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Friday
December 17, 1999

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Presidential Documents

Title 3—

The President

Proclamation 7260 of December 13, 1999

Bicentennial Commemoration of the Death of George Washington

By the President of the United States of America

A Proclamation

Few individuals in history have had a more profound and lasting effect on a nation and its people than has George Washington. His character, convictions, and vision shaped our Republic in its crucial formative years and started us on the great American journey that continues to this day.

At every moment of challenge or peril in the early history of our Nation, George Washington emerged as a leader of uncommon wisdom and steadfast dedication to the ideals of service. A brilliant warrior, he held together a small, undisciplined army with the force of his personality and the trust he inspired in his men, ultimately leading them to victory in the American Revolution. When the Constitutional Convention began in Philadelphia in 1787, the delegates turned to George Washington to lead their efforts to create a Constitution for the American people. Elected unanimously to preside over the Convention, Washington helped to craft the blueprint for our democracy that has inspired freedom-loving peoples across the globe for more than 2 centuries.

As the first President of the United States, George Washington used his power wisely and with restraint, recognizing that his actions would set enduring precedents and traditions for the leaders who would follow him. He set a steady course for our fledgling Nation, keeping us free from entanglement in foreign conflicts, laying the foundations for financial stability and economic prosperity, maintaining a strong defense to preserve our independence and security, and ensuring above all the protection of Americans' rights and freedoms. And, in relinquishing his office at the appointed time, he established by example the peaceful transition of power that has become the hallmark of our democracy.

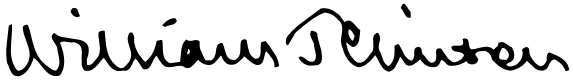
Near midnight on December 14, 1799, America's great warrior, statesman, and leader took his final breath. His last words were, ''Tis well.'' Due in large part to the early guiding hand of George Washington, it has been well for our Nation ever since. Now, 200 years later, as America continues its journey into a new century, it is fitting that we acknowledge our enduring debt to this great man.

The Congress, by Senate Concurrent Resolution 83, has requested the President to proclaim December 14, 1999, as a day to commemorate the 200th anniversary of the death of George Washington.

NOW, THEREFORE, I, WILLIAM J. CLINTON, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim December 14, 1999, as the Bicentennial Commemoration of the Death of George Washington. I call upon the people of the United States to mark this day with appropriate ceremonies and activities, paying tribute to the life and achievements of George Washington and his contributions to our Nation. As a further mark of respect, I hereby order that the flag of the United States shall be flown at half-staff upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia

and throughout the United States and its Territories and possessions on Tuesday, December 14, 1999. I also direct that the flag shall be flown at half-staff on that day at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of December, in the year of our Lord nineteen hundred and ninety-nine, and of the Independence of the United States of America the two hundred and twenty-fourth.



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Rules and Regulations

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

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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASW–19]

Revision of Class D Airspace; NAS JRB (Carswell Field), Fort Worth, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final Rule.

SUMMARY: This action revises Class D airspace extending upward from the surface to and including 3,000 feet mean seal level (MSL), within a 4.5-mile radius of the Naval Air Station (NAS) Joint Reserve Base (JRB) Carswell Field, Fort Worth, TX. This action is prompted by the U.S. Navy request to enhance flight safety and reduce the mid-air collision potential for aircraft operating in the vicinity of NAS JRB Carswell Field, Fort Worth, TX. The intended effect of this proposal is to provide adequate controlled airspace for aircraft operating in the vicinity of NAS JRB Carswell Field, Fort Worth, TX.

EFFECTIVE DATE: 0901 UTC, February 24, 2000.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193–0520, telephone: 817–222–5593.

SUPPLEMENTARY INFORMATION:

History

On September 22, 1999, a proposal to amend 14 CFR Part 71 to revise Class D airspace at NAS JRB Carswell Field, Fort Worth, TX, was published in the **Federal Register** (64 FR 51273). The proposal was to revise Class D airspace extending upward from the surface to and including 3,000 feet MSL, within a 4.5-mile radius of the NAS JRB Carswell Field, Fort Worth, TX. This action is prompted by the U.S. Navy request to enhance flight safety and reduce the mid-air collision potential for aircraft operating in the vicinity of NAS JRB Carswell Field, Fort Worth, TX. The intended effect of this proposal is to provide adequate controlled airspace for aircraft operating in the vicinity of NAS JRB Carswell Field, Fort Worth, TX.,

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments to the proposal were received. The rule is adopted as proposed, with the exception of minor editorial changes.

The coordinates for this airspace docket are based on North American Datum 83. Designated Class D airspace areas are published in paragraph 5000 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR 71.1. The Class D airspace designations listed in this document will be published subsequently in the order.

The Rule

This amendment to 14 CFR Part 71 revises Class D airspace, at NAS JRB Carswell Field, Fort Worth, TX, extending upward from the surface to and including 3,000 feet MSL, within a 4.5-mile radius of the NAS JRB Carswell Field, Fort Worth, TX.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule will not have federalism implications under Executive Order 13132.

Further, the FAA has determined that this regulation only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 154 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9G, *Airspace Designations and Reporting Points,* dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 5000 Class D airspace areas.

* * * * *

ASW TX D Fort Worth NAS JRB (Carswell Field), TX [Revised]

Fort Worth, NAS JRB Carswell Field, TX
(Lat. 32°46′09″ N., long. 97°26′30″ W.)
Carswell ILS Localizer North
(Lat. 32°47′19″ N., long. 97°26′28″ W.)
Carswell TACAN
(Lat. 32°46′18″ N., long. 97°26°22″ W.)
Carswell ILS Localizer South
(Lat. 32°45′08″ N., long. 97°26′27″ W.)

That airspace extending upward from the surface to and including 3,000 feet MSL within a 4.5-mile radius of NAS JRB Carswell Field and within 1 mile each side of the Carswell ILS Localizer north course extending from the 4.5-mile radius to 6.5 miles north of the airport and within 1.3 miles each side of the 359° radial of the Carswell TACAN extending from the 4.5-mile radius to 6.5 miles north of the airport and within 1 mile each side of the Carswell ILS Localizer south course extending from the 4.5-mile radius to 6.5 miles south of the airport and within 1.3 miles each side of the 182° radial of the Carswell TACAN extending from the 4.5-mile radius to 6.5 miles south of the airport excluding that airspace east of long. 97°24′00″ W.

Issued in Forth Worth, TX on December 8, 1999.

JoEllen Casilio

Assistant Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99–32769 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASW–22]

Revision of Class E Airspace; Corpus Christi, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; correction.

SUMMARY: This action corrects an error in the legal description of a direct final rule that was published in the **Federal Register** on October 5, 1999 (64 FR 53899) that revised the Class E Airspace at Corpus Christi, TX.

EFFECTIVE DATE: 0901 UTC, December 30, 1999.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193–0520, telephone 817–222–5593.

