought against it by a private individual, or the applicant demonstrates that it is operating in compliance with a court order, or implementing a HUD-approved tenant selection and assignment plan or compliance agreement, designed to correct the area(s) of noncompliance;

(iii) There is no deferral of Federal funding based upon civil rights violations;

(iv) HUD has not deferred application processing by HUD under Title VI, the Attorney General's Guidelines (28 CFR 50.3) and HUD's Title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1) [PHAs only] or under Section 504 and HUD's implementing regulations (24 CFR 8.57) [PHAs and IHAs];

(v) There is no pending civil rights suit brought against the applicant by the Department of Justice; and

(vi) There is no unresolved charge of discrimination against the applicant issued by the Secretary under section 810(g) of the Fair Housing Act, as implemented by 24 CFR 103.400.

(10) Applicants which are Intermediary Resident Organizations must list in the application the name of the RAs that will receive training, technical assistance and/or coordinated supportive services and must provide letters of support from each entity identified in the application. The intermediary can not list RAs that have been previously awarded Resident Management and/or TOP funds at the maximum limit of \$100,000.

(h) *Selection Factors.* Each application for a grant award that is submitted in a timely manner, as specified in the Application Kit, to the local HUD field office or AONAP as applicable and that otherwise meets the threshold and other requirements of this NOFA will be evaluated competitively using a point scale.

The number of points that an application receives will depend on how well it addresses the selection factors described below. An application must receive a score of at least 75 points out of the maximum of 100 points that may be awarded under this competition to be eligible for funding. Unless specifically noted below, Intermediary Resident Organization applicants will be scored based on the same factors as those generally applicable to the TOP program.

Applications for the Tenant Opportunities Program activities will be scored on the following factors:

(1) *Quality of the TOP Implementation Plan* (Maximum Points: 40).

In assessing this factor, HUD will consider the following:

(i) *Needs Assessment* (Maximum Points: 10): HUD will award up to 5 points based on the quality and comprehensiveness of the needs assessment document. Intermediary Resident Organizations will receive points under this Needs Assessment factor (as outlined below) based on the assessment of needs and resources for each of the project sites the Intermediary Resident Organization proposes to assist as well as the goals, objectives and strategies for those sites. In order to obtain maximum points, this document must contain statistical data and other information which provides:

(A) A thorough socioeconomic profile of the eligible residents in relationship to PHA-wide and national public and Indian housing data on residents:

(1) Who are on TANF, SSI, or other fixed income arrangements;

(2) In job training, entrepreneurship, or community service programs;

(3) Who are employed.

(4) Specific information should be provided on training, contracting and employment through the HA.

(B) An assessment of the current service delivery system as it relates to the needs of the target population, including the number and type of services, the location of services, and community facilities currently in use;

(ii) *Viability and comprehensiveness of the strategies to address the needs of residents* (Maximum Points: 15): (A) The score in this factor will be based on the extent and comprehensiveness of the training and related services that will be provided as well as the extent that the proposed training and related services will contribute to providing for unmet resident needs identified in the required Needs Assessment Report.

(B) To receive a high score applicants must provide a comprehensive description of how the proposed plan provides training and related services that specifically address the successful transition from welfare to work of non-elderly families and the achievement of independence of elderly families and persons with disabilities. To obtain maximum points the training and related services must be located in the community facility and be available as needed by the eligible residents.

(C) Intermediary Resident Organizations will receive points under this Viability and Comprehensiveness factor (as outlined above) based on the training and related services for each of the project sites the Intermediary

Resident Organization proposes to assist.

(iii) *Proposed program staffing* (Maximum Points: 5): The score in this factor will be based on the extent to which the applicant's proposed staffing in support of the program is suited to accomplishing the program's objectives in terms of the appropriateness of staff skills, assignments and levels. In order to receive a high score an applicant must provide a comprehensive description of who will provide the training and related services and how the training and related services identified will be delivered. This should include an organizational chart, proposed staff/other resources/consultants proposed, and a discussion of coordination among various services providers.

(iv) *Budget appropriateness/efficient use of grant funds* (Maximum Points: 5): The score in this factor will be based on the following:

(A) *Detailed Budget Break-Out*: The extent to which the application includes a detailed budget break-out for each budget category in the SF-424A.

(B) *Reasonable administrative costs*: The extent to which the application includes reasonable administrative costs within the administrative cost ceiling.

(C) *Budget Efficiency*: The extent to which the application requests funds commensurate with the level of effort necessary to accomplish the goals and objectives and the estimated costs to the government are reasonable in relationship to the anticipated results.

(v) *Reasonableness of the timetable* (Maximum Points: 5): The score in this factor will be based on the speed at which the applicant can realistically accomplish the goals of the proposed TOP program. To receive a high score, the applicant must demonstrate that the proposed timetable for all components of the proposed program is reasonable (i.e. a given task is allotted the amount of time it would normally take to accomplish such a task) and that the applicant can accomplish the proposed implementation plan objectives within the 24 month time limit. The applicant must also demonstrate that a substantial portion of their proposed program will be implemented within 6 months of receiving grant funds.

(2) *Adequacy of Managerial/Fiscal Structure for Administering and Coordinating the Services to Meet the Needs* (Maximum Points: 30).

In assessing this factor, HUD will consider the following:

(i) *Program Administration* (Maximum Points: 5): The score in this factor will be based on the soundness of the proposed management of the

proposed TOP program. In order to receive a high score an applicant must provide a clear description of the project management structure, including the use of a contract administrator if applicable. The narrative must provide a description of how any partner organizations relate to the program administrator as well as the lines of authority and accountability among all components of the proposed program.

(ii) *Fiscal Management* (Maximum Points: 5): The score in this factor will be based on the soundness of the applicant's proposed fiscal management. In order to receive a high score an applicant must provide a comprehensive description of the fiscal management structure, including but not limited to budgeting, fiscal controls and accounting. The application must clearly describe the staff responsible for fiscal management, and the processes and timetable for implementation during the proposed grant period.

(iii) *Program Assessment* (Maximum Points: 5): The score in this factor will be based on the soundness of the applicant's plan to assess the success of its proposed TOP program both at the completion of the program and during program implementation. In order to receive a high score the application must contain a comprehensive description of the program assessment system (including staff designated for the program quality controls), program evaluation and performance measures (including use of automated systems for collecting the program data), and timetable for undertaking this activity. Guidance on the preparation of performance measures will be contained in the Application Kit. The performance measures must be related to the goals and objectives of the proposed program and may include but not be limited to the following:

(A) Number of residents successfully completing job training or beginning businesses;

(B) Number of residents receiving supportive services (specified by type of service);

(C) Number of community facilities used for welfare to work or other self-sufficiency/independence efforts; and

(D) Number of community partnerships executed in support of self-sufficiency for residents.

(iv) *Applicant/Administrator Track Record/Capability* (Maximum Points: 15): In assessing this factor, HUD will consider the soundness of the prior experience of the Applicant and the Contract Administrator (if applicable) in successfully carrying out resident services programs designed to assist residents in increasing their self-

sufficiency, security or independence. A high score is received if the Applicant or Administrator can demonstrate compliance and successful implementation (i.e. completion of grant implementation plan tasks) of prior resident services programs. Applicants and Contract Administrators with no prior experience in operating programs that foster resident self-sufficiency, security or independence will receive a score of 0 on this factor.

(3) *Partnerships* (Maximum Points: 30). In assessing this factor, HUD will consider the following:

(i) *Housing Authority-Resident Association Partnership* (Maximum Points: 10): (A) The score in this factor will be based on the extent of coordination between the applicant's proposed TOP program and any/all existing or proposed HA resident services programs that assist residents in increasing their self-sufficiency, security or independence. In order to receive a high score the application must contain an MOU (between the HA and the RA) which describes collaboration between HA staff and residents on all of the specific components related to the implementation plans of both the proposed TOP program and the resident services programs of the housing authority.

(B) Intermediary Resident Organizations will receive points under this Housing Authority-Resident Association Program Partnership factor based on the extent to which the Intermediary Resident Organization can demonstrate that the housing authorities for each of the project sites the Intermediary Resident Organization proposes to assist have agreed to support and coordinate their efforts with those of the Intermediary Resident Organization in assisting the project site.

(ii) *Other Partnerships* (Maximum Points: 15): The score in this factor will be based on the successful integration of partners into implementation of the proposed TOP program. In order to receive a high score an applicant must provide an MOU or other equivalent documentation that delineates specific partnerships related to the components in the comprehensive plan. In assessing this factor HUD will examine a number of aspects of the proposed partnership including:

(A) The appropriateness of the level of expertise of the partners related to activities proposed in the application;

(B) The soundness of the division of responsibilities/management structure of the proposed partnership relative to

the expertise and resources of the partners;

(C) The extent of commitment of the partners (time, resources, funds, etc.); and

(D) The extent to which the partnership as a whole addresses a broader range of resident needs: the extent to which the addition of the partners provides the ability to meet needs more cost effectively or efficiently than the applicant or its partners could achieve individually without forming the partnership.

(5) If located in, or serving the population of a federally designated Empowerment Zone or Enterprise Community, the extent to which the program has been coordinated with the Empowerment Zone or Enterprise Community Strategic Plan.

(iii) *Resident Involvement* (Maximum Points: 5). (A) The score in this factor will be based on the extent of resident involvement in developing the proposed TOP program as well as the extent of proposed resident involvement in implementing the proposed TOP program. In order to receive a high score on this factor the applicant must provide verifiable documentation which describes the involvement of affected residents in the planning phase for this program, and a commitment by the Resident Association to provide continued involvement in grant implementation. In order to receive maximum points the application must contain a resolution from the appropriate RA(s) which includes signatures from the resident community.

(B) *Intermediary Resident Organizations* will receive points under this Resident Involvement factor based on the demonstrated level of coordination of efforts between the RA for each of the project sites the Intermediary Resident Organization proposes to assist and the Intermediary Resident Organization. Higher points will be awarded to the extent that RAs proposed to be assisted have taken the preliminary steps to be ready to take advantage of the assistance proposed for their site by the Intermediary Resident Organization. For example, the RA for the proposed site has organized itself and selected its leadership and obtained basic training from the HA or other community organizations.

(4) *Bonus Points* (Maximum Points: 5): The applicant may receive up to 5 bonus points based on the following factor:

(i) *Leveraging Community Resources* (Maximum Points: 5): The applicant may receive a maximum of 5 extra points if the budget can show that outside resources (including other

existing Federal, state, local, Tribal, public, non-profit, and/or private resources) are to be utilized in this proposed program. The maximum number of points can be provided if the applicant can demonstrate that the total amount of the resources (including in-kind contributions of personnel, space and/or equipment) equals the amount proposed in this grant application.

(i) *General Program Requirements*. (1) *Travel Policy*. All TOP grantees must adhere to the travel policy established by HUD. All travel must be in complete compliance with PIH Notice 96-18, Travel Policy for Resident Management/Tenant Opportunities Program Grantees. The policy ensures that all travel funded under TOP is directed toward the successful completion of the required TOP Work Plan/Performance Standards. The travel policy sets a maximum amount of \$5,000 over the 2- to 3-year period of the grant. Requests for funds beyond the limit of \$5,000 must be approved by the local HUD Office.

(2) *TOP Orientation*. Grantees are required to attend HUD sponsored training specifically designated for grantees under this program. The Department intends to offer a three to four day training session within six months of awarding grants. If the grantee's grant agreement is executed and the organization is properly established in the Line of Credit Control System/Voice Response System (LOCCS/VRS), the grantee must draw down the total amount needed to attend the training. If the grantee's grant agreement is not executed and the organization is not properly established in the LOCCS/VRS, the grantee may request the HA to advance the organization the total amount needed to attend the HUD orientation training. The grantee must reimburse the HA when the organization is properly established in the LOCCS/VRS.

(3) *Procurement of Trainers and Consultants*. To ensure the successful implementation of the TOP Work plan activities, RAs are required to determine the need to contract for outside consulting/training services. The RA and HA must jointly select the consultant/trainer in accordance with applicable procurement requirements and with approval by the local HUD Field Office or AONAP. Each RA should make maximum use of the resources provided by the following entities for technical assistance and training needs:

- (i) HAs;
- (ii) Nonprofits;
- (iii) Educational institutions; and
- (iv) Federal, State, local or Tribal government institutions.

(4) *Computer Capability*. RAs must have access to computer capability and access to the INTERNET and electronic mail and must make such access available to resident beneficiaries for TOP training and supportive service activities.

(5) *Training Requirements*. All grantees must adhere to the following training requirements:

(i) RA grantees are required to have training, and intermediary grantees are requested to provide training, in the areas listed below. The amount and scope of training, however, will depend on their RA's goals. For example, the training required to assume property management is more extensive than the training needed to establish a landscaping enterprise. The required training areas are:

(A) HUD regulations and policies governing the operation of low-income housing, which includes:

- (1) The part 900 series of 24 CFR;
- (2) Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and HUD's implementing regulations at 24 CFR part 135 or in the case of programs in Native American jurisdictions Indian preference requirements as stated in 950.175; and
- (3) The applicable civil rights laws as implemented for public housing (24 CFR part 964) and Indian housing (24 CFR part 950).

(B) Financial management, including budgetary and accounting principles and techniques, in accordance with Federal guidelines, including:

- (A) (1) OMB Circulars A-110 (and HUD's implementing regulations at 24 CFR part 84) and A-122, which contain Federal administrative requirements for grants; and

(2) OMB Circular A-133 (and HUD's implementing regulations at 24 CFR part 48), which relates to audit requirements for nonprofit organizations;

(C) Capacity building to develop the necessary skills to become economically self-sufficient.

(D) Organizational planning and development leadership training and development skills.

(E) Interviewing skills, effective communication skills, and proper attire in the workforce, specifically as it relates to the skills being taught.

(ii) Each grantee must ensure that the training is provided by a qualified housing management specialist (Consultant/Trainer) or the local HA. The total allowed to assist in hiring an individual consultant shall not exceed 50 percent of the total grant award or \$50,000, whichever is less.

(j) *Ranking Procedures*: For the TOP program, Headquarters will rank

applicants that have complied with the threshold requirements and possess a score greater than or equal to the minimum score in three lists based upon the type of applicant (Intermediary Resident Organization applicants vs. applicants that are either Resident Organizations or Native American Resident Management Corporations vs. Resident Association (RA) applicants that do not fall within either of the previous two categories) pursuant to Section V(a)(2) of this announcement. Using the Resident Association list (not including Intermediary Resident Organizations, etc.), Headquarters will select the highest ranking applications from each housing authority jurisdiction until the funds available for that jurisdiction are exhausted. In the event of a tie score HUD will follow the procedure outlined in Section V(a)(iv)(2) of this announcement. HUD will then compile the list of the higher ranking applications from each jurisdiction that do not exhaust the funding available for the housing authority jurisdiction and array them from highest to lowest score on one National list. Headquarters shall separately fund the remaining applications on all three separate lists (the Intermediary Resident Organization list, the Resident Organization/Native American Resident Management Corporation list and the Resident Association list exclusive of the other two categories) in rank order pursuant to the procedure outlined in Section V(a)(2) of this announcement utilizing the funding allocated to each type of applicant in Section V(a)(2) of this announcement. At the completion of the process, there will be a separate list of awardees corresponding to the separate rank order lists. If there are insufficient applications to exhaust the funding for either the Intermediary Resident Organization applicants list or the applicants that are either Resident Organizations or Native American Resident Management Corporations list (or for both lists), the remaining funds will be reallocated to the list for the other type of applicant (Resident Associations that do not fall within the first two categories). If there are insufficient applications to exhaust the funding for the Resident Associations that do not fall within the first two categories, the remaining funds will be reallocated to the list for Intermediary Resident Organization applicants first and then if funds remain to the list for either Resident Organizations or Native American Resident Management Corporations.

### VIII. Findings and Certifications

The following findings and certifications are applicable to both the TOP and ED/SS Programs:

*Paperwork Reduction Act.* The information collection requirements contained in this Notice have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned OMB control numbers 2577–0087 (TOP) and 2577–0211 (ED/SS). *An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.*

*Environmental Impact.* The ED/SS and TOP NOFAs do not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate property acquisition, disposition, lease, rehabilitation, alteration, demolition, or new construction, or set out or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), the ED/SS and TOP NOFAs are categorically excluded from environmental review under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321).

*Federalism Executive Order.* The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this NOFA will not have substantial, direct effects on states, on their political subdivisions, or on their relationship with the Federal Government, or on the distribution of power and responsibilities between them and other levels of government. This notice announces the availability of funds to provide economic development opportunities and supportive services to residents of public and Indian housing and other low-income families. It will not have an effect on the relationship between the Federal Government and the states or their political subdivisions.

*Prohibition of Advance Disclosure of Funding Decisions.* HUD's regulation implementing section 103 of the Department of Housing and Urban Development Reform Act of 1989, codified as 24 CFR part 4, applies to the funding competition announced today. The requirements of the rule continue to apply until the announcement of the selection of successful applicants.

HUD employees involved in the review of the applications and in the making of funding decisions are limited by part 4 from providing advance

information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted under 24 CFR part 4.

Applicants who have ethics related questions should contact HUD's Ethics Law Division (202) 708–3815. (This is not a toll-free number.)

*Section 102 of the HUD Reform Act—Documentation, Access, and Disclosure.* Section 102 of the Department of Housing and Urban Development Reform Act of 1989 (HUD Reform Act) and the final rule codified at 24 CFR part 4, subpart A, published on April 1, 1996 (61 FR 1448), contain a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. On January 14, 1992 (57 FR 1942), HUD published a notice that also provides information on the implementation of section 102. The documentation, public access, and disclosure requirements of section 102 are applicable to assistance awarded under this NOFA as follows:

(a) *Documentation and public access requirements.* HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its **Federal Register** notice of all recipients of HUD assistance awarded on a competitive basis.

(b) *Disclosures.* HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15.

*Prohibition Against Lobbying Activities.* Applicants for funding under

this NOFA are subject to the provisions of section 319 of the Department of Interior and Related Agencies Appropriation Act for Fiscal Year 1991, 31 U.S.C. Section 1352 (the Byrd Amendment) and to the provisions of the Lobbying Disclosure Act of 1995, Pub. L. 104-65 (December 19, 1995).

The Byrd Amendment, which is implemented in regulations at 24 CFR part 87, prohibits applicants for Federal contracts and grants from using appropriated funds to attempt to influence Federal Executive or legislative officers or employees in connection with obtaining such assistance, or with its extension, continuation, renewal, amendment or modification. The Byrd Amendment applies to the funds that are the subject of this NOFA. Therefore, applicants must file a certification stating that they have not made and will not make any prohibited payments and, if any payments or agreement to make payments of nonappropriated funds for these purposes have been made, a form SF-LLL disclosing such payments must be submitted. The certifications and the SF-LLL are included in the application package.

#### Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance Number is 14.853.

Dated: June 2, 1997.

**Kevin Emanuel Marchman,**

*Acting Assistant Secretary for Public and Indian Housing.*

#### Appendix—Names, Addresses and Telephone Numbers of the Local HUD Offices and Offices of Native American Programs Accepting Applications for the Economic Development and Supportive Services Grant Program

##### *New England*

Connecticut State Office, Attention: Director, Office of Public Housing, First Floor, 330 Main Street, Hartford, CT 06106-1860, Telephone No. (203) 240-4523

Massachusetts State Office, Attention: Director, Office of Public Housing, Thomas P. O'Neill, Jr., Federal Building, 10 Causeway Street, Boston, MA 02222-1092, Telephone No. (617) 565-5634

New Hampshire State Office, Attention: Director, Office of Public Housing, Norris Cotton Federal Building, 275 Chestnut Street, Manchester, NH 03101-2487, Telephone No. (603) 666-7681

Rhode Island State Office, Attention: Director, Office of Public Housing, Sixth Floor, 10 Weybosset Street, Providence, RI 02903-3234, Telephone No. (401) 528-5351

##### *New York/New Jersey*

New Jersey State Office, Attention: Director, Office of Public Housing, One Newark

Center, Thirteenth Floor, Newark, NJ 07102-5260, Telephone No. (202) 622-7900

New York State Office, Attention: Director, Office of Public Housing, 26 Federal Plaza, Suite 3237, New York, NY 10278-0068, Telephone No. (212) 264-6500

Buffalo Area Office, Attention: Director, Office of Public Housing, Lafayette Court, Fifth Floor, 465 Main Street, Buffalo, NY 14203-1780, Telephone No. (716) 846-5755

##### *Mid-Atlantic*

District of Columbia Office, Attention: Director, Office of Public Housing 820 First Street, NE, Washington, DC 20002-4205, Telephone No. (202) 275-9200

Maryland State Office, Attention: Director, Office of Public Housing, City Crescent Building, 5th Floor, 10 South Howard Street, Baltimore, MD 21201-2505, Telephone No. (410) 962-2520

Pennsylvania State Office, Attention: Director, Office of Public Housing, The Wanamaker Building, 100 Penn Square East, Philadelphia, PA 19107-3390, Telephone No. (215) 656-0576 or 0579

Virginia State Office, Attention: Director, Office of Public Housing, The 3600 Centre, 3600 West Broad Street, P.O. Box 90331, Richmond, VA 23230-0331, Telephone No. (804) 278-4507

West Virginia State Office, Attention: Director, Office of Public Housing, 405 Capitol Street, Suite 708, Charleston, WV 25301-1795, Telephone No. (304) 347-7000

Pittsburgh Area Office, Attention: Director, Office of Public Housing, 339 Sixth Avenue, Sixth Floor, Pittsburgh, PA 15222-2515, Telephone No. (412) 644-6571

##### *Southeast/Caribbean*

Alabama State Office, Attention: Director, Office of Public Housing, Beacon Ridge Tower, Suite 300, 600 Beacon Parkway, West, Birmingham, AL 35209-3144, Telephone No. (205) 290-7617

Caribbean Office, Attention: Director, Office of Public Housing, New San Juan Office Building, 159 Carlos E. Chardon Avenue, Room 305, San Juan, PR 00918-1804, Telephone No. (809) 766-6121

Georgia State Office, Attention: Director, Office of Public Housing, Richard B. Russell Federal Building, 75 Spring Street, SW, Atlanta, GA 30303-3388, Telephone No. (404) 331-5136

Kentucky State Office, Attention: Director, Office of Public Housing, 601 West Broadway, P.O. Box 1044, Louisville, KY 40201-1044, Telephone No. (502) 582-5251

Mississippi State Office, Attention: Director, Office of Public Housing, Doctor A.H. McCoy Federal Building, Suite 910, 100 West Capitol Street, Jackson, MS 39269-1016, Telephone No. (601) 965-5308

North Carolina State Office, Attention: Director, Office of Public Housing, Koger Building, 2306 West Meadowview Road, Greensboro, NC 27407-3707, Telephone No. (910) 547-4001

South Carolina State Office, Attention: Director, Office of Public Housing, Strom

Thurmond Federal Building, 1835 Assembly Street, Columbia, SC 29201-2480, Telephone No. (803) 765-5592

Tennessee State Office, Attention: Director, Office of Public Housing, 251 Cumberland Bend Drive, Suite 200, Nashville, TN 37228-1803, Telephone No. (615) 736-5213

Jacksonville Area Office, Attention: Director, Office of Public Housing, Southern Bell Tower, Suite 2200, 301 West Bay Street, Jacksonville, FL 32202-5121, Telephone No. (904) 232-2626

Knoxville Area Office, Attention: Director, Office of Public Housing, John J. Duncan Federal Building, Third Floor, 710 Locust Street, Knoxville, TN 37902-2526, Telephone No. (615) 545-4384

##### *Midwest*

Illinois State Office, Attention: Director, Office of Public Housing, Ralph Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604-3507, Telephone No. (312) 353-5680

Indiana State Office, Attention: Director, Office of Public Housing, 151 North Delaware Street, Suite 1200, Indianapolis, IN 46204-2526, Telephone No. (317) 226-6303

Michigan State Office, Attention: Director, Office of Public Housing, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Detroit, MI 48226-2592, Telephone No. (313) 226-7900

Minnesota State Office, Attention: Director, Office of Public Housing, 220 Second Street, South, Minneapolis, MN 55401-2195, Telephone No. (612) 370-3000

Ohio State Office, Attention: Director, Office of Public Housing, 200 North High Street, Columbus, OH 43215-2499, Telephone No. (614) 469-5737

Wisconsin State Office, Attention: Director, Office of Public Housing, Suite 1380, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Suite 1380, Milwaukee, WI 53203-2289, Telephone No. (414) 297-3214

Cincinnati Area Office, Attention: Director, Office of Public Housing, 525 Vine Street, Suite 700, Cincinnati, OH 45202-3188, Telephone No. (513) 684-2533

Cleveland Area Office, Attention: Director, Office of Public Housing, Renaissance Building, Fifth Floor, 1350 Euclid Avenue, Cleveland, OH 44115-1815, Telephone No. (216) 522-4058

Grand Rapids Area Office, Attention: Director, Office of Public Housing, 50 Louis Street, N.W.—Third Floor, Grand Rapids, MI 49503, Telephone No. (616) 456-2127