SUPPLEMENTARY INFORMATION:

History

On October 5, 1999 (64 FR 53899), the FAA published a direct final rule that revised the description of the Class E airspace area at Corpus Christi, TX. However, an error was made in the legal description for the Corpus Christi, TX Class E airspace area. The geographic coordinates for the latitude (lat.) of the Corpus Christi VORTAC was incorrectly shown as 26°54′14″N. It should have been 27°54′14″N. This action corrects that error.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the publication on October 5, 1999; FR Doc. 99–25856 and the legal description in FAA Order 7400.9G which is incorporated by reference in 14 CFR 71.1 are corrected as follows:

§ 71.1 [Corrected]

* * * * *

On page 53900, beginning at the bottom of the first column, the legal description is corrected to read as follows:

ASW TX E5 Corpus Christi, TX [Revised]

Corpus Christi International Airport, TX
(Lat. 27°46′13″N., long. 97°30′04″W.)
Corpus Christi NAS
(Lat. 27°41′35″N., long. 97°17′29″W.)
Nueces County Airport, TX
(Lat. 27°46′43″N., long. 97°41′26″W.)
Corpus Christi VORTAC, TX
(Lat. 27°54′14″N., long. 97°26′42″W.)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Corpus Christi International Airport and within 1.4 miles each side of the 200° radial of the Corpus Christi VORTAC extending from the 7.5mile radius to 8.5 miles north of the airport and within 1.5 miles each side of the 316° bearing from the airport extending from the 7.5-mile radius to 10.1 miles northwest of the airport and within an 8.8-mile radius of Corpus Christi NAS and within a 6.3-mile radius of Nueces County Airport.

* * * * *

Issued in Forth Worth, TX, on December 8, 1999.

JoEllen Casilio,

Assistant Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99–32770 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASW–27]

Revision of Class E Airspace; Lake Jackson, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E airspace at Lake Jackson, TX. The development of a Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP), at Brazoria County Airport, Angleton/Lake Jackson, TX, has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Brazoria County Airport, Angleton/Lake Jackson, TX.

DATES: Effective 0901 UTC, April 20, 2000. Comments must be received on or before January 31, 2000.

ADDRESSES: Send comments on the rule in triplicate to Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99–ASW–27, Fort Worth, TX 76193–0520. The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Meacham Boulevard, Room 663, Fort Worth, TX, between 9:00 AM and 3:00 PM, Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193–0520, telephone 817–222–5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises the Class E airspace at Lake Jackson, TX. The development of a GPS SIAP, at Brazoria County Airport, Angleton/Lake Jackson, TX, has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Brazoria County Airport, Angleton/Lake Jackson, TX.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR § 17.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical actions have resulted in negligible adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be

published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action is needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the 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 that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–ASW–27.'' The postcard will be date stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various level of government. Therefore, it is determined that this final rule will not have federalism implications under Executive Order 13132.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated will not have a significant economic impact, positive or negative, on a substantial number of small entities under the critiera of the Regulatory Flexibility Act. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

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

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9G, *Airspace Designations and Reporting Points,* dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW TX E5 Lake Jackson, TX [Revised]

Angleton/Lake Jackson, Brazoria County Airport, TX
(Lat. 29°06′31″N., long. 95°27′43″W.)

That airpsace extending upward from 700 feet above the surface within a 6.7-mile radius of Brazoria County Airport.

* * * * *

Issued in Fort Worth, TX, on December 8, 1999.

JoEllen Casilio,

Assistant Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99–32771 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASW–30]

Revision of Class E Airspace; Artesia, NM

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E airspace at Artesia, NM. The development of a Nondirectional Radio Beacon (NDB) Standard Instrument Approach Procedure (SIAP), at Artesia Municipal Airport, Artesia, NM, has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Artesia Municipal Airport, Artesia, NM.

DATES: Effective 0901 UTC, April 20, 2000. Comments must be received on or before January 31, 2000.

ADDRESSES: Send comments on the rule in triplicate to Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99–ASW–30, Fort Worth, TX 76193–0520. The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Meacham Boulevard, Room 663, Fort Worth, TX, between 9 AM and 3 PM, Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193–0520, telephone 817–222–5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises the Class E airspace at Artesia, NM. The development of a NDB SIAP, at Artesia Municipal Airport, Artesia, NM, has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Artesia Municipal Airport, Artesia, NM.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR § 71.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical actions have resulted in negligible adverse comments or objections. Unless a written adverse or negative comment, or a written notice, of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action is needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the 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 that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–ASW–30.'' The postcard will be date stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule will not have federalism implications under Executive Order 13132.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) 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. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

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

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CRF 71.1 of the Federal Aviation Administration Order 7400.9G, *Airspace Designations and Reporting Points,* dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005: Class E airspace areas extending upward from 700 feet or more above the surface of the Earth.

* * * * *

ASW NM E5 Artesia, NM [Revised]

Artesia Municipal Airport, NM
(Lat. 32°51′09″ N., long. 104°28′04″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Artesia Municipal Airport and within 1.8 miles each side of the 035° bearing from the Artesia Municipal Airport extending from the 7-mile radius to 8.1 miles northeast of the airport and within 2.5 miles each side of the 305° bearing from the Artesia Municipal Airport extending from the 7-mile radius to 7.6 miles northwest of the airport and within 2.5 miles each side of the 150° bearing from the Artesia Municipal Airport extending from the 7-mile radius to 7.6 miles southeast of the airport.

* * * * *

Issued in Fort Worth, TX, on December 8, 1999.

JoEllen Casilio,

Assistant Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99–32773 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASW–29]

Revision of Class E Airspace; Carrizo Springs, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E airspace at Carrizo Springs, TX. The development of a Nondirectional Radio Beacon (NDB) Standard Instrument Approach Procedure (SIAP), at Dimmit County Airport, Carrizo Springs, TX, has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight

Rules (IFR) operations to Dimmit County Airport, Carrizo Springs, TX.

DATES: Effective 0901 UTC, April 20, 2000. Comments must be received on or before January 31, 2000.

ADDRESSES: Send comments on the rule in triplicate to Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99–ASW–29, Fort Worth, TX 76193–0520.

The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Meacham Boulevard, Room 663, Fort Worth, TX, between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193–0520, telephone 817–222–5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises the Class E airspace at Carrizo Springs, TX. The development of a NDB SIAP, at Dimmit County Airport, Carrizo Springs, TX, has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Dimmit County Airport, Carrizo Springs, TX.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical actions have resulted in negligible adverse comments or objections. Unless a written or adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action is needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the 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 that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–AWS–29.'' The postcard will be date stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various level of government. Therefore, it is determined that this final rule will not have federalism implications under Executive Order 13132.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) 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. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

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

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9G, *Airspace Designation and Reporting Points*, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005: Class E airspace areas extending upward from 700 feet or more above the surface of the Earth.

* * * * *

ASW TX E5 Carrizo Springs, TX [Revised]

Carrizo Springs, Dimmit County Airport, TX
(Lat. 28°31′22″ N., Long. 99°49′27″ W.)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Dimmit County Airport.

Issued in Fort Worth, TX, on December 8, 1999.

JoEllen Casilio,

Assistant Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99–32772 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASW–31]

Revision of Class E Airspace; Del Rio, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E Airspace at Del Rio, TX. Insufficient controlled airspace to conduct aircraft recoveries during Instrument Flight Rules (IFR) operations for the United States Air Force (USAF) has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Laughlin Air Force Base (AFB), Del Rio, TX.

DATES: Effective 0901 UTC, April 20, 2000. Comments must be received on or before January 31, 2000.

ADDRESSES: Send comments on the rule in triplicate to Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99–ASW–31, Fort Worth, TX 76193–0520. The official docket maybe examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Meacham Boulevard, Room 663, Fort Worth, TX, between 9:00 AM and 3:00 PM, Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193–0520, telephone 817–222–5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises the Class E airspace at Del Rio, TX. Insufficient controlled airspace to conduct aircraft recoveries during IFR operations for the USAF has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for IFR operations to Laughlin AFB, Del Rio, TX.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR § 71.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical actions have resulted in negligible adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action is needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the 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 that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–ASW–31.'' The postcard will be date stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various level of government. Therefore, it is determined that this final rule will not have federalism implications under Executive Order 13132.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) 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. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

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

Authority: 49 U.S.C. 106(g), 40103, 40113. 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9G, *Airspace Designations and Reporting Points,* dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW TX E5 Del Rio, TX [Revised]

Del Rio, Laughlin AFB, TX
(lat. 29°21′36″N., long. 100°46′39″W.)
Laughlin VORTAC
(lat 29°21′39″N., long. 100°46′18″W.)
Del Rio International Airport, TX
(lat 29°22′19″N., long. 100°55′23″W.)