##### *Southeast*

Arkansas State Office, Attention: Director, Office of Public Housing, TCBY Tower, 425 West Capitol Avenue, Little Rock, AR 72201-3488, Telephone No. (501) 324-5931

Louisiana State Office, Attention: Director, Office of Public Housing, 501 Magazine Street, Ninth Floor, New Orleans, LA 70130, Telephone No. (504) 589-7233

Oklahoma State Office, Attention: Director, Office of Public Housing, 500 West Main

Street, Oklahoma City, OK 73102, Telephone No. (405) 553-7559

Texas State Office, Attention: Director, Office of Public Housing, 1600 Throckmorton, Post Office Box 2905, Fort Worth, TX 76113-2905, Telephone No. (817) 885-5401

Houston Area Office, Attention: Director, Office of Public Housing, Norfolk Tower, Suite 200, 2211 Norfolk, Houston, TX 77098-4096, Telephone No. (713) 834-3274

San Antonio Area Office, Attention: Director, Office of Public Housing, Washington Square 800 Dolorosa, San Antonio, TX 78207-4563, Telephone No. (210) 229-6800

#### *Great Plains*

Iowa State Office, Attention: Director, Office of Public Housing, Federal Building, Room 29, 210 Walnut Street, Des Moines, IA 50309-2155, Telephone No. (515) 284-4512

Kansas/Missouri State Office, Attention: Director, Office of Public Housing, Gateway Tower II, Room 200, 400 State Avenue, Kansas City, KS 66101-2406, Telephone No. (913) 551-5462

Nebraska State Office, Attention: Director, Office of Public Housing, Executive Tower Centre 10909 Mill Valley Road, Omaha, NE 68154-3955, Telephone No. (402) 492-3100

St. Louis Area Office, Attention: Director, Office of Public Housing, Robert A. Young Federal Building 50 Louis, N.W., Third Floor, St. Louis, MO 63103-2836, Telephone No. (314) 539-6512

#### *Rocky Mountains*

Colorado State Office, Attention: Director, Office of Public Housing, 633-17th Street 12th Floor, Denver, CO 80202-3607, Telephone No. (303) 672-5440

#### *Pacific/Hawaii*

Arizona State Office, Attention: Director, Office of Public Housing, 2 Arizona Center, Suite 1600, 400 North Fifth Street, Phoenix, AZ 85004-2361, Telephone No. (602) 379-4434

California State Office, Attention: Director, Office of Public Housing, Phillip Burton Federal Building and U.S. Courthouse 450 Golden Gate Avenue, Ninth Floor, San Francisco, CA 94102-3448, Telephone No. (415) 556-4752

Hawaii State Office, Attention: Director, Office of Public Housing, Seven Waterfront Plaza, Suite 500, 500 Ala Moana Boulevard, Honolulu, HI 96813-4918, Telephone No. (808) 522-8175

Los Angeles Area Office, Attention: Director, Office of Public Housing, AT&T Center 611 West 6th Street, Suite 800, Los Angeles, CA 90017-3127, Telephone No. (213) 894-8000 ext. 3500

Sacramento Area Office, Attention: Director, Office of Public Housing, 777 12th Street, Suite 200, Sacramento, CA 95814-1997, Telephone No. (916) 551-1351

#### *Northwest/Alaska*

Alaska State Applicants submit applications to the Washington State Office in Seattle, WA (see below):

Oregon State Office, Attention: Director, Office of Public Housing, 400 Southwest Sixth Avenue, Suite 700, Portland, OR 97204-1596, Telephone No. (503) 326-2519

Washington State Office, Attention: Director, Office of Public Housing, Seattle Federal Office Building, Suite 200, 909 1st Avenue, Seattle, WA 98104-1000, Telephone No. (206) 220-5101

#### *Office of Native American Program Offices*

Serves East of the River (Including all of Minnesota)

Eastern Woodlands Office of Native American Programs, Attention: Administrator, Office of Native American Programs, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604-3507, Telephone No. (800) 735-3239 [Toll Free] or (312) 886-3539

Serves: Louisiana, Missouri, Kansas, Oklahoma and Eastern Texas

Southern Plains Office of Native American Programs, Attention: Administrator, Office

of Native American Programs, 500 West Main Street, Suite 400, Oklahoma City, OK 73102, Telephone No. (405) 553-7525

Serves: Colorado, Montana, The Dakotas, Nebraska, Utah and Wyoming

Northern Plains Office of Native American Programs, Attention: Administrator, Office of Native American Programs, First Interstate Tower North, 633 17th Street, Denver, CO 80202-3607, Telephone No. (303) 672-5465

Serves: California, Nevada, Arizona and New Mexico

Southwest Office of Native American Programs, Attention: Administrator, Office of Native American Programs, Two Arizona Center, Suite 1650, 400 North Fifth Street, Suite 1650, Phoenix, AZ 85004-2361, Telephone No. (602) 379-4156

or

Albuquerque Division of Native American Programs, Albuquerque Plaza, 201 3rd Street, Suite 1830, Albuquerque, NM 87102-3368, Telephone No. (505) 766-1372

Serves: Iowa, Washington, Idaho and Oregon

Northwest Office of Native American Programs, Attention: Administrator, Office of Native American Programs, 909 1st Avenue, Suite 300, Seattle, WA 98104-1000, Telephone No. (206) 220-5270

Serves: Alaska

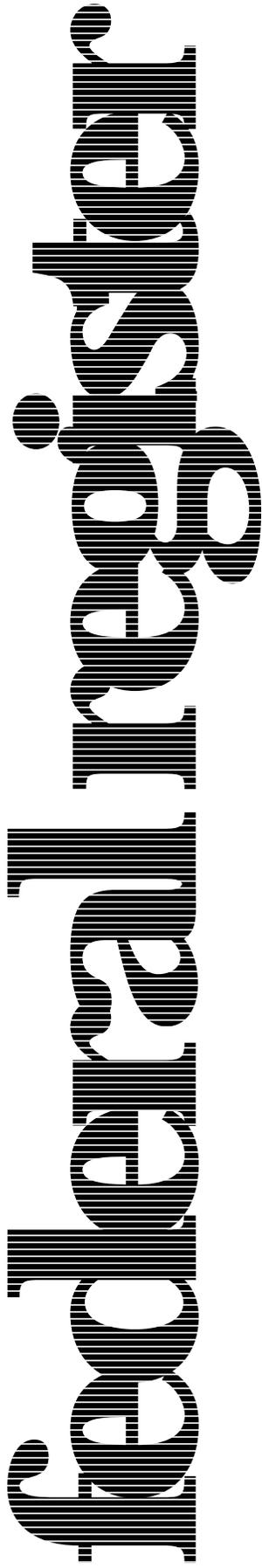
Alaska Office of Native American Programs, Attention: Administrator, Office of Native American Programs, University Plaza Building, 949 East 36th Avenue, Suite 401, Anchorage, AK 99508-4399, Telephone No. (907) 271-4633

Serves: National

Office of Native American Programs, 1999 Broadway, Suite 3390, Box 90, Denver, CO 80302, Telephone No. (303) 675-1600

[FR Doc. 97-14812 Filed 6-5-97; 8:45 am]

BILLING CODE 4210-33-P



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Friday  
June 6, 1997

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**Part IV**

**Office of Management and Budget**

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**Office of Federal Procurement Policy**

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**48 Cost Part 9903**

**Cost Accounting Standards Board;  
Applicability of Cost Accounting  
Standards Coverage; Final Rule**

**OFFICE OF MANAGEMENT AND BUDGET****Office of Federal Procurement Policy****48 CFR Part 9903****Cost Accounting Standards Board; Applicability of Cost Accounting Standards Coverage**

**AGENCY:** Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB.

**ACTION:** Final rule.

**SUMMARY:** The Cost Accounting Standards (CAS) Board is revising the applicability criteria for application of CAS to negotiated Federal contracts. This rulemaking is authorized pursuant to Section 26 of the Office of Federal Procurement Policy Act, 41 U.S.C. § 422. The Board is taking action on this topic to adjust CAS applicability requirements in accordance with Section 4205 of Pub. L. 104-106, the "Federal Acquisition Reform Act of 1996."

**EFFECTIVE DATE:** This rule is effective June 6, 1997.

**FOR FURTHER INFORMATION CONTACT:** Richard C. Loeb, Executive Secretary, Cost Accounting Standards Board (telephone: 202-395-3254).

**SUPPLEMENTARY INFORMATION:****A. Background**

On July 29, 1996, the Cost Accounting Standards Board (CASB) issued an interim rule with request for comment, 61 FR 39360, implementing Section 4205 of Pub. L. 104-106, the "Federal Acquisition Reform Act of 1996" (FARA), also known as the "Clinger-Cohen Act". This law amends 41 U.S.C. § 422(f)(2)(B) to revise clause (i) and delete clause (iii). The phrase "contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public" has been replaced with the phrase "contracts or subcontracts for the acquisition of commercial items." The CAS Board is today finalizing its interim applicability regulations, solicitation provision and contract clauses in recognition of this change. As amended, firm fixed-price contracts and subcontracts as well as fixed-price contracts and subcontracts with economic price adjustment (provided that adjustments are not based on actual costs incurred), for the acquisition of commercial items (see 48 CFR, Chap. 1, Part 12) will be exempt from CAS requirements. This exemption (b)(6) supersedes all other exemptions

for the acquisition of commercial items under 9903.201-2.

To accomplish these changes, the Board is finalizing the interim amendments to Section 9903.201-1(b)(6) of its rules. Additionally, the interim solicitation provision found at 9903.201-3, the contract clauses at 9903.201-4, and the definition found at 9903.301 are finalized to reflect this change.

The Conference Report to Pub. L. 104-106 directs the CAS Board, in consultation with the Director of the Defense Contract Audit Agency, to issue guidance, consistent with commercial accounting systems and practices, to ensure that contractors appropriately assign costs to commercial item contracts, other than firm fixed-price commercial item contracts. At the present time, however, commercial item contracts are limited by regulation to the firm fixed-price and fixed-price with economic price adjustment (FPEA) variety. The Board recognizes that one of the three varieties of FPEA contracts authorized for use provides for adjustment of price based upon actual incurred costs for labor and material. Consequently, in order to reconcile the Conference Report language with the expansion of this CAS exemption to cover FPEA contracts, the Board's exemption for FPEA contracts does not include those contracts where adjustment is based on actual costs incurred (see FAR 16.203-1(b)).

The Board's inquiry of a number of Federal procuring agencies, including the Department of Defense, has indicated that FPEA contracts with adjustments based on actual costs incurred are rarely, if ever, used (DOD could not identify any contract awards of this type that had been made in the last year). Accordingly, after further consideration and review of this issue, the Board has concluded that development of the requested guidance should appropriately await the time when other than firm fixed-price or fixed-price with economic price adjustment commercial item contracts are authorized, or until another need for such guidance arises. At the time that a need arises for guidance to address the allocation of costs to other than firm fixed-price or fixed-price with economic price adjustment commercial item contracts as exempted by this rule, the Board will, of course, pursue the development of guidance to address the issue.

**B. Paperwork Reduction Act**

The Paperwork Reduction Act, Public Law 96-511, does not apply to this rulemaking, because this rule imposes

no paperwork burden on offerors, affected contractors and subcontractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

**C. Executive Order 12866 and the Regulatory Flexibility Act**

The economic impact of this rule on contractors and subcontractors is expected to be minor. As a result, the Board has determined that this final rule will not result in the promulgation of a "major rule" under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required. Furthermore, this rule will not have a significant impact on a substantial number of small businesses because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980.

**D. Public Comments**

This final rule is based upon the Board's interim rule that was issued on July 29, 1996, 61 FR 39360. Six public comments were received, including five timely comments, and one late comment. The comments received and the Board's actions taken in response thereto are summarized below:

**Comment:** Four commenters, representing industry associations, the private bar and Government, supported the issuance of the interim rule.

**Response:** The Board thanks the commenters for their supportive comments.

**Comment:** Two commenters opposed the rule. They stated that there was no cost accounting basis for the rule. These commenters argued that whether a contract was subject to DAS should be dependent on the size of the contract (dollar amount) and whether contractor cost information had been submitted to assist or support contract negotiations or contract pricing, and not the product description or nomenclature used to describe the Government's intended purchase; i.e., a "commercial item".

**Response:** The Board believes that the commenters raise valid conceptual accounting concerns. However, inasmuch as Congress has given the Board what it believes to be direction to create this new CAS exemption, the Board believes it would be remiss if it were not to implement the Congressional initiative. In addition, the Board believes that the absence of any agency audit clause from "commercial item" contracts renders an enforceability and compliance scheme

for CAS, as applied to this contract type, a moot issue.

*Comment:* Three commenters, including the private bar, objected to or questioned the Board's procedural process for issuing an interim rule. Two of the three commenters believe that the Board must use its statutory "four-step" rulemaking process in issuing the new exemption. Another commenter requested a more specific explanation of the authority for issuance of the interim rule.

*Response:* The Board agrees that it would normally have processed a new regulatory exemption to CAS coverage in accordance with the "four-step" rulemaking process normally appertaining to CAS rules. However, in this specific instance, the Board believes that it was following Congressional direction, as embodied in new statutory language contained in FARA, increasing the subject CAS exemption. In this instance, in which a statutory authorization has changed, the Board believes that it is merely implementing a Congressional initiative with respect to CAS. As such, the Board regards the new statutory language as representing a specific circumstance that creates an exception to the Board's regular "four-step" rulemaking process.

*Comment:* Two commenters, representing industry associations, recommended that the Board authorize contracting officers to waive all CAS requirements, for all commercial item contracts, entered into since October 13, 1994, the date of enactment of the Federal Acquisition Streamlining Act (FASA), Pub. L. 103-355.

*Response:* The Board believes that the present CAS exemption for commercial item contracts, as well as the agency CAS waiver authority that was previously in effect prior to the promulgation of the interim rule, were sufficient to address CAS commercial item contracting issues under both FASA and FARA. In this regard, the Board notes that the effective date of the interim rule was some five months prior to the effective date of the commercial item contracting changes made in the FAR as a result of the enactment of FARA. In addition, the Board is unaware of any contracts in which CAS has served as an impediment with respect to the acquisition of commercial items since the effective date of the FASA commercial item contracting rule on October 1, 1995.

*Comment:* Two commenters, representing Government and the private bar, recommended that the CAS commercial item exemption be expanded to include both firm fixed-price contracts and fixed-price contracts

with economic price adjustment (FPEA). These commenters pointed out that only these two contract types are authorized for the acquisition of commercial items.

*Response:* The Board agrees with the commenters. However, the Board again notes that the Conference Report to Pub. L. 104-106 directs the CAS Board, in consultation with the Director of the Defense Contract Audit Agency, to issue guidance, consistent with commercial accounting systems and practices, to ensure that contractors appropriately assign costs to commercial item contracts, other than firm fixed-price commercial item contracts. In promulgating the interim rule, the Board chose not to issue this guidance, at the present time, on the basis that it is unnecessary, provided that the CAS commercial item exemption is limited to firm fixed-price commercial item contracts.

However, the Board is also persuaded that failure to include FPEA contracts within the CAS commercial item exemption might tend to contract rather than expand the intent of the Board's previous "catalog or market price" exemption for commercial items that was in effect prior to the passage of FARA. Moreover, the Board recognizes that one of the three varieties of FPEA contracts authorized for use, provides for adjustment of price based upon actual incurred costs for labor and material. In order to reconcile the Conference Report language with the expansion of this CAS exemption to cover FPEA contracts, the Board is expanding the exemption provided in the interim rule to include a CAS exemption for FPEA contracts, provided that price adjustments are not based on actual costs incurred (see FAR 16.203-1(b)). The Board believes that this approach to FPEA contracts comports with both the intent of the statute and the Conference Report by expanding the CAS commercial item exemption to FPEA contracts in a manner that will avoid the allocation of costs to cost objectives based on actual contractor incurred costs.

#### List of Subjects in 48 CFR Part 9903

Costs accounting standards,  
Government procurement.

**Richard C. Loeb**

*Executive Secretary, Cost Accounting Standards Board.*

Accordingly, the interim rule amending 48 CFR Part 9903 which was published at 61 FR 39360 on July 29, 1996, is adopted as a final rule with the following changes:

## PART 9903—CONTRACT COVERAGE

### Subpart 9903.2—CAS Program Requirements

1. The authority citation for part 9903 of chapter 99 of title 48 continues to read as follows:

**Authority:** Pub. L. 100-679, 102 Stat 4056, 41 U.S.C. § 422.

2. Section 9903.201-1 is amended by revising paragraph (b)(6) to read as follows:

#### § 9903.201-1 CAS applicability.

\* \* \* \* \*

(b) \* \* \*  
(6) Firm fixed-priced and fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred) contracts and subcontracts for the acquisition of commercial items.

\* \* \* \* \*

3. Section 9903.201-4 is amended by revising the clause heading and paragraph (d) of the clause entitled Cost Accounting Standards; and by revising paragraph (d)(1) of the clause entitled Disclosure and Consistency of Cost Accounting Practices, to read as follows:

#### § 9903.201-4 Contract clauses.

\* \* \* \* \*

Cost Accounting Standards

(May 1997)

\* \* \* \* \*

(d) The contractor shall include in all negotiated subcontracts which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all CAS in effect on the subcontractor's award date or if the subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data. If the subcontract is awarded to a business unit which pursuant to 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 9903.201-4 shall be inserted. This requirement shall apply only to negotiated subcontracts in excess of \$500,000, except that the requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 9903.201-1.

(End of clause)

\* \* \* \* \*

Disclosure and Consistency of Cost Accounting Practices

(May 1997)

\* \* \* \* \*

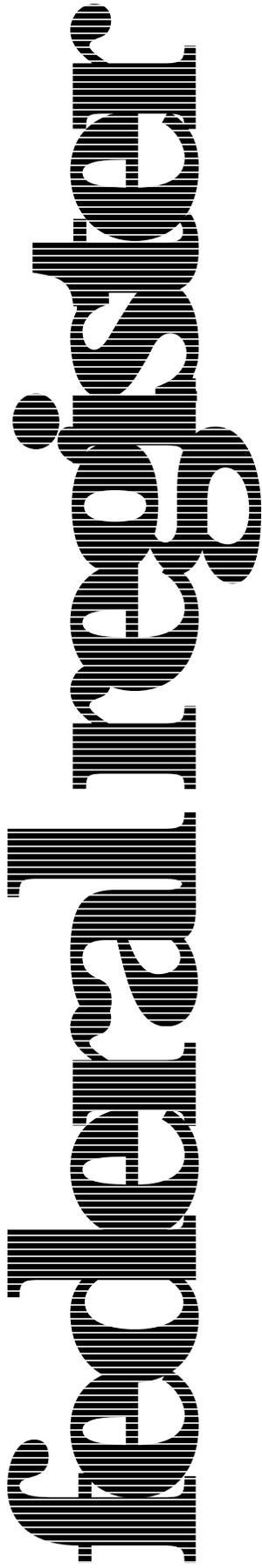
(d) \* \* \*  
(1) If the subcontract is awarded to a business unit which pursuant to 9903.201-2

is subject to other types of CAS coverage, the substance of the applicable clause set forth in 9903.201-4 shall be inserted.

\* \* \* \* \*

[FR Doc. 97-14775 Filed 6-5-97; 8:45 am]

**BILLING CODE 3110-01-M**



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Friday  
June 6, 1997

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**Part V**

**Department of the  
Interior**

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**Fish and Wildlife Service**

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**50 CFR Part 20**

**Migratory Bird Hunting; Supplemental  
Proposals for Migratory Game Bird  
Hunting Regulations; Proposed Rule**

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 20**

RIN: 1018-AE14

**Migratory Bird Hunting; Supplemental Proposals for Migratory Game Bird Hunting Regulations; Notice of Meetings**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; supplemental.

**SUMMARY:** The U.S. Fish and Wildlife Service (hereinafter the Service) proposed in an earlier document to establish annual hunting regulations for certain migratory game birds for the 1997–98 hunting season. This supplement to the proposed rule provides the regulatory schedule; announces a special meeting to discuss and review Adaptive Harvest Management; announces the Service Migratory Bird Regulations Committee and Flyway Councils meetings; and describes the proposed regulatory alternatives for the 1997–98 duck hunting seasons and other proposed changes from the 1996–97 hunting regulations.

**DATES:** The Service will hold a special open meeting at 9:00 a.m. on June 24, 1997, to review the concepts and process of Adaptive Harvest Management. The Service Migratory Bird Regulations Committee will consider and develop proposed regulations for early-season migratory bird hunting at 8:30 a.m. on June 25 and 26, and for late-season migratory bird hunting on August 5 and 6. The Service will hold public hearings on proposed early- and late-season frameworks at 9:00 a.m. on June 27 and August 7, 1997, respectively. The comment period for the proposed regulatory alternatives for the 1997–98 duck hunting seasons will end on July 3, 1997. The comment period for proposed migratory bird hunting-season frameworks for Alaska, Hawaii, Puerto Rico, the Virgin Islands, and other early seasons will end on July 25, 1997. The comment period for late-season proposals will end on September 4, 1997.

**ADDRESSES:** The Adaptive Harvest Management Meeting and the Service Migratory Bird Regulations Committee will meet in room 200 of the U.S. Fish and Wildlife Service's Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia. The Service will hold public hearings in the Auditorium of the Department of the Interior

Building, 1849 C Street, NW., Washington, DC. Parties should submit written comments on the proposals and/or a notice of intent to participate in either hearing to the Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634—ARLSQ, 1849 C Street, NW., Washington, DC 20240. The public may inspect comments during normal business hours in room 634, ARLSQ Building, 4401 N. Fairfax Drive, Arlington, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Paul R. Schmidt, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, (703) 358-1714.

**SUPPLEMENTARY INFORMATION:****Regulations Schedule for 1997**

On March 13, 1997, the Service published in the **Federal Register** (62 FR 12054) a proposal to amend 50 CFR part 20. The proposal dealt with the establishment of seasons, limits, and other regulations for migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. This document is the second in a series of proposed, supplemental, and final rules for migratory game bird hunting regulations. The Service will propose early-season frameworks in late June and late-season frameworks in early August. The Service will publish final regulatory alternatives for the 1997–98 duck hunting seasons in mid-July and final regulatory frameworks for early seasons on or about August 20, 1997, and those for late seasons on or about September 25, 1997.

On June 27, 1997, the Service will hold a public hearing in Washington, DC, to review the status of migratory shore and upland game birds and waterfowl hunted during early seasons and the recommended hunting regulations for these species.

On August 7, 1997, the Service will hold a public hearing in Washington, DC, to review the status of waterfowl and recommended hunting regulations for regular waterfowl seasons, and other species and seasons not previously discussed at the June 27 public hearing.

**Announcement of Adaptive Harvest Management Meeting**

The June 24 meeting will review the concepts and process of Adaptive Harvest Management. Representatives from the Service, the Service Migratory Bird Regulations Committee, and Flyway Council Consultants will attend.

**Announcement of Service Migratory Bird Regulations Committee Meetings**

The June 25 meeting will review information on the current status of migratory shore and upland game birds and develop 1997–98 migratory game bird regulations recommendations for these species plus regulations for migratory game birds in Alaska, Puerto Rico, and the Virgin Islands; special September waterfowl seasons in designated States; special sea duck seasons in the Atlantic Flyway; and extended falconry seasons. In addition, the Service will review and discuss preliminary information on the status of waterfowl as it relates to the development of the final regulatory packages for the 1997–98 regular waterfowl seasons. The June 26 meeting will ensure that the Service develops its regulations recommendations in full consultation.

The August 5 meeting will review information on the current status of waterfowl and develop 1997–98 migratory game bird regulations recommendations for regular waterfowl seasons and other species and seasons not previously discussed at the early season meetings. The August 6 meeting will ensure that the Service develops its regulations recommendations in full consultation.

In accordance with Departmental policy, these meetings are open to public observation. Members of the public may submit written comments on the matters discussed to the Director.

**Announcement of Flyway Council Meetings**

Service representatives will be present at the following meetings of the Flyway Councils:

Atlantic Flyway—July 31–August 1, Savannah Georgia (Savannah Marriott River Front)

Central Flyway—July 30–31, Cypress Hills, Saskatoon, Saskatchewan

Mississippi Flyway—July 30–31, Hot Springs, Arkansas

Pacific Flyway—July 30–31, Reno, Nevada (Peppermill Hotel)

Although agendas are not yet available, these meetings usually commence at 8:30 a.m. on the days indicated.

**Review of Public Comments**

This supplemental rulemaking contains the proposed regulatory alternatives for the 1997–98 duck hunting seasons. All comments and recommendations received through May 1, 1997, relating to the development of these alternatives are included and addressed herein.

This supplemental rulemaking also describes other recommended changes based on the preliminary proposals published in the March 13, 1997, **Federal Register**. Only those recommendations requiring either new proposals or substantial modification of the preliminary proposals are included here. This supplement does not include recommendations that support or oppose but do not recommend alternatives to the preliminary proposals. The Service will consider these comments later in the regulations-development process. The Service will publish responses to all proposals, written comments, and public-hearing testimony when it develops final frameworks.