That airspace extending upward from 700 feet above the surface within a 8-mile radius of Laughlin AFB and within 8 miles east and 6.5 miles west of the 149° radial of the Laughlin VORTAC extending from the 8-mile radius to 16 miles southeast of the VORTAC and within 8 miles north and 4 miles south of the 305° radial of the Laughlin VORTAC extending from the 8-mile radius to 16 miles northwest of the VORTAC and within a 12.3-mile radius of the Del Rio International Airport excluding that airspace in Mexico.

* * * * *

Issued in Fort Worth, TX, on December 8, 1999.

JoEllen Casilio,

Assistant Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99–32774 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

Changes in Permissible Stage 2 Airplane Operations

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of statutory changes.

SUMMARY: The FAA is notifying operators of Stage 2 airplanes of recent changes to the Airport Noise and Capacity Act that except certain airplanes from the law and allow other Stage 2 airplanes to operate past the statutory deadline for certain operations. This notice explains the effect of the law and provides a procedure for operators to use to obtain a special flight authorization allowing nonrevenue flight of Stage 2 airplanes.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Connor, Manager, Noise Division (AEE–100), Office of Environment and Energy, FAA, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8933, fax (202) 267–5594, email *Thomas.Connor@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Airport Noise and Capacity Act (ANCA) of 1990 prohibits the operation of civil subsonic turbojet Stage 2 airplanes over 75,000 pounds in the contiguous United States after December 31, 1999. The original version of the law did not distinguish airplanes by type of certification or operation. The waiver provisions of the original law are very limited, and address only limited revenue operation of Stage 2 airplanes by U.S. air carriers.

On November 29, 1999, the President signed into law certain changes to ANCA that effect operators of Stage 2 airplanes. The prohibition on revenue operations of Stage 2 airplanes after December 31, 1999, remains in effect. The FAA was not granted any new authority to allow anyone to operate a Stage 2 airplane in revenue service after December 31, 1999. The changes to the law are summarized as follows:

Conflicting Regulations in 14 CFR Part 91

The changes described below may appear to conflict with various portions of the noise transition regulations currently codified at 14 CFR 91.801 through 91.877. However, the new provisions state that the regulations are to be considered modified where they conflict with any new statutory provisions. The FAA is aware that the statutory change is not apparent to anyone reading the regulations, and plans to change the regulations through appropriate rulemaking within the next year.

Experimental Certificates

Turbojet airplanes over 75,000 pounds that operate under an experimental airworthiness certificate have been excepted from the law. The requirement that aircraft over 75,000 pounds meet Stage 3 noise levels no longer applies to airplanes with experimental airworthiness certificates. These airplanes may continue to be flown after December 31, 1999, without further action by the operator or by the FAA. The prohibition on non-Stage 3 operation continues to apply to all airplanes operating under any other type of airworthiness certificate.

Hawaiian Operators

Certain operators of Stage 2 airplanes in Hawaii are now allowed to bring their Stage 2 airplanes to the contiguous United States for maintenance or major alterations. This change to the statute permits these flights without further action by the operators or by the FAA.

Nonrevenue Stage 2 Operations

The revised law now permits a range of nonrevenue Stage 2 operations to occur after December 31, 1999. Any operator of a Stage 2 airplane over 75,000 pounds may operate that airplane in the contiguous United States for the following purposes:

- Sell, lease or scrap the airplane
- Obtain modifications to meet Stage 3 noise levels
- Obtain scheduled heavy maintenance or significant modifications
- Deliver the airplane to a lessee or return it to a lessor
- Park or store the airplane
- Prepare the airplane for any of these events

With regard to these listed uses, operators are advised to note the following:

(1) Nonrevenue flight is a shorthand term. Whether you are a commercial or noncommercial operator, Stage 2 operations are restricted to the purposes listed above only. No ''dual purposes'' are allowed. For example, you may not operate a Stage 2 airplane for one of the listed purposes and also transport a company official or company goods, or accomplish any action in furtherance of company business. Nonrevenue service means that the flight does not generate any revenue for carrying passengers or cargo.

(2) Operators moving a Stage 2 airplane to location where Stage 3 modifications may be obtained must provide a copy of the modification contract to the FAA with the application for a special flight authorization. For the other purposes, documentation of the activity may be required depending on the circumstances presented.

(3) ''Scheduled heavy maintenance'' means a ''C'' or ''D'' check. The FAA interprets the statutory language to mean that operators of Stage 2 airplanes may not request a special flight authorization to accomplish routine

light maintenance actions in the United States.

(4) Similarly, ''significantly modifications'' is interpreted as those that require specialized knowledge or equipment not readily available elsewhere, or is not practicable to obtain outside the United States. All requests claiming significant modifications will be reviewed individually.

(5) No Stage 1 operations of covered airplanes are permitted for any reason.

Special Flight Authorizations

The FAA is implementing the provisions of the law that allow nonrevenue flights by issuing special flight authorizations. An operators of a Stage 2 airplane that wishers to operate in the contiguous United States for any of the purposes listed in the revised statute (and above) may apply to the FAA's Office of Environment and Energy (AEE) for a special flight authorization. The applicant must file in advance. Applications are due 30 days in advance of the planned flight and must provide the information necessary for the FAA to determine that the planned flight is within the limits prescribed in the law.

Any Stage 2 airplane (not otherwise excepted from the law) that operates for any reason after December 31, 1999, without a special flight authorization will be considered in violation of the law. The operator may be subject to civil penalties (including a fine of up to $11,000 per flight) or other remedial actions, including cease and desist orders. Once granted, the special flight authorization must be carried on board the airplane during the authorized flight. Similar to other special flight authorization, only flight crew members are permitted on board the airplane during the flight. Further, the special flight authorizations issued by AEE are for noise only. They are not substitutes for any other authorization or ferry permit that may be required for airworthiness or other reasons, such as those granted under 14 CFR § 21.199 or § 43.3.

To simplify the application process, the FAA has developed a form that lists the information that the applicant must supply. Use of this form is not mandatory; it is intended to simplify the process. The form does contain important reminders about the use of special flight authorizations. In some cases, more information than is requested on the form may be necessary for the FAA to determine whether a special flight authorization can be issued.

The form has received OMB approval for information collection and can be obtained on the FAA's web site (http://*www.aee.faa.gov/sfa/*), or by fax or mail by contacting the Office of Environment and Energy at the number listed in the **FOR FURTHER INFORMATION CONTACT** section above. The form is also reproduced below.

Given the short notice of these changes and procedures necessitated by the recent passage of the legislation, the FAA will make every attempt to satisfy the needs of affected operators of Stage 2 airplanes in a timely manner. Operators of Stage 2 airplanes that have any questions concerning their rights or requirement under the new statutory language are encouraged to contact the FAA as soon as possible.