The Service seeks additional information and comments on the recommendations in this supplemental proposed rule. The Service will consider all recommendations and associated comments during development of the final frameworks.

New proposals and modifications to previously described proposals are discussed below. Wherever possible, they are discussed under headings corresponding to the numbered items in the March 13, 1997, **Federal Register**.

#### General

*Written Comments:* Several individuals from Tennessee and Mississippi recommended either a noon or 1:00 p.m. closing time for duck hunting, citing positive benefits to the duck population and law enforcement.

An individual from Minnesota urged elimination of the 4:00 p.m. closing time in Minnesota.

#### 1. Ducks

Categories used to discuss issues related to duck harvest management are: (A) Harvest Strategy Considerations, (B) Framework Dates, (C) Season Length, (D) Closed Seasons, (E) Bag Limits, (F) Zones and Split Seasons, and (G) Special Seasons/Species Management. Categories containing substantial recommendations are discussed below.

##### A. Harvest Strategy Considerations

On March 13, 1997, the Service published for public comment recommendations from the Adaptive Harvest Management (AHM) technical working group regarding modification of the regulatory alternatives for duck hunting (62 FR 12054). If adopted, significant changes from the alternatives utilized in 1996-97 would include: (1) addition of a "very restrictive" alternative; (2) additional days and a higher total-duck daily bag limit in the "moderate" and "liberal" alternatives;

and (3) an increase in the daily bag limit of hen mallards in the "moderate" and "liberal" alternatives.

*Council Recommendations:* All four Flyway Councils generally endorsed the regulatory alternatives recommended by the AHM technical working group that were identified in the March 13, 1997, **Federal Register**. However, some modifications were recommended and are identified below.

The Atlantic Flyway Council endorsed the four regulatory alternatives for the Atlantic Flyway, with the exception of the total duck bag limit and hen mallard bag limit restrictions (see further discussion in *E. Bag Limits*).

The Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council endorsed the regulatory packages for the Mississippi Flyway for the 1997-98 season, with the Lower-Region Regulations Committee also recommending an experimental framework closing date (see further discussion in *B. Framework Dates*).

The Central Flyway Council endorsed the regulatory packages with the exception of recommending a harvest strategy for pintails and an earlier framework opening date for northern states (see further discussions in *B. Framework Dates* and *G. Special Seasons/Species Management, ii. Pintails*).

The Pacific Flyway Council endorsed the working group's recommended alternatives with several modifications. The Council recommended minor changes in season length and the hen mallard bag limit and adoption of an interim pintail harvest strategy (see further discussion in *C. Season Length, E. Bag Limits* and *G. Special Seasons/Species Management, ii. Pintails*).

*Written Comments:* The Minnesota Department of Natural Resources (Minnesota) and the Wisconsin Department of Natural Resources supported the packages proposed by the AHM technical working group, although both stated that the packages provide little additional benefit to hunters in northern States. Minnesota noted that AHM brings more science, better decisions and less politics into the regulations-setting process. Minnesota also expressed support for the working group's recommended "liberal" alternative despite their belief that it essentially changes the allocation of harvest, providing additional opportunity to mid-latitude and southern States while limiting Minnesota hunter opportunities due to typical freeze-up dates.

The Missouri Department of Conservation (Missouri) supported the

working group's recommendations and further supported any change among the various options that provided a consistent, science-based approach to waterfowl management. Missouri further commented that the strengths of AHM are the shared objectives and improved use of available information and that State and region-specific proposals generated outside the AHM process jeopardize this improved waterfowl management decision-making process.

The North American Waterfowl Federation (NAWF) supported the development and implementation of AHM in setting waterfowl regulations but did not support the liberalizations proposed by the working group regarding increases in season lengths and bag limits. NAWF believed that extensive changes were premature and did not provide adequate consideration for population impacts. NAWF pointed out that several species of waterfowl had not yet reached population goals and that additional harvest did not appear justified. NAWF was also not aware of any initiative or substantial interest among the duck hunting public for an expansion of hunting opportunities and questioned whether the interests of hunters were being represented.

The Delta Wildlife Foundation and the Delta Outfitters Association of Mississippi and the Alabama Waterfowl Association expressed support for the recommendations of the Lower-Region Regulations Committee of the Mississippi Flyway Council.

The Louisiana Wildlife Federation supported the establishment of a "more" or "most" liberal alternative for those years when duck reproduction was high and the population could support additional harvest.

Several individuals from Louisiana fully supported the working group's recommendations.

Several individuals from Alabama expressed support for the recommendations of the Lower Region Regulations Committee of the Mississippi Flyway Council.

An individual from Minnesota questioned the AHM process, citing the fact that harvest had increased each year under AHM. He further questioned the need for a "super-liberal" alternative and believed that States would be unwilling to actually use the "conservative" alternative.

Individuals from Tennessee and Louisiana expressed support for the "liberal" alternative.

Several individuals from Minnesota and one individual from Louisiana suggested keeping the "liberal"

alternative at 50 days with a 5-bird daily bag limit. Another commenter requested longer (i.e., 60 to 70 days) seasons and 4-bird daily bag limits.

An individual from Minnesota urged support for a 30- to 40-day season and a 3- to 5-bird daily bag limit, depending on water conditions.

The California Waterfowl Association supported the addition of a "very restrictive" alternative and the working group's recommendation for extended season lengths under the "moderate" and "liberal" alternatives.

An individual from Kansas strongly supported the addition of a "very restrictive" alternative as a management tool.

An individual from Oregon was concerned about potential increases in mallard harvest given the population status of mallards and recent season liberalizations.

Several individuals from Ohio, California, and Pennsylvania opposed all increases in either daily bag limits or season lengths on moral grounds, with some calling for overall reductions in hunting opportunities.

*Service Response:* Comments received to date regarding the recommendations of the AHM technical working group generally have been favorable.

Therefore, the Service is proposing to adopt most of the recommendations of the AHM working group. Minor differences between the working group's recommendations and the Service's proposal are noted under *C. Season Lengths, E. Bag Limits, and G. Special Seasons/Species Management, ii. Pintails*. The Service notes a number of comments suggesting some hunters may not be interested in more liberal regulations, even though they may be biologically acceptable.

For the 1997-98 regular duck hunting season, the Service proposes the four regulatory alternatives detailed in the accompanying table. Alternatives are specified for each Flyway and are designated as "VERY RES" for the very restrictive, "RES" for the restrictive, "MOD" for the moderate, and "LIB" for the liberal alternative. The Service will publish final regulatory alternatives in July and propose a specific regulatory alternative when survey data on waterfowl population and habitat status are available. Public comments will be accepted until June 27, 1997, and should be sent to the address under the caption **ADDRESSES**.

#### B. Framework Dates

*Council Recommendations:* The Lower-Region Regulations Committee of the Mississippi Flyway Council recommended the Service allow an

experimental January 31 framework closing date, as long as it does not affect regulations/framework packages in non-participatory States.

The Central Flyway Council recommended a framework opening date of the Saturday nearest September 23 in North Dakota, South Dakota, Montana, Wyoming, Colorado, and Nebraska.

*Written Comments:* The State of North Dakota provided a concurrent resolution urging the Service to adopt a framework opening date of September 20.

The Alabama Department of Conservation and Natural Resources recommended a framework closing date of January 31 under the "liberal" and "moderate" alternatives. In lieu of this option, they suggested an experimental season of 3 to 5 years for a limited number of States in order to determine any resulting detrimental effects from the later framework closing date.

Senators Trent Lott and Thad Cochran of Mississippi urged support for extending the framework closing date to January 31 in Mississippi with the same number of days and bag limit as other States in the Mississippi Flyway.

The Mississippi State Senate provided a concurrent resolution urging the Mississippi U.S. Congressional delegation to express to the Service the need and support for a duck hunting framework closing date of January 31 for the Mississippi Flyway. The resolution stated that peak duck populations in Mississippi occur from late December through January, a January 31 framework closing date would not adversely impact the survival rate of ducks, and Mississippi hunters were denied the same opportunity to hunt ducks afforded to hunters in the northern and central portions of the Mississippi Flyway.

The City of Grenada, Mississippi, urged consideration of a season ending after the first week in February so as to allow Mississippi hunters the same hunting opportunities afforded other States in the Mississippi Flyway.

The Mississippi Wildlife Federation expressed support for a later framework closing date in January, citing the fact that Mississippi overwinters the third largest number of waterfowl in the Mississippi Flyway, but only ranks 11th out of 14 States in the Flyway in waterfowl harvest.

One hundred and twenty-six individual commenters and 107 petitioners from Mississippi recommended a framework closing date extension to January 31. Most commenters believed the majority of waterfowl do not arrive in Mississippi until mid- to late-January after the

current season closes. Further, many cited the opinion that due to the Service's unfair frameworks policy, southern waterfowlers are not given the same hunting opportunities as those given to hunters in northern States.

Twenty-two individuals and eleven petitioners from Mississippi recommended a framework closing date extension to February 9. One individual from Mississippi recommended a season running through the middle of February.

Three individuals from Alabama urged the Service to consider extending the framework closing date to at least January 31.

The Louisiana Wildlife Federation supported modifying the framework closing date to allow hunting through the last weekend in January, provided that the late-season disturbance was not shown to be an impediment to the overall population or to achieving the NAWMP goals.

Several individuals from Louisiana recommended a duck hunting season closing the end of January.

The Minnesota Department of Natural Resources (Minnesota) expressed serious concerns about the proposals to extend framework opening and closing dates stating that the proposed changes would alter the current distribution of duck harvest within and among Flyways. Minnesota commented that shifting hunting opportunity further to the south through a framework extension would be unacceptable to Minnesota and would allow a reallocation of harvest by default.

The Wisconsin Department of Natural Resources (Wisconsin) did not support modification of the frameworks at this time. Wisconsin stated, however, that if the Service were to seriously consider changing the framework closing date, it must also consider changes to the framework opening date. Wisconsin believed that extending the framework date to the end of January without modifying the opening framework dates would only serve to widen the gap in hunting opportunities currently offered in the Mississippi Flyway. Wisconsin further recommended that the Service establish a timetable and a process to allow a thorough discussion of the implications of framework modification for all Flyways.

Although supporting the working group's recommended packages, the Missouri Department of Conservation (Missouri) believed the 1996-97 regulations provided excellent hunting opportunity and would prefer retaining these options rather than any additional wholesale changes in frameworks. Missouri was concerned that the potential biological impacts of

framework extensions had not been adequately considered and that a rigorous evaluation would be necessary. Missouri further believed that this was not a high priority for AHM at this time and questioned whether issues of harvest allocation should even be a part of the AHM process, stating that these issues were largely social, not technical.

Several individuals from Tennessee and Louisiana expressed strong opposition to extending the framework closing date past January 20, citing concerns for the conditions of the ducks and the lack of hunting opportunity later in January.

The California Waterfowl Association expressed concerns about the impacts of either earlier framework opening dates or later framework closing dates.

Individuals in Pennsylvania and Iowa believed the season in their respective States closed too early.

Individuals in California and Oregon expressed support for extending the hunting season.

*Service Response:* In 1995, the Service established AHM framework opening and closing dates of the Saturday nearest October 1 to the Sunday nearest January 20 for the Pacific, Central, and Mississippi Flyways, and fixed dates of October 1 to January 20 for the Atlantic Flyway (60 FR 50045). In 1996, the Service denied requests for a January 31 closing date in Mississippi, but recognized that the suitability of all aspects of the regulatory alternatives, including framework dates, should be investigated by the AHM technical working group. All four Flyway Councils, in joint recommendations dated July 28, 1996, assigned a high priority to refining the AHM regulatory alternatives and asked the technical working group to draft recommendations prior to the 1997 regulatory cycle. In the fall of 1996, the technical working group circulated a questionnaire to all States seeking input regarding concerns with the current regulatory alternatives. Fifty-four percent of States nationwide believed the current framework dates of approximately October 1 to January 20 were satisfactory, while 32 percent believed the dates were too constrained. Overall, States ranked framework dates as the sixth most important regulatory issue, after issues involving season lengths, bag limits, and the number of regulatory alternatives. The Service recognizes that questionnaires received from Central and Mississippi Flyway States indicated a somewhat higher level of dissatisfaction with established framework dates than the national average.

After extensive deliberation and consideration of input by States and Flyway Councils, the AHM technical working group recommended no change in framework dates from those established in 1995 (62 FR 12054). The Service's Migratory Bird Regulations Committee reviewed the working group's recommendations with the Flyway Council Regulations Consultants at the January 23, 1997, meeting and there were no indications that framework dates of approximately October 1 to January 20 would not be satisfactory to most States. On April 22, 1997, representatives from the Service met with Flyway Council Chairmen and Regulations Consultants to consider the Flyway Councils recommendations for the AHM regulatory alternatives. Representatives from the Atlantic, Central, and Pacific Flyway Councils, and from the Upper-Region Regulations Committee of the Mississippi Flyway Council, agreed that framework dates should not be extended beyond those currently in use for the 1997-98 season; however, the representatives agreed the issue should be reviewed further by the AHM working group and all four Flyway Councils. Therefore, the Service has adopted the working group's recommendation for framework dates of approximately October 1 to January 20 for all AHM regulatory alternatives as its formal proposal.

In considering requests for either earlier or later framework dates, such as those described above, the Service will focus on the following issues:

(1) Possible changes in the size of the harvest. Experience with hunting seasons opening more than a few days before October 1 or closing similarly after January 20 is limited. Mississippi experimented with a January 31 closing date during 1979-84, and Iowa was permitted an opening date for a small portion of their regular duck season of approximately September 20 during 1979-87 and 1994-96 in lieu of an early teal season. In both States, harvests of mallards and total ducks were higher in years with a framework extension, relative to surrounding States where a framework extension was not available. If results from these States are representative, then proposals to extend framework dates in the Central and Mississippi Flyways would be expected to increase the harvest of midcontinent mallards by 13 percent (10% range of error). This increase would be in addition to the 20 percent increase in mallard harvest expected from the proposed increase in season length under the "liberal" alternative. The Service predicts that adoption of the Central and Mississippi Flyway

proposals would lead to a more conservative harvest strategy for all States, whether or not they could take advantage of the extended framework dates. The Service also predicts more frequent changes in regulations and more variability in population size of midcontinent mallards if the Central and Mississippi Flyway proposals were adopted.

(2) Re-allocation of hunting opportunity and harvest within and among Flyways. Based on the survey conducted by the AHM technical working group, most States are satisfied with the distribution of hunting opportunity within and among Flyways. Nationwide, concerns regarding allocation of hunting opportunity among States ranked last among those concerns with the current AHM regulatory alternatives. Also, all Flyway Councils passed a joint recommendation (July 28, 1996) asking the Service to maintain traditional allocations of hunting opportunity among Flyways when considering changes to the AHM regulatory alternatives. The Service agrees with the Flyway Councils that resolving outstanding disputes over allocation will require development of an appropriate framework for discussion and that progress is unlikely prior to the 1997 hunting season. (3) The potential for negative physiological impacts on ducks.

The Service reiterates its long-standing concerns that hunting disturbance in late winter may interfere with pair-bonding and inhibit nutrient acquisition necessary for successful migration and reproduction (61 FR 50664). Information from a recent study of late-winter mate loss among captive-reared mallards by Mississippi State University has not alleviated these concerns because these preliminary study results cannot necessarily be applied to free-ranging mallards or other species.

The Service does not wish to prejudice a discussion about allocation of duck hunting opportunity, but is confused about public comments that hunters in the southern Mississippi Flyway are not afforded the same hunting opportunities as their northern counterparts. States of the southern Mississippi Flyway collectively enjoy hunter success (as measured by seasonal duck harvest per hunter) that is higher than that in any region of the country. Moreover, hunter success in the Mississippi Flyway is about twice as high in southern States as in northern and mid-latitude States, and this discrepancy has been increasing steadily over time. The State of Mississippi has the fourth highest

hunter success in the country, after Louisiana, California, and Arkansas.

In summary, the Service is not proposing at this time to extend framework dates beyond those currently in use. However, the Service seeks further clarification from the Flyway Councils, States, and the public regarding the relative importance of this issue and requests comments concerning the three issues described above. The Service believes strongly that potential changes to framework dates must be approached in a methodical and comprehensive manner, and with due consideration of both biological and sociological impacts.

### C. Season Length

*Council Recommendations:* The Pacific Flyway Council recommended the "restrictive" regulatory package for their Flyway be modified from 59 days to 60 days.

*Written Comments:* The Alabama Department of Conservation and Natural Resources recommended the "very restrictive" alternative be 23 days rather than 20 days to allow for 4 full weekends of hunting.

The California Waterfowl Association supported the addition of 1 day to the "restrictive" alternative in the Pacific Flyway.

Several individuals from Minnesota opposed increases in the season length under the "liberal" alternative, arguing that it would only benefit the southern States in the Mississippi Flyway.

An individual from Louisiana believed that seasons should be lengthened by 5 to 10 days.

Individuals from Kansas and Washington believed that season lengths should be extended as opposed to additional birds in the daily bag limit.

An individual from Oregon believed that season lengths did not need to be any longer.

An individual from Oregon expressed support for lengthening the seasons.

*Service Response:* The Service agrees with the Pacific Flyway Council's recommendation to modify the "restrictive" alternative to 60 days rather than 59 days in the Pacific Flyway. This modification would allow those States opting to split their seasons into 2 segments to open on a Saturday and close on a Sunday in each segment as has been traditional in the Pacific Flyway. The Service notes that this option becomes increasingly important to States as season length decreases and would not be a primary consideration under more liberal seasons.

### E. Bag Limits

*Council Recommendations:* The Mississippi, Central, and Pacific Flyway Councils endorsed the AHM working group's recommendations for total duck bag limits. The Atlantic Flyway Council recommended a uniform total duck bag limit of 4 in all Atlantic Flyway regulatory packages to minimize the frequency of changes.

All Flyway Councils supported the basic mallard daily bag limits as recommended by the working group in each of the regulatory packages. However, the Atlantic and Pacific Flyway Councils recommended modifications to the hen mallard daily bag limit in the "liberal" package. The Atlantic Flyway Council recommended that there be no hen mallard restrictions and the Pacific Flyway Council recommended a daily bag limit of 3 hen mallards instead of 2.

*Written Comments:* The South Carolina Department of Natural Resources recommended the Service adopt the 6-bird daily bag limit recommended by the working group and retain hen mallard restrictions outlined in the "liberal" regulations package.

The California Waterfowl Association supported the working group's recommendation of adding a second hen mallard to the daily bag limits under the "moderate" and "liberal" alternatives. They further recommended adding a third hen mallard under the Pacific Flyway's "liberal" alternative.

The Save Hens Alliance did not support an increase in the hen mallard daily bag limit, indicating that hen restrictions have had a positive effect on yearly breeding stocks. They further pointed out that a high percentage of hens surviving until the last few weeks of the season could be expected to return to breeding areas. As an alternative, they recommended that an extra drake mallard be added to the mallard daily bag limit.

The Great Outdoors, L.L.C., urged the Service to not tease the dedicated duck hunter with regulations that are not sustainable. They stated that the rebound in duck populations is due to a reversal in weather patterns, habitat improvements like the Conservation Reserve Program, and restrictions on season length and bag limits. They further pointed out that hunters are not requesting these liberalizations in seasons and believed that liberalizations in the shooting of hens was not ethical. They also believed that the increased use of zone/split seasons by States has increased the potential for higher harvests. Finally, they encouraged the Service to exercise common sense,

restraint, and ethics, which are the foundations upon which sportsmanship is based.

Several individuals from Louisiana preferred additional birds in the daily bag limit rather than additional days of season length.

Several individuals from Louisiana and individuals from Kansas, Minnesota, and California supported the working group's recommendation of additional days in the "moderate" and "liberal" alternatives, but recommended daily bag limits of no more than 5 birds.

Several individuals from Oregon and Louisiana believed that current bag limits provided plenty of hunter opportunity.

Several individuals from Louisiana recommended a daily bag limit of 1 hen mallard under the "liberal" alternative rather than the working group's recommendation of 2, while another individual supported any increase in the overall daily bag limit.

An individual from California expressed support for no internal bag-limit restrictions, while an individual from Oregon recommended holding bag limits at the "restrictive" alternative level.

*Service Response:* As indicated above, the Service concurs with the recommendations for regulatory packages drafted by the AHM working group. The Service supports the Atlantic Flyway Council's request to have more restrictive bag limits of 4 rather than 6 in the "moderate" and "liberal" packages, but does not support having a 4-bird daily bag limit instead of 3 in the "restrictive" and "very restrictive" packages. Maintaining a 4-bird daily bag limit during restrictive seasons has the potential to increase harvests at a time when attempts are being made to reduce harvest.

Regarding mallard hen restrictions, the Service does not support the changes in hen restrictions recommended by the Atlantic and Pacific Flyway Councils. Although the role of sex-specific bag limits in regulating mallard harvests, total mortality, and recruitment is uncertain, sex-specific bag limits for mallards have been used since the early 1970's. Lower female (relative to male) bag limits (hen restrictions) have been used during 1972-96 in the Central Flyway, since 1976 in the Mississippi Flyway, and beginning in 1985 in the Atlantic and Pacific Flyways. These differential regulations were intended to direct harvest pressure away from females and thus increase annual survival of females relative to males in the population.

Recent analysis of the effects of mallard hen restrictions have shown

these restrictions to have been effective in increasing the harvest of males relative to females. However, the effects of changes in female mallard bag limits on overall mallard population status and on species that are similar in appearance to mallards are unknown.

The Service supports the AHM working group's recommendation of a moderate increase in the female mallard bag limits in the "moderate" and "liberal" alternatives, but does not support the larger increases recommended by the Atlantic and Pacific Flyway Councils. The Service continues to support the use of regulations for mallards that emphasize protection of females while allowing optimum recreational opportunity on males. Therefore, the Service believes that it would be premature to remove hen restrictions without further investigation of the potential biological and social consequences of such changes. Further, the Service is concerned about the potential of synergistic effects of removing hen restrictions on the harvest of similar appearing species like mottled or black ducks.

#### F. Zones and Split Seasons

**Council Recommendations:** The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended the Service allow "3 zones and 2-way splits in one or more zones" as an additional option to the current zoning process. The Committee also requested that the Service allow States up to 1 year to choose this option, based on the public-input process States undertake, before they provide the Service with their proposal (prior to the 1998-99 regular-duck season).

**Written Comments:** The Louisiana Wildlife Federation urged the Service to consider allowing Louisiana to split into north and south zones for duck hunting.

#### G. Special Seasons/Species Management

##### i. Canvasback

**Council Recommendations:** The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended the Service continue its use of the Office of Migratory Bird Management's January 1994 "Draft—Canvasback Harvest Management: An Interim Strategy" to guide the 1997-98 regulatory decisions on canvasback.

##### ii. Pintails

**Council Recommendations:** The Atlantic Flyway Council, the Upper-Region Regulations Committee of the Mississippi Flyway Council, and the Central Flyway Council did not endorse

the Pacific Flyway Council's "Proposed Interim Strategy for Northern Pintail Harvest Regulations" as circulated for Councils' review in February of this year.

The Central Flyway Council recommended an interim, prescriptive method for determining pintail daily bag limits based on the breeding population size. The pintail limit would be 1 with a breeding population below 3.0 million; 2 with a breeding population between 3.0 and 4.5 million; 3 with a breeding population between 4.5 and 5.6 million; and equal to the overall daily bag limit with a breeding population above 5.6 million.

The Pacific Flyway Council recommended adoption of a revised "Proposed Interim Harvest Strategy." The Council's revised interim strategy included several modifications intended to address the concerns expressed by the other Flyway Councils and by the Service technical review. The revised interim strategy was presented to the Service and the other three Flyways at the April 22, 1997, AHM meeting in Arlington, VA.

The revised strategy is based on a mathematical model of the continental pintail population, which assumes that:

- (1) the size of the continental population can be effectively monitored through spring surveys in the northcentral U.S., Central Canada, and Alaska,
- (2) mortality due to hunting is additive to natural mortality,
- (3) harvest in Canada and Alaska is relatively constant from one year to the next,
- (4) crippling loss is constant and proportional to the size of the retrieved harvest,
- (5) recruitment of young birds can be reasonably predicted based on the distribution of breeding pintails, and
- (6) harvest of pintails can be reasonably predicted based on the length of the season and pintail bag limit in each Flyway.

The model predicts allowable harvest of pintails in the lower 48 States based on the current size of the pintail breeding population, anticipated recruitment, anticipated natural mortality, anticipated mortality due to hunting, and the desired size of the population in the following spring.

**Written Comments:** The California Waterfowl Association urged adoption of a pintail interim AHM model for determining alternative daily bag limits for the 1997-98 hunting season.

An individual from Louisiana recommended a daily bag limit of 2 pintails, only 1 of which could be a hen, under the "liberal" alternative.