Request for Special Flight Authorization Stage 2 Airplane Over 75,000 Pounds

1. Applying Operator:
   (a) Operator's Name:
   (b) Address:
   (c) City:
   (d) State and zip code:
   (e) Country:
   (f) Contact Name:
   (g) Contact Phone Number:
   (h) Contact Fax Number:
   (i) Contact E-mail Address:
2. Airplane:
   (a) Airplane Make, Model, and Series:
   (b) Registration Number (including country of registration):
   (c) Serial Number:
   (d) Current Noise Certification (check one):
   Stage 1 Stage 2
3. Purpose (check one and fill in appropriate fields):
   —(a) Sell, lease or use the airplane outside the contiguous 48 States;
   —(b) Scrap the airplane;
   —(c) Obtain modifications to the airplane to meet Stage 3 noise levels (copy of modification contract required with this application);
   —(d) Perform scheduled heavy maintenance or significant modifications on the airplane at a maintenance facility in the contiguous 48 States. Maintenance (check all applicable):
   —'C' Check
   —'D' Check
   —Other significant modifications (describe):
   —(e) Deliver the airplane to a lessee (include name and address of both parties below);
   —(f) Return the airplane to the lessor (include name and address of both parties below);
   —(g) Prepare or park or store the airplane in anticipation of any of the activities described in (a) through (e) (include name and location of storage or maintenance facility):

   Company's Name:

   Company's Location:
4. Flights:
   (a) Dates (approximate start and end dates);
   (b) Describe each flight (origin and destination). Designate if fuel stop only.

   Flight 1:

   Flight 2:

   * * *

   Flight __:
5. Other information:

Note: This form is an application for a special flight authorization only. It may not be used to fly an airplane. It must be submitted to the FAA, which will issue a special flight authorization based on the information submitted.

When issued, the Special Flight Authorization must be carried on board the airplane during the authorized flight. Persons on board are limited to flightcrew only. A Special Flight Authorization issued pursuant to this application is for noise only, and may not be used as a substitute for other ferry permit or authorization that may be required for airworthiness or other purposes, such as 14 CFR § 21.199 or § 43.3.

Paperwork Reduction Act Statement: The information collected on this form is required by PL 106–113. The FAA will use the information to issue special flight authorizations for nonrevenue operations of Stage 2 airplanes at U.S. airports. The annual burden is estimated to be 25 hours based on 100 requests at 15 minutes per request. The submission of information is voluntary. If proprietary information is submitted, it will be protected in accordance with appropriate laws. 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 number for this collection is 2120–0652.

(FAA Changes is Permissible Stage 2 Airplane Operations)

Issued in Washington, DC on December 13, 1999.

Paul R. Dykeman,

Deputy Director, Office of Environment and Energy.

[FR Doc. 99–32725 Filed 12–14–99; 3:08 pm]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 254

[Docket No. OST–1996–1340, formerly Docket 41690]

RIN 2105–AC07

Domestic Baggage Liability

AGENCY: Office of the Secretary, DOT.

ACTION: Final Rule.

SUMMARY: The Department is amending its rule governing the minimum amount to which U.S. carriers may limit their liability to passengers for lost, damaged, or delayed baggage in domestic air transportation. We are raising the minimum liability limit from $1250 to $2500. Also, to keep the minimum liability limit current, the Department will review the Consumer Price Index for All Urban Consumers every two years and adjust the minimum limit if necessary. Doubling the current minimum limit to $2500 reflects judgments by the Department and some in Congress about fairness and the current value of some consumer baggage claims. The Department's intent in adopting the higher minimum limit is to offer consumers a more reasonable level of protection while continuing to allow airlines to limit their exposure to extraordinary claims.

DATES: This rule will become effective on January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Joanne Petrie, Office of Regulation and Enforcement, Office of the General Counsel, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–9315.

SUPPLEMENTARY INFORMATION:

Background

Part 254 of Title 14 of the Code of Federal Regulations (Part 254) puts a floor under the amount to which an air carrier may limit its liability for loss, damage, or delay in the carriage of passenger baggage in domestic air transportation. The rule applies to both charter and scheduled service. It provides, ''[i]n any flight segment using large aircraft [any aircraft designed to have a maximum passenger capacity of more than 60 seats], or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $1250 for each passenger.'' 14 CFR 254.4 (1999).

In addition, Part 254 requires a carrier to provide certain types of notice to passengers. It provides, ''[i]n any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall provide to passengers, by conspicuous written material included on or with its ticket, either: (a) Notice of any monetary limitation on its baggage liability to passengers; or (b) The following notice: ''Federal rules require any limit on an airline's baggage liability to be at least $1250 per passenger.'' 14 CFR 254.5 (1999).

The minimum liability limit was last amended by a final rule, issued by the Civil Aeronautics Board (CAB) before its ''sunset,'' in 1984. ER–1374, 49 FR 5065, February 10, 1984. The $1250 figure was based on the increase in the Consumer Price Index for All Urban Consumers'' (CPI–U) between the date of the previous amendment in May 1977 and September 1983. When setting the minimum limit, the CAB attempted to determine the amount necessary to cover the value of passengers' baggage while still allowing air carriers to protect themselves from extraordinary claims.

Regulatory History of the Current Proposal

In 1993, Public Citizen and the Aviation Consumer Action Project (ACAP) petitioned the Department to raise the minimum liability limit to $1850. In response to the petition, the Department issued a notice of proposed rulemaking (NPRM), requesting comment on three proposals. 59 FR 49868, September 30, 1994.

The first proposal would have raised the minimum liability limit to $1850. To assess the economic effects of this figure on the industry, the Department requested that air carriers submit annual data on 1993 domestic baggage claims. The second proposal would have raised the minimum liability limit to $1850 with a mechanism that provided for periodic future increases based on the CPI–U. The third proposal would have raised the minimum liability limit to $2000. Comments and baggage data were due on November 29, 1994.

In November 1994, the Air Transport Association (ATA) asked for an extension of the November 29, 1994, deadline. In response, the Department declined to alter the deadline for submission of baggage data, but agreed to publish the baggage data in the docket in aggregate form and to extend the comment period for 30 days after such publication. 59 FR 60926, November 29, 1994. The Department received several comments, which are accessible, along with the aggregate baggage data and other rulemaking documents, at the Department's Docket Management System website (http://dms.dot.gov) in Docket No. OST–1996–1340. In 1998, ACAP filed an updated petition requesting that the Department raise the minimum liability limit, recalculated with the then-current CPI–U index, to $2,100.

On June 28, 1999, the Department issued a supplemental notice of proposed rulemaking (SNPRM) that proposed to double the minimum liability limit to $2,500 with an adjustment mechanism using the CPI–U. The Department based the proposed amount of the minimum limit on the Administration's legislative proposal, titled the ''Airline Passenger Fair Treatment Initiative,'' as well as the minimum liability limit Congress considered in H.R. 780. The Department selected the CPI–U as the basis for future increases because it is the best available measure of the current-dollar replacement cost to a consumer for replacing lost, damaged, or delayed items in checked baggage.

In order to keep the minimum liability limit current, the Department proposed that it would review the CPI–U every two years following the issuance of a final rule in this proceeding. The Department would increase the minimum liability limit (rounded to the nearest $100 for simplicity), if necessary, based on the July CPI–U of the second year following the previous amendment. Under this process, the Department would announce the increase by publishing a final rule in the **Federal Register** in early fall of the second year. Because this would merely reflect a mathematical computation of the minimum liability limit using the CPI–U, the Department would not need to first publish a proposed rule. The new minimum liability limit and the revised notice requirement would be effective on the following January 1.

Comments Received on the SNPRM

As part of the airline industry's Airline Customer Service Commitment, released on June 17, 1999, the Air Transport Association (ATA) petitioned the Department to increase the minimum liability limit. ATA represents the airlines that carry roughly 95 percent of the nation's air travelers. In comments that ATA filed separately

from its petition, it supports the increase in the minimum liability limit to $2500. ATA's opinion is, however, that the CPI–U does not reflect accurately the effect of inflation on contents of baggage and should, therefore, not be used to adjust the minimum liability limit. Since ''most of the contents of baggage are apparel,'' ATA asserts that the apparel component of the Consumer Price Index (CPI) is a more sensible index to use to adjust the minimum liability limit. To address concerns that air travelers also often pack relatively more expensive electronic equipment in their checked baggage, ATA points out that the video and audio component of the CPI is more stable than that for apparel. Using the apparel component of the CPI would not, therefore, disadvantage travelers with respect to non-apparel items in their checked baggage. Atlantic Southeast Airlines (ASA) also opposes using the CPI–U to adjust the minimum liability limit. ASA asserts that passenger baggage generally contains clothing and personal hygiene products, whose rate of inflation tends to be lower than for many items included in the aggregate CPI–U.

Trans World Airlines, Inc. (TWA) supports the proposed $2500 minimum liability limit, but believes the Department should reconsider its proposal to adjust the minimum limit every two years. Because the inflation rate has been, in recent years, very low, TWA suggests that the Department revise the minimum limit, if necessary, every five years instead.

The Regional Airline Association (RAA), which is not a party to the Airline Customer Service Commitment, does not support the Department's proposal to increase the minimum liability limit to $2500. The RAA questions whether the DOT's minimum liability limits have ever accurately reflected the value of the contents of passengers' baggage. Further, the RAA, like the ATA, argues that the CPI–U is the wrong measure of inflation to use to adjust the minimum liability limit since it includes more than apparel, which the RAA asserts is the primary component of passengers' baggage.

Sky Trek International Airlines (Sky Trek) is opposed to the Department's proposal to amend its domestic baggage liability rule. Sky Trek states, ''[T]he airlines themselves should determine the extent to which baggage liability should affect their product's marketability.'' Further, Sky Trek argues that, contrary to the Department's assertion, domestic carriers have actively improved their baggage handling systems. Sky Trek bases this argument on the Department's statistics that indicate a steady number of mishandled baggage complaints in the face of dramatic increases in enplanements from 1993 through 1998.

Also, Sky Trek believes that most mishandled baggage is the result of employee misconduct. Sky Trek suggests, therefore, that the Department permit a portion of Passenger Facility Charges (PFCs) to be used to enhance security in those airport areas where baggage is most at-risk of loss or damage. Further, Sky Trek suggested that an airline task force, not the Department, should establish industry guidelines for resolving damaged baggage claims.

The Luggage and Leather Goods Manufacturers of America, Inc. (LLGMA) supports both the proposed increase in the minimum liability limit and the biannual update mechanism. LLGMA represents over 300 producers, distributors, and retailers of travel goods, including luggage. LLGMA's comments express a concern, however, that these measures will contribute further to the passing back of repair or replacement costs to its members by air carriers. LLGMA accused the airlines of failing to improve their baggage handling systems and causing most of the damage to passengers' baggage.

LLGMA made the following recommendations to prevent the airlines from evading responsibility for their actions that result in damaged baggage. First, LLGMA urges the Department to monitor airline claims departments closely to determine whether airlines are accepting responsibility for bags that their baggage handling systems damage. Second, LLGMA recommends that the Department report in its monthly Air Travel Consumer Report (ATCR) the number of mishandled baggage complaints that involve damage. LLGMA also requests that the ATCR include information on the resolution of these complaints. LLGMA asserts that these measures will encourage the airlines to improve their baggage handling systems and provide LLGMA with information it needs to determine the frequency of damaged baggage and whether airlines are resolving the damaged baggage complaints.

Several airline passengers, such as Rita Altamore, wrote to support the increase in the minimum liability limit as long overdue. Emmett Scully suggests that the proposed figure of $2500 is too low. Several of these passengers note that stricter enforcement of carry-on baggage limitations forces them to check more of their belongings. Joan Junger comments that some elderly passengers or passengers with disabilities must place all their belongings in checked baggage since they may be unable to carry carry-on baggage. Further, Walter and Christa Barke and an anonymous commenter urge airlines to prevent loss and damage to baggage by doing things such as securing baggage areas and requiring persons to show baggage claim checks before leaving secured areas.

Finally, ATA further suggests that the Department redraft the notice requirement in 14 CFR 254.5 to state that the Department has established the minimum liability limit at $2500, that the amount is subject to periodic revision, and that passengers should consult their travel agents or airlines for further information. ATA asserts that this kind of notice would disclose clearly and directly to passengers the minimum liability limit without requiring repeated revisions to ticket stock and related documents. Alternatively, TWA suggests that the Department permit airlines to deplete existing ticket stock when the minimum liability limit changes, since the old stock would disclose a lower than actual minimum liability limit, which would not result in any harm to consumers.

DOT's Response to the Comments

The Department's proposal to double the current minimum liability limit to $2500 reflects the Department's judgment about fairness and the current value of some baggage claims. Some members of Congress also considered $2500 to be an appropriate minimum limit. H.R. 780, 106th Cong. § 101(a) (1999). Further, ATA, in its Airline Customer Service Commitment, vowed to support this increase in the minimum liability limit. Also, the Department applauds both American Airlines and Midwest Express Airlines for voluntarily raising their minimum liability limits in advance of this rule.

Although the CPI–U includes many goods and services that are not associated with passengers' baggage, the apparel component of the CPI–U also does not accurately reflect the wide variety of items passengers pack in their luggage. The Department believes the CPI–U is the proper index to use for its proposed biannual updates of the minimum liability limit. The CPI–U reflects spending patterns for approximately 80 percent of the U.S. population. The CPI–U is the best measure for adjusting payments to consumers when the intent is to allow consumers to purchase the same items in current dollars. Since no single index or component of an index covers all items in passengers' baggage, the aggregate CPI–U is the best available measure of the cost to passengers of

replacing their belongings when an airline loses, damages, or delays their baggage.

The Department recognizes that airlines often order ticket stock and related documents that contain the baggage liability notice that Part 254 requires in bulk to receive discounted rates. Under this rule, the Department will review the minimum liability limit every two years. Since the Department will always round the minimum liability limit to the nearest hundred-dollar amount, however, the minimum limit will likely not change every two years. If, as TWA suggests, the inflation rate continues to remain steady, uncertainty involving the amount of the minimum liability limit will not be as burdensome as ATA and TWA represent. The Department continues to believe that notice to consumers of the minimum liability limit, as 14 CFR 254.5 requires, should contain the current minimum liability limit.

For a reasonable time, however, the Department will not enforce the notice requirement in § 254.5 while airlines deplete their current ticket stock that contains the old minimum liability limit. During this time, the Department encourages airlines to use inserts or other means to notify passengers of the new $2500 minimum liability limit.

As a final matter, the Department wishes to call attention to a change in the formula used to adjust the minimum liability limit from the formula published in the SNPRM. The formula in this final rule is merely a technical correction to reflect the Department's description of the adjustment mechanism in the preambles of the SNPRM and this final rule.

Regulatory Analyses and Notices

E.O. 12866 and DOT Regulatory Policies and Procedures

The Department has determined that this action is not a significant regulatory action under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. Interested parties can access the regulatory evaluation that examines the projected costs and impacts of the proposal in the docket (OST–1996–1340). Since this final rule is the same as the proposed rule and since we have received no comments providing information that warrants changing any of the analysis, the Department has decided to adopt the draft regulatory evaluation as final.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. The Department received no comments in response to the SNPRM on potential impacts on small entities. By its express terms, the rule applies only to flight segments that use large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft. Few, if any, air carriers operating large aircraft would qualify as small entities. The rule could apply to some air carriers that might be considered small entities to the extent that they interline or codeshare with large air carriers. Based on our analysis, we also do not believe this rule would have significant economic impact because most claim payments are currently well below the existing $1250 minimum liability limit. Claimants still need to demonstrate the extent of their actual losses and are not automatically entitled to compensation at the higher level.

Federalism Implications

The Department believes that a federalism assessment is unnecessary since this rule does not have sufficient federalism implications under Executive Order 13132.

Compliance with the Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), each federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal Regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Sec. 201. Section 202 of the Unfunded Mandates Reform Act further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on state, local, and tribal government and the private sector. Since this rule does not result in an unfunded mandate, the Department did not prepare a statement.

List of Subject in 14 CFR Part 254

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, the Department amends 14 CFR Part 254 as follows:

PART 254—DOMESTIC BAGGAGE LIABILITY

1. The authority citation for part 254 is revised to read as follows:

Authority: 49 U.S.C. 40113, 41501, 41504, 41510, 41702, and 41707.

§ 254.1 [Amended]

2. In § 254.1, the phrase ''and overseas'' is removed and the phrase ''and intrastate'' is added in its place.

§ 254.2 [Amended]

3. In § 254.2, the phrase ''or overseas'' is removed and the phrase ''or intrastate'' is added in its place.

4. Section 254.4 is revised to read as follows:

§ 254.4 Carrier liability.

On any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $2500 for each passenger.

§ 254.5 [Amended]

5. In § 254.5(b), the amount ''$1250'' is revised to read ''$2500.''

6. Section 254.6 is added to read as follows:

§ 254.6 Periodic Adjustments

The Department of Transportation will review the minimum limit of liability prescribed in this part every two years. The Department will use the Consumer Price Index for All Urban Consumers as of July of each review year to calculate the revised minimum liability amount. The Department will use the following formula:

$2500 × (a/b) rounded to the nearest $100 where:

a = July CPI–U of year of current adjustment

b = Most current CPI–U figure when final rule is issued.

Issued in Washington, DC under authority delegated by 49 CFR 1.56a(h)2 on December 13, 1999.

Robert Goldner,

Acting Deputy Assistant Secretary for Aviation and International Affairs.

[FR Doc. 99–32782 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Neomycin Sulfate

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Pharmacia & Upjohn Co. The supplemental NADA provides for use of neomycin sulfate Type A medicated articles to make Type B and C medicated feeds for cattle, swine, sheep, and goats, and medicated milk replacers for calves, piglets, lambs, and goat kids.

EFFECTIVE DATE: December 17, 1999.

FOR FURTHER INFORMATION CONTACT: Dianne T. McRae, Center for Veterinary Medicine (HFV–102), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0212.

SUPPLEMENTARY INFORMATION: Pharmacia & Upjohn Co., 7000 Portage Rd., Kalamazoo, MI 49001–0199, filed supplemental NADA 140–976 that provides for use of neomycin sulfate Type A medicated articles to make Type B and C medicated feeds for cattle, swine, sheep, and goats, and medicated milk replacers for calves, piglets, lambs, and goat kids, for treatment and control of colibacillosis (bacterial enteritis) caused by *Escherichia coli* susceptible to neomycin. The products were the subject of a National Academy of Sciences/National Research Council (NAS/NRC) Drug Efficacy Study Group review of the product's effectiveness (DESI 11–315V). The results of the NAS/NRC review and FDA's conclusions based on that review were published in the **Federal Register** of January 19, 1971 (36 FR 837). The sponsor filed a supplemental NADA that reflects compliance with the results of the NAS/NRC review and FDA's conclusions based on that review. The supplement is approved as of November 3, 1999, and 21 CFR 558.364 is added to reflect the approval. The basis for approval is discussed in the freedom of information summary.

Also, 21 CFR 558.4 is amended in the ''Category II'' table in paragraph (d) to add an entry for neomycin sulfate.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

FDA has determined under 21 CFR 25.33(a)(3) 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.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

2. Section 558.4 is amended in the ''Category II'' table in paragraph (d) by adding an entry alphabetically for neomycin sulfate to read as follows:

§ 558.4 Medicated feed applications.

* * * * *

(d) * * *

Category II

Drug	Assay limits percent[1] type A	Type B maximum (100x)	Assay limits percent[1] type B/C[2]
*	*	*	*
Neomycin sulfate	80–120	100 g/lb (22.0%)	70–125
*	*	*	*

[1] Percent of labeled amount.

[2] Values given represent ranges for either Type B or Type C medicated feeds. For those drugs that have two range limit, the first set is for a Type B medicated feed and the second set is for a Type C medicated feed. These values (ranges) have been assigned in order to provide for the possibility of dilution of a Type B medicated feed with lower assay limits to make a Type C medicated feed.

* * * * *

3. Section 558.364 is added to subpart B to read as follows:

§ 558.364 Neomycin sulfate.

(a) *Approvals.* Type A medicated article: 325 grams per pound to 000009 in § 510.600(c) of this chapter.

(b) *Related tolerances.* See § 556.430 of this chapter.

(c) [Reserved]

(d) *Conditions of use.* Neomycin sulfate is used as follows:

Neomycin Sulfate	Combination	Indications for Use	Limitations	Sponsor
(1) 400 to 1,600 grams per ton (g/t) of dry type C feed.		Cattle, swine, sheep, and goats. For treatment and control of colibacillosis (bacterial enteritis) caused by *Escherichia coli* susceptible to neomycin.	To provide 10 milligrams (mg) of neomycin sulfate per pound of body weight per day for a maximum of 14 days. The concentration of neomycin sulfate required in medicated feed must be adjusted to compensate for variation in age and weight of animal, the nature and severity of disease signs, and environmental temperature and humidity, each of which affects feed consumption. If symptoms persist after using for 2 or 3 days, consult a veterinarian. Treatment should continue 24 to 48 hours beyond remission of disease symptoms. Discontinue treatment prior to slaughter as follows: Cattle 1 day, swine 3 days, sheep 2 days, and goats 3 days. A withdrawal period has not been established for use in preruminating calves. Do not use in calves to be processed for veal. A milk discard time has not been established for use in lactating dairy cattle or lactating dairy goats. Do not use in female dairy cattle 20 months of age or older or female dairy goats 12 months of age or older. For use in dry feeds only. Not for use in liquid feed supplements.	000009

Neomycin Sulfate	Combination	Indications for Use	Limitations	Sponsor
(2) 400 to 2,000 g/t of type C milk replacer.		Do.	To provide 10 mg of neomycin sulfate per pound of body weight per day for a maximum of 14 days. Amount consumed will vary depending on animal's consumption and weight. If symptoms persist after using for 2 or 3 days, consult a veterinarian. Treatment should continue 24 to 48 hours beyond remission of disease symptoms. Discontinue treatment prior to slaughter as follows: Cattle 1 day, swine 3 days, sheep 2 days, and goats 3 days. A withdrawal period has not been established for use in preruminating calves. Do not use in calves to be processed for veal. A milk discard time has not been established for use in lactating dairy cattle or lactating dairy goats. Do not use in female dairy cattle 20 months of age or older or female dairy goats 12 months of age or older. For use in milk replacers only.	000009

Dated: December 1, 1999.

Andrew J. Beaulieu,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. 99–32426 Filed 12–16–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 914

[SPATS No. IN–142–FOR]

Surface Coal Mining and Reclamation Operations On Federal Lands; State-Federal Cooperative Agreements; Indiana

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule.

SUMMARY: The Governor of the State of Indiana and the Secretary of the Department of the Interior (Secretary) are entering into a cooperative agreement between the Department of the Interior and the State of Indiana. This agreement will allow Indiana, under the permanent regulatory program, to regulate surface coal mining and reclamation operations on Federal lands in Indiana. Section 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) authorizes the cooperative agreement.

EFFECTIVE DATE: January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Andrew R. Gilmore, Director, Indianapolis Field Office, Office of Surface Mining, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Room 301, Indianapolis, Indiana 46204–1521. Telephone (317) 226–6700. Internet: INFOMAIL@indgw.osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Indiana Program
II. Submission of the Cooperative Agreement
III. Director's Findings
IV. Approval of the Cooperative Agreement
V. Summary and Disposition of Comments
VI. Procedural Determinations

I. Background on the Indiana Program

The Secretary conditionally approved the Indiana program effective on July 29, 1982. On August 19, 1983, the program was fully approved. You can find background information on the Indiana program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the July 26, 1982, **Federal Register** (47 FR 32107). You can find later actions on the Indiana program at 30 CFR 914.10, 914.15, and 914.16.

II. Submission of the Cooperative Agreement

By letter dated March 10, 1998 (Administrative Record No. IND–1598), Indiana submitted a request for a State-Federal cooperative agreement under 30 CFR 745.11.

We announced receipt of the amendment in the February 8, 1999, **Federal Register** (64 FR 6150). In the same document, we opened the public comment period and provided an opportunity for a public hearing on the adequacy of the cooperative agreement. The public comment period closed on April 9, 1999. Because no one requested a public hearing or meeting, we did not hold one.

III. Director's Findings

Under the Federal regulations at 30 CFR 745.11(f), we must make the following three findings before recommending to the Secretary that the Department of the Interior enter into a cooperative agreement with a State.

1. We find that the State of Indiana has a State program which was conditionally approved and became effective on July 29, 1982, after publication in the **Federal Register** on July 26, 1982 (47 FR 32107). The program was fully approved on August 19, 1983 (48 FR 37626).

2. We find that the State regulatory authority has sufficient budget, equipment and personnel to enforce fully the State's statutes and regulations for regulating surface coal mining and reclamation operations on Federal land covered by the cooperative agreement in Indiana. We base this finding upon the written certification by the Budget Analyst for the Division of Reclamation, Indiana Department of Natural Resources.

3. We find that the State of Indiana has the legal authority to administer the cooperative agreement. This finding is based upon the written certification of the Chief Legal Counsel of the Indiana Department of Natural Resources and on the approval of the State's permanent regulatory program.

We reported our findings to the Secretary in a decision memorandum and recommended approval of the cooperative agreement.

IV. Approval of the Cooperative Agreement

Based upon the approved Indiana State program, the administrative record of this rulemaking, written comments, and our findings and recommendations, the Secretary is entering into a permanent program cooperative agreement with the State of Indiana. We are publishing the signed cooperative agreement as part of this rulemaking and are codifying it at 30 CFR Part 914. By its terms, the cooperative agreement becomes effective on January 18, 2000.

V. Summary and Disposition of Comments

Public Comments

We requested public comments and provided an opportunity for a public hearing on the proposed cooperative agreement. No comments were submitted by members of the public and no one requested a public hearing. Because no one requested an opportunity to speak at a public hearing, we did not hold one.

Federal Agency Comments

Under 30 CFR 745.11(e), we requested comments on the cooperative agreement from various Federal agencies with an actual or potential interest in the Indiana program (Administrative Record No. IND–1629). In a letter dated February 22, 1999, the U.S. Department of the Interior Fish and Wildlife Service (FWS) stated that it has no specific concerns about the program revision as long as it provides for an agency coordination process that is at least as effective as the federal process would be (Administrative Record No. IND–1631). The cooperative agreement under Article VI. Review of Permit Application Package, items B. and C. provides for the Division of Reclamation, Indiana Department of Natural Resources to consult with the Federal land management agency and to obtain comments and determinations of other Federal agencies with jurisdiction or responsibility over Federal lands affected by the operations proposed in coal mining permit application packages. This provision is seen as adequately addressing the concern raised by the FWS.

The U.S. Department of the Interior's Bureau of Land Management (Administrative Record No. IND–1632) and the Minerals Management Service (Administrative Record No. IND–1634) responded, in letters dated March 2 and 4, 1999, respectively, that they have no comments.

VI. Procedural Determinations

1. Executive Order 12866—Regulatory Planning and Review

This document is not a significant rule and is not subject to review by the Office of Management and Budget (OMB) under Executive Order 12866.

(a) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(b) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(c) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(d) This rule does not raise novel legal or policy issues.

2. Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will establish a cooperative agreement between the Department of the Interior and the State of Indiana. The cooperative agreement does not impose any new substantive requirements on the coal industry. It merely authorizes the State of Indiana to regulate surface coal mining and reclamation activities on Federal lands in Indiana instead of the Federal government regulating these activities.

3. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more. The rule only affects the State of Indiana. The costs of carrying out the functions under the cooperative agreement are offset by grants from the Federal government.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because the rule does not impose any new requirements on the coal mining industry or consumers. The functions that will be performed by the State under the cooperative agreement are offset by grants from the Federal government.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

4. Unfunded Mandates

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. The rule establishes a cooperative agreement at the request of the State of Indiana and will result in the delegation of authority to the State. A statement containing the information required by the Unfunded Mandates Reform Act (1 U.S.C. 1531 *et seq.*) is not required.

5. Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. The rule establishes a cooperative agreement at the request of the State of Indiana and will result in the delegation of authority

to the State. A takings implication assessment is not required.

6. Executive Order 12612—Federalism

In accordance with Executive Order 12612, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment. The rule establishes a cooperative agreement at the request of the State of Indiana and will result in the delegation of authority to the State. Therefore, a Federalism assessment is not required.

7. Executive Order 12988—Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

8. Paperwork Reduction Act

This rule does not require information collection from 10 or more parties or a submission under the Paperwork Reduction Act. An OMB form 83–I is not required.

9. National Environmental Policy Act

This rule does not require an environmental impact statement since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Authors: The principal author of this final rule is Andrew R. Gilmore, Director, Office of Surface Mining, Indianapolis Field Office, Minton-Capehart Federal Building, 575 N. Pennsylvania Street, Indianapolis, Indiana 46204–1521.

List of Subjects in 30 CFR Part 914

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 14, 1999.

Sylvia V. Baca,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, 30 CFR part 914 is amended as set forth below:

PART 914—INDIANA

1. The authority citation for part 914 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 914.30 is added to read as follows:

§ 914.30 State-Federal Cooperative Agreement.

State-Federal Cooperative Agreement

The Governor of the State of Indiana (Governor) and the Secretary of the Department of the Interior (Secretary) enter into a Cooperative Agreement (Agreement) to read as follows:

Article I: Introduction, Purposes and Responsible Agencies

A. Authority

This Agreement is authorized by section 523(c) of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. 1273(c), which allows a State with a permanent regulatory program approved by the Secretary under section 503 of SMCRA, 30 U.S.C. 1253, to elect to enter into an Agreement for the State regulation of surface coal mining and reclamation operations (including surface operations and surface impacts incident to underground mining operations) on Federal lands. This Agreement provides for State regulation of coal exploration operations not subject to 43 CFR Part 3400 and surface coal mining and reclamation operations in Indiana on Federal lands (30 CFR Chapter VII Subchapter D), consistent with SMCRA and State and Federal laws governing such activities and the Indiana State Program (Program).

B. Purposes

The purposes of this Agreement are to (a) foster Federal-State cooperation in the regulation of surface coal mining and reclamation operations and coal exploration operations not subject to 43 CFR Part 3400; (b) minimize intergovernmental overlap and duplication; and (c) provide uniform and effective application of the Program on all lands in Indiana in accordance with SMCRA, the Program, and this Agreement.

C. Responsible Administrative Agencies

The Natural Resource Commission (NRC) and the Division of Reclamation (DOR) of the Indiana Department of Natural Resources will be responsible for administering this Agreement on behalf of the Governor under the approved Indiana Regulatory Program. The Office of Surface and Mining Reclamation and Enforcement (OSM) will administer this Agreement on behalf of the Secretary.

Article II: Effective Date

After being signed by the Secretary and the Governor, this Agreement will take effect 30 days after publication in the **Federal Register** as a final rule. This Agreement will remain in effect until terminated as provided in Article XI.

Article III: Definitions

The terms and phrases used in this Agreement which are defined in SMCRA, 30 CFR Parts 700, 701 and 740, the Program, including the OSM approved State Act (I.C. 14–34), and the rules and regulations promulgated pursuant to those Acts, will be given the meanings set forth in said definitions. Where there is a conflict between the above referenced State and Federal definitions, the definitions used in the Program will apply.

Article IV: Applicability

In accordance with the Federal lands program, the laws, regulations, terms and conditions of the Program are applicable to Federal lands in Indiana except as otherwise stated in this Agreement, SMCRA, 30 CFR 740.4, 740.11(a) and 745.13, and other applicable laws, Executive Orders, or regulations.

Article V: General Requirements

The Governor and the Secretary affirm that they will comply with all the provisions of this Agreement.

A. *Authority of State Agency:* DOR and NRC have and will continue to have the authority under State law to carry out this Agreement.

B. *Funds:* 1. Upon application by DOR and subject to appropriations, OSM will provide the State with the funds to defray the costs associated with carrying out its responsibilities under this Agreement as provided in section 705(c) of SMCRA, the grant agreement, and 30 CFR 735.16. Such funds will cover the full cost incurred by DOR and NRC in carrying out these responsibilities, provided that such cost does not exceed the estimated cost the Federal government would have expended on such responsibilities in the absence of this Agreement.

2. OSM's Indianapolis Field Office and OSM's Mid-Continent Region Coordinating Center office will work with DOR to estimate the amount the Federal government would have expended for regulation of Federal lands in Indiana in the absence of this Agreement.

3. OSM and the State will discuss the OSM Federal lands cost estimate. After resolution of any issues, DOR will include the Federal lands cost estimate in the State's annual regulatory grant application submitted to OSM's Indianapolis Field Office.

The State may use the existing year's budget totals, adjusted for inflation and workload considerations in estimated regulatory costs for the following grant year. OSM will notify DOR as soon as possible if such projections are not acceptable.

4. If DOR applies for a grant but sufficient funds have not been appropriated to OSM, OSM and DOR will promptly meet to decide on appropriate measures that will insure that surface coal mining and reclamation operations on Federal lands in Indiana are regulated in accordance with the Program. If agreement cannot be reached, either party may terminate the Agreement in accordance with Article XI of this Agreement.

5. Funds provided to the DOR under this Agreement will be adjusted in accordance with Office of Management and Budget Common Rule for Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments.

C. *Reports and Records:* DOR will make annual reports to OSM containing information with respect to compliance with the terms of this Agreement pursuant to 30 CFR 745.12(d). Upon request, DOR and OSM will exchange information developed under

this Agreement, except where prohibited by Federal or State law.

OSM will provide DOR with a copy of any final evaluation report prepared concerning State administration and enforcement of this Agreement. DOR comments on the report will be appended before transmission to the Congress, unless necessary to respond to a request by a date certain, or to other interested parties.

D. *Personnel:* Subject to adequate appropriations and grant awards, the DOR will maintain the necessary personnel to fully implement this Agreement in accordance with the provisions of SMCRA, the Federal lands program, and the Program.

E. *Equipment and Laboratories:* Subject to adequate appropriations and grant awards, the DOR will assure itself access to equipment, laboratories, and facilities with which all inspections, investigations, studies, tests, and analyses can be performed which are necessary to carry out the requirements of the Agreement.

F. *Permit Application Fees and Civil Penalties:* The amount of the fee accompanying an application for a permit for surface coal mining and reclamation operations on Federal lands in Indiana will be determined in accordance with the approved Indiana Program. All permit fees, civil penalties and fines collected from operations on Federal lands will be retained by the State and will be deposited within the Natural Resources Reclamation Division Fund. Permit fees will be considered program income. Civil penalties and fines will not be considered program income. The financial status report submitted pursuant to 30 CFR 735.26 will include a report of the amount of fees, penalties, and fines collected on such permits during the State's prior fiscal year.

Article VI: Review of Permit Application Package

A. Submission of Permit Application Package:

1. DOR and the Secretary require an applicant proposing to conduct surface coal mining and reclamation operations on Federal lands covered by this Agreement to submit a permit application package (PAP) in an appropriate number of copies to DOR. DOR will furnish OSM and other Federal agencies with an appropriate number of copies of the PAP. The PAP will be in the form required by DOR and will include any supplemental information required by OSM, the Federal land management agency, and other agencies with jurisdiction or responsibility over Federal lands affected by the operations proposed in the PAP.

At a minimum, the PAP will satisfy the requirements of 30 CFR 740.13(b) and include the information necessary for DOR to make a determination of compliance with the Program and for OSM and the appropriate Federal agencies to make determinations of compliance with applicable requirements of SMCRA, the Federal lands program, and other Federal laws, Executive Orders, and regulations for which they are responsible.

2. For any outstanding or pending permit applications on Federal lands being processed by OSM prior to the effective date of this Agreement, OSM will maintain sole permit decision responsibility. After the final decision, all additional responsibilities shall pass to DOR pursuant to the terms of this Agreement along with any attendant fees, fines, or civil penalties therefrom.

B. Review Procedures Where There is No Leased Federal Coal Involved:

1. DOR will assume the responsibilities for review of PAPs where there is no leased Federal coal to the extent authorized in 30 CFR 740.4(c)(1), (2), (4), (6) and (7). In addition to consultation with the Federal land management agency pursuant to 30 CFR 740.4(c)(2), DOR will be responsible for obtaining, except for non-significant revisions, the comments and determinations of other Federal agencies with jurisdiction or responsibility over Federal lands affected by the operations proposed in the PAP. DOR will request such Federal agencies to furnish their findings or any requests for additional information to DOR within 45 calendar days of the date of receipt of the PAP. OSM will assist DOR in obtaining this information, upon request. Responsibilities and decisions which can be delegated to DOR under other applicable Federal laws may be specified in working agreements between OSM and the State, with the concurrence of any Federal agency involved, and without amendment to this Agreement.

2. DOR will assume responsibility for the analysis, review and approval, disapproval, or conditional approval of the permit application component of the PAP required by 30 CFR 740.13 for surface coal mining and reclamation operations in Indiana on Federal lands not requiring a mining plan pursuant to the Mineral Leasing Act (MLA). DOR will review the PAP for compliance with the Program and the OSM approved State Act and regulations. DOR will be the primary point of contact for applicants regarding decisions on the PAP and will be responsible for informing the applicant of determinations.

3. The Secretary will make his determinations under SMCRA that cannot be delegated to the State. Some of which have been delegated to OSM.

4. OSM and DOR will coordinate with each other during the review process as needed. OSM will provide technical assistance to DOR when requested, if available resources allow. DOR will keep OSM informed of findings made during the review process which bear on the responsibilities of OSM or other Federal