An individual from Oregon was concerned about potential increases in pintail harvest given the population status of pintails.

An individual in Louisiana believed that the pintail season should be closed since the population had not recovered despite good breeding conditions.

**Service Response:** The Service remains concerned about the overall status of the continental population of northern pintails. The breeding population of northern pintails was an estimated 2,735,900 in 1996, which was 38 percent below the 1955-95 average and more than 50 percent below the population objective established in the North American Waterfowl Management Plan.

The Service recognizes the value of developing a strategy for determining pintail hunting regulations that is technically sound and explicitly promotes growth of the pintail population. The Service believes that ultimately pintail hunting regulations should be guided by a formal AHM process. This year, a cooperative effort began to develop the needed technical foundation for a more formal incorporation of pintails into the AHM process. The Service recognizes and greatly appreciates the support for this effort provided by the Flyway Councils and participating non-governmental organizations. However, since it likely will require about three more years to complete the development and implementation of this new process, the Service believes there is merit in adopting an interim prescriptive strategy for the management of pintail harvest until the species can be fully addressed by the AHM process.

In the July 22, 1996, **Federal Register** (61 FR 37994), the Service indicated that the adoption of any interim strategy would be dependent on how the strategy addressed three key concerns: (1) explicit harvest-management objectives, (2) comprehensive model development for continental pintails, and (3) a consideration of the regulatory constraints imposed by the adaptive harvest strategy for mid-continent mallards. We believe that the strategy recommended by the Pacific Flyway Council more satisfactorily addresses these elements than does the strategy recommended by the Central Flyway. Therefore, the Service proposes to adopt the revised interim harvest strategy proposed by the Pacific Flyway Council, with the following modifications: (1) the maximum pintail daily bag limit under any regulatory alternative in any Flyway would be limited to 3 pintails, and (2) that this interim strategy will be replaced by a more fully adaptive approach at the earliest opportunity. Further, we believe the interim pintail harvest strategy should be thoroughly reviewed in about 3 years, regardless of

whether a more adaptive approach is available at that time.

The technical details of the Pacific Flyway Proposal are available by writing directly to MBMO at the address indicated under the caption **ADDRESSES**.

iii. September Teal Seasons

*Council Recommendations:* The Lower-Region Regulations Committee of the Mississippi Flyway Council recommended the continuance of the experimental September teal/wood duck seasons in Kentucky and Tennessee for the 1997-98 season with no change from the 1996-97 season frameworks.

The Central Flyway Council recommended a 3-year experimental teal harvest strategy in the Central Flyway based on the breeding population of blue-winged teal. When the 3-year running average breeding population of blue-winged teal is 4.7 million or greater, the Council's recommended harvest strategy would consist of two changes to the current September teal season frameworks. First, in those Central Flyway States currently allowed a September teal season, an additional 7 days of hunting (for a total of 16 days) and 1 additional teal (for a total of 5 teal) would be allowed. Second, for Central Flyway production States, the recommended harvest strategy would provide for a season of up to 7 days, beginning no earlier than September 20, and a daily bag limit of 4 ducks, 3 of which must be teal. The Council further recommended that the Service work with the States to cooperatively develop an experimental design and criteria to adequately evaluate the proposed expansion of teal harvest.

iv. September Duck Seasons

*Council Recommendations:* The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended that Iowa be allowed to open the second segment of their split duck season no earlier than October 10, instead of October 15.

v. High Plains Mallard Management Unit

*Council Recommendations:* The Central Flyway Council recommended minor administrative changes to the High Plains Mallard Management Unit boundary in North Dakota and South Dakota for boundary clarification and wetland development.

vi. Youth Hunt

*Council Recommendations:* The Atlantic Flyway Council recommended the continuance of the youth waterfowl hunt day and requested the Service announce their intent in June. The Council further recommended that

ducks, coots, mergansers, moorhens, brant and snow geese be open to harvest on the special day and requested clarification of whether youth may participate in other open migratory bird hunting seasons on that day.

The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended that youth waterfowl hunt day bag limits be the same as the regular-season bag limits and include ducks, geese, and coots, with framework dates 14 days outside the regular duck-season framework dates instead of 10.

The Lower-Region Regulations Committee of the Mississippi Flyway Council recommended the inclusion of geese and coots in a 2-day youth waterfowl hunting season, with framework dates 14 days outside of the regular duck-season framework dates instead of 10.

The Pacific Flyway Council recommended the continuation of the youth hunt allowing States to select outside the general season and frameworks.

#### 4. Canada Geese

##### A. Special Seasons

*Council Recommendations:* The Atlantic Flyway Council recommended a 3-year experimental September Canada goose season in New Jersey with a framework closing date of the first Saturday in October.

The Atlantic Flyway Council recommended an experimental framework closing date of October 5 for the Long Island, New York, 1997 September Canada Goose Season.

The Pacific Flyway Council recommended expansion of the Washington September Canada goose hunt zone to include all of Washington for 7 consecutive days. The Council also recommended the establishment of a new 9-day season, with a 2-bird daily bag and possession limit, in Humboldt County, California. Harvest of up to 200 birds would be controlled through a regulated permit system.

##### B. Regular Seasons

*Council Recommendations:* The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended Iowa be allowed to open its regular Canada goose season on September 27, 1997, rather than on the Saturday nearest October 1 (October 4, 1997).

#### 7. Snow and Ross's (Light) Geese

*Council Recommendations:* The Lower-Region Regulations Committee of the Mississippi Flyway Council

recommended the Service follow the regulatory changes for snow goose harvest endorsed by the Arctic Goose Joint Venture Management Board.

The Central Flyway Council recommended the Service extend light goose hunting in the Rainwater Basin region of Nebraska to March 10.

#### 9. Sandhill Cranes

*Council Recommendations:* The Central Flyway and Pacific Flyway Councils recommended that in Montana, sandhill cranes in Wheatland County and that portion of Sweet Grass County north of I-90 be delineated as Rocky Mountain Population sandhill cranes. Thus, management of these cranes, including harvest, would be guided by the Rocky Mountain Population Sandhill Crane Management Plan, rather than the Mid-Continent Population Sandhill Crane Management Plan.

#### 17. White-Winged and White-Tipped Doves

*Council Recommendations:* The Central Flyway Council recommended removing the restriction of no more than 6 white-winged doves in the aggregate daily bag limit during the regular mourning dove season in Texas.

#### 18. Alaska

*Council Recommendations:* The Pacific Flyway Council recommended an experimental tundra swan season in the Kotzebue Sound region of Alaska's GMU 23, which would be consistent with the Pacific Flyway Management Plan's harvest and permit guidelines for Western Population of [Tundra] swans, and current guidelines for conductive experimental seasons (3-year evaluation). The recommended season framework would be September 1 - October 31 with a 3-swan per season limit (by sequential permit) and a maximum of 300 permits in the GMU.

The Pacific Flyway Council recommended an increase in Alaska's dark goose daily bag and possession limit from 4 and 8 to 6 and 12, respectively in GMU 9(D) and the Unimak Island portion of Unit 10.

The Pacific Flyway Council recommended an increase in Alaska's falconry bag limits to 6 daily and 12 in possession for migratory birds in the aggregate. Restrictive species limits would not be applied.

#### 22. Falconry

*Written Comments:* The North American Falconers Association urged the Service to examine all possible means by which falconers might be afforded safe access to the expanding

hunting potential reflected in the AHM working group's recommended alternatives. In particular, they were concerned that the potential "liberal" alternative (i.e., 107-day season) under consideration in the Pacific Flyway allows no opportunity for special falconry seasons under current regulations. Further, they can envision other similar season expansions in other Flyways.

*Service Response:* Under the Migratory Bird Treaty (1916), sport hunting seasons are set at a maximum of 107 days. However, most regular hunting seasons are much shorter than that permitted by the Treaty. Thus, the Service has utilized special "extended" falconry seasons which allow falconers the opportunity to hunt when gun hunters are not afield. The Service recognizes that as some regular hunting seasons become longer due to increases in certain migratory bird populations and overall decreasing hunter numbers, seasons approach, and in some cases, meet, the Treaty's mandated 107-day season limit. While the Service also recognizes the special concerns of falconers relative to the safety of their birds, we do not believe the provisions of the Treaty allow for any latitude regarding sport season length and methods of take.

### 23. Other

#### A. Compensatory Days

*Council Recommendations:* The Atlantic Flyway Council requested the Service grant compensatory days for States in their Flyway that are closed to waterfowl hunting statewide on Sunday by State law. The Council's requested compensatory days would apply to waterfowl seasons only and not to other migratory game birds. The compensatory request includes the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, North Carolina, Pennsylvania, Virginia, and West Virginia.

#### Public Comment Invited

The Service intends that adopted final rules be as responsive as possible to all concerned interests, and therefore desires to obtain the comments and suggestions of the public, other concerned governmental agencies, non-governmental organizations, and other private interests on these proposals. Such comments, and any additional information received, may lead to final regulations that differ from these proposals.

Special circumstances are involved in the establishment of these regulations

which limit the amount of time that the Service can allow for public comment. Specifically, two considerations compress the time in which the rulemaking process must operate: (1) the need to establish final rules at a point early enough in the summer to allow affected State agencies to appropriately adjust their licensing and regulatory mechanisms; and (2) the unavailability, before mid-June, of specific, reliable data on this year's status of some waterfowl and migratory shore and upland game bird populations. Therefore, the Service believes that to allow comment periods past the dates specified is contrary to the public interest.

#### Comment Procedure

The policy of the Department of the Interior, whenever practical, affords the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may participate by submitting written comments to the Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634—ARLSQ, 1849 C Street, NW., Washington, DC 20240. The public may inspect comments during normal business hours at the Service's office in room 634, Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia. The Service will consider all relevant comments received. The Service will attempt to acknowledge received comments, but substantive response to individual comments may not be provided.

#### NEPA Consideration

NEPA considerations are covered by the programmatic document, "Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSER 88-14)," filed with EPA on June 9, 1988. The Service published a Notice of Availability in the June 16, 1988, **Federal Register** (53 FR 22582). The Service published its Record of Decision on August 18, 1988 (53 FR 31341). Copies of these documents are available from the Service at the address indicated under the caption **ADDRESSES**.

#### Endangered Species Act Consideration

As in the past, hunting regulations are designed, among other things, to remove or alleviate chances of conflict between seasons for migratory game birds and the protection and conservation of endangered and threatened species. Consultations are presently under way

to ensure that actions resulting from these regulatory proposals will not likely jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitat. It is possible that the findings from the consultations, which will be included in a biological opinion, may cause modification of some regulatory measures proposed in this document. The final frameworks will reflect any modifications. The Service's biological opinions resulting from its consultation under Section 7 are public documents and are available for public inspection in the Division of Endangered Species and the Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia.

#### Regulatory Flexibility Act; Executive Order (E.O.) 12866 and the Paperwork Reduction Act

In the **Federal Register** dated March 13, 1997, the Service reported measures it had undertaken to comply with requirements of the Regulatory Flexibility Act and the Executive Order. These included preparing a Small Entity Flexibility Analysis (Analysis) in 1996 to document the significant beneficial economic effect on a substantial number of small entities. The Analysis estimated that migratory bird hunters would spend between \$254 and \$592 million at small businesses in 1996. Copies of the Analysis are available upon request from the Office of Migratory Bird Management. This rule was not subject to review by the Office of Management and Budget under E.O. 12866.

The Service examined these proposed regulations under the Paperwork Reduction Act of 1995 and found no information collection requirements.

#### List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

The rules that eventually will be promulgated for the 1997-98 hunting season are authorized under 16 U.S.C. 703-712 and 16 U.S.C. 742 a-j.

Dated: May 30, 1997.

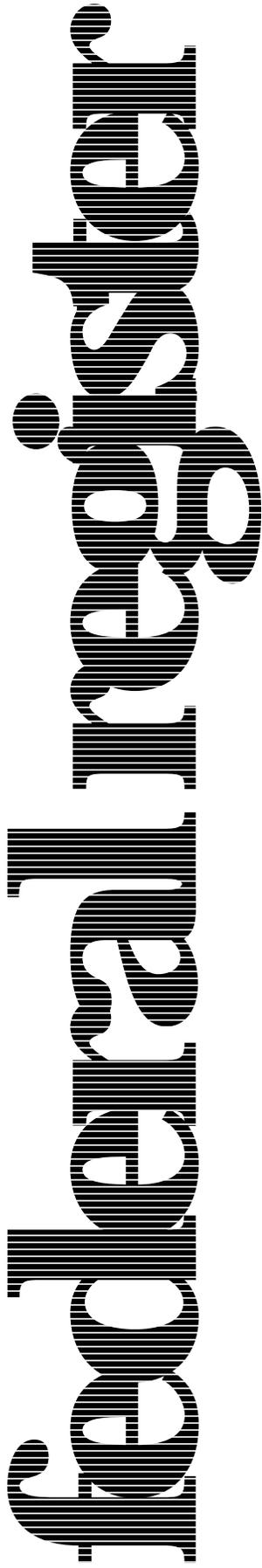
**Donald J. Barry,**

*Assistant Secretary for Fish and Wildlife and Parks.*

PROPOSED REGULATORY ALTERNATIVES FOR DUCK HUNTING DURING THE 1997-98 SEASON

	ATLANTIC FLYWAY			MISSISSIPPI FLYWAY			CENTRAL FLYWAY (a)			PACIFIC FLYWAY (b)(c)																																																																																																																																				
	VERY RES	RES	LIB	VERY RES	RES	LIB	VERY RES	RES	LIB	VERY RES	RES	LIB																																																																																																																																		
Beginning Shooting Time	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise																																																																																																																																		
Ending Shooting Time	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset																																																																																																																																		
Opening Date	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1	Oct. 1																																																																																																																																		
Closing Date	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20	Jan. 20																																																																																																																																		
Season Length	20	30	45	60	60	60	60	60	60	60	60	60																																																																																																																																		
Daily Bag Possession	3 6	3 6	4 6																																																																																																																																											
Species/Sex Limits within the Overall Daily Bag Limit	<table border="1"> <tr> <td>Mallard (Total/Female)</td> <td>3/1</td> <td>3/1</td> <td>4/2</td> </tr> <tr> <td>Pintail</td> <td>1</td> </tr> <tr> <td>Black Duck</td> <td>1</td> </tr> <tr> <td>H. Merganser</td> <td>2</td> </tr> <tr> <td>Canvasback</td> <td>2</td> </tr> <tr> <td>Redhead</td> <td>1</td> </tr> <tr> <td>Wood Duck</td> <td>1</td> </tr> <tr> <td>Whistling Ducks</td> <td>Closed</td> </tr> <tr> <td>Harequin</td> <td>1</td> </tr> <tr> <td>Mottled Duck</td> <td>1</td> </tr> </table>												Mallard (Total/Female)	3/1	3/1	4/2	4/2	4/2	4/2	4/2	4/2	4/2	4/2	4/2	4/2	Pintail	1	1	1	1	1	1	1	1	1	1	1	1	Black Duck	1	1	1	1	1	1	1	1	1	1	1	1	H. Merganser	2	2	2	2	2	2	2	2	2	2	2	2	Canvasback	2	2	2	2	2	2	2	2	2	2	2	2	Redhead	1	1	1	1	1	1	1	1	1	1	1	1	Wood Duck	1	1	1	1	1	1	1	1	1	1	1	1	Whistling Ducks	Closed	Harequin	1	1	1	1	1	1	1	1	1	1	1	1	Mottled Duck	1	1	1	1	1	1	1	1	1	1	1	1											
Mallard (Total/Female)	3/1	3/1	4/2	4/2	4/2	4/2	4/2	4/2	4/2	4/2	4/2	4/2																																																																																																																																		
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Mottled Duck	1	1	1	1	1	1	1	1	1	1	1	1																																																																																																																																		

(a) In the High Plains Mallard Management Unit, all regulations would be the same as the remainder of the Central Flyway with the exception of season length. Additional days would be allowed under the various options as follows:  
 very restrictive - 8, restrictive - 12, moderate and liberal - 23. Under all options, additional days must be on or after the Saturday nearest December 10.  
 (b) In the Columbia Basin Mallard Management Unit, all regulations would be the same as the remainder of the Pacific Flyway, with the exception of season length. Under all options except the liberal option, an additional 7 days would be allowed in Alaska. Framework dates, bag limits, and season length would be different than the remainder of the Pacific Flyway. The bag limit would be 5-7 under the very restrictive and restrictive options, and 8-10 under the moderate and liberal options.  
 (c) There would be no restrictions on pintails, and canvasback limits would follow those for the remainder of the Pacific Flyway. Under all options, season length would be 107 days and framework dates would be Sep 1 - Jan 26.



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Friday  
June 6, 1997

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**Part VI**

**Office of  
Management and  
Budget**

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**48 CFR Part 9904  
Cost Accounting Standards Board;  
Allocation of Contractor Restructuring  
Costs; Final Rule**

**OFFICE OF MANAGEMENT AND BUDGET****Office of Federal Procurement Policy****48 CFR Part 9904****Cost Accounting Standards Board; Allocation of Contractor Restructuring Costs**

**AGENCY:** Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB.

**ACTION:** Final rule; interpretation.

**SUMMARY:** The Cost Accounting Standards (CAS) Board is issuing an interpretation designed to address period cost assignment and allocability criteria for restructuring costs incurred under certain national defense contracts.

**DATES:** *Effective Date:* August 15, 1994.

**FOR FURTHER INFORMATION CONTACT:** Richard C. Loeb, Executive Secretary, Cost Accounting Standards Board (telephone: 202-395-3254).

**SUPPLEMENTARY INFORMATION:****A. Background**

Section 818 of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, restricts the Department of Defense from reimbursing a contractor or subcontractor that decides to avail itself of incurring restructuring costs associated with a business combination unless certain "net savings" provisions are met. Questions have arisen as to the methods to be used in measuring, assigning and allocating such restructuring costs. This interpretation is designed to address these questions, as well as the cost of restructuring activities, in general.

This interpretation is based upon the interim interpretation (with request for comment) issued by the CAS Board on March 8, 1995, 60 *FR* 12711. Ten sets of public comments were received in response to the interim interpretation. None of the commenters identified any substantive issues, although several requested more specificity with respect to the relationship of the interim interpretation to the provisions of CAS 9904.406—Cost Accounting Period. Accordingly, the interim interpretation is being revised to clarify that it serves principally as an interpretation of the provisions of CAS 9904.406 as related to restructuring costs.

**B. Authority To Issue an Interpretation**

Authority for issuance of this interpretation is provided by 41 U.S.C. 422(f)(1) and 48 CFR 9901.302(b).

**Richard C. Loeb,**

*Executive Secretary, Cost Accounting Standards Board.*

**List of Subjects in 48 CFR part 9904**

Accounting, Government procurement.

Accordingly, 48 CFR part 9904 is amended as follows:

**Part 9904—COST ACCOUNTING STANDARDS****Subpart 9904.406—Cost Accounting Standard—Cost Accounting Period**

1. The authority citation for part 9904 of chapter 99 of title 48 continues to read as follows:

**Authority:** Pub. L. 100-679, 102 Stat. 4056, 41 U.S.C. 422.

2. Section 9904.406-61 is amended by adding text to read as follows:

**§ 9904.406-61 Interpretation.**

(a) Questions have arisen as to the allocation and period cost assignment of certain contract costs (primarily under defense contracts and subcontracts). This section deals primarily with the assignment of restructuring costs to cost accounting periods. In essence, it clarifies whether restructuring costs are to be treated as an expense of the current period or as a deferred charge that is subsequently amortized over future periods.

(b) "Restructuring costs" as used in this Interpretation means costs that are incurred after an entity decides to make a significant nonrecurring change in its business operations or structure in order to reduce overall cost levels in future periods through work force reductions, the elimination of selected operations, functions or activities, and/or the combination of ongoing operations, including plant relocations. Restructuring activities do not include ongoing routine changes an entity makes in its business operations or organizational structure. Restructuring costs are comprised both of direct and indirect costs associated with contractor restructuring activities taken after a business combination is effected or after a decision is made to execute a significant restructuring event not related to a business combination. Typical categories of costs that have been included in the past and may be considered in the future as restructuring charges include severance pay, early retirement incentives, retraining,

employee relocation, lease cancellation, asset disposition and write-offs, and relocation and rearrangement of plant and equipment. Restructuring costs do not include the cost of such activities when they do not relate either to business combinations or to other significant nonrecurring restructuring decisions.

(c) The costs of betterments or improvements of capital assets that result from restructuring activities shall be capitalized and depreciated in accordance with the provisions of 9904.404 and 9904.409.

(d) When a procuring agency imposes a net savings requirement for the payment of restructuring costs, the contractor shall submit data specifying

(1) the estimated restructuring costs by period,

(2) the estimated restructuring savings by period (if applicable), and

(3) the cost accounting practices by which such costs shall be allocated to cost objectives.

(e) Contractor restructuring costs defined pursuant to this section may be accumulated as deferred cost, and subsequently amortized, over a period during which the benefits of restructuring are expected to accrue. However, a contractor proposal to expense restructuring costs for a specific event in a current period is also acceptable when the Contracting Officer agrees that such treatment will result in a more equitable assignment of costs in the circumstances.

(f) If a contractor incurs restructuring costs but does not have an established or disclosed cost accounting practice covering such costs, the deferral of such restructuring costs may be treated as the initial adoption of a cost accounting practice (see 9903.302-2(a)). If a contractor incurs restructuring costs but does have an existing established or disclosed cost accounting practice that does not provide for deferring such costs, any resulting change in cost accounting practice to defer such costs may be presumed to be desirable and not detrimental to the interests of the Government (see 9903.201-6). Changes in cost accounting practices for restructuring costs shall be subject to disclosure statement revision requirements (see 9903.202-3), if applicable.

(g) Business changes giving rise to restructuring costs may result in changes in cost accounting practice (see 9903.302). If a contract price or cost allowance is affected by such changes in cost accounting practice, adjustments shall be made in accordance with subparagraph (a)(4) of the CAS clause

(see 9903.201-4(a)(2), 9903.201-4(c)(2) and 9903.201-4(e)(2)).

(h) The amortization period for deferred restructuring costs shall not exceed five years. The straight-line method of amortization should normally be used, unless another method results in a more appropriate matching of cost to expected benefits.

(i) Restructuring costs that are deferred shall not be included in the computation to determine facilities capital cost of money (see 9904.414). Specifically, deferred charges are not tangible or intangible capital assets and

therefore are excluded from the facilities capital values for the computation of facilities capital cost of money.

(j) Restructuring costs incurred at a home office level shall be treated in accordance with the provisions of 9904.403. Restructuring costs incurred at the segment level that benefit more than one segment should be allocated to the home office and treated as home office expense pursuant to 9904.403. Restructuring costs incurred at the segment level that benefit only that segment shall be treated in accordance

with the provisions of 9904.418. If one or more indirect cost pools do not comply with the homogeneity requirements of 9904.418 due to the inclusion of the costs of restructuring activities, then the restructuring costs shall be accumulated in indirect cost pools that are distinct from the contractor's ongoing indirect cost pools.

(k) This section is applicable to contractor "restructuring costs" paid or approved on or after August 15, 1994.

[FR Doc. 97-14773 Filed 6-5-97; 8:45 am]

BILLING CODE 3110-01-P

**Presidential  
Determination  
No. 97-25**

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Friday  
June 6, 1997

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**Part VII**

**The President**

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**Presidential Determination No. 97-25—  
Determination Under Subsection 402(d)(1)  
of the Trade Act of 1974, as Amended—  
Continuation of Waiver Authority**



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**Federal Register**

Vol. 62, No. 109

Friday, June 6, 1997

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**Presidential Documents****Title 3—****Presidential Determination No. 97-25 of May 29, 1997****The President****Determination Under Subsection 402(d)(1) of the Trade Act of 1974, as Amended—Continuation of Waiver Authority****Memorandum for the Secretary of State**

Pursuant to the authority vested in me under the Trade Act of 1974, as amended, Public Law 93-618, 88 Stat. 1978 (hereinafter "the Act"), I determine, pursuant to subsection 402(d)(1) of the Act, 19 U.S.C. 2432(d)(1), that the further extension of the waiver authority granted by subsection 402(c) of the Act will substantially promote the objectives of section 402 of the Act. I further determine that continuation of the waiver applicable to the People's Republic of China will substantially promote the objectives of section 402 of the Act.

You are authorized and directed to publish this determination in the **Federal Register**.



THE WHITE HOUSE,  
*Washington, May 29, 1997.*

[Fr Doc. 97-15036

Filed 6-5-97; 8:45 am]

Billing code 4710-10-M

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**LIST OF PUBLIC LAWS**

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-523-6641. This list is also available online at <http://www.nara.gov/nara/fedreg/fedreg.html>.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-2470). The text will also be made available on the Internet from GPO Access at [http://www.access.gpo.gov/su\\_docs/](http://www.access.gpo.gov/su_docs/). Some laws may not yet be available.

**H.R. 5/P.L. 105-17**

Individuals with Disabilities Education Act Amendments of 1997 (June 4, 1997; 111 Stat. 37)

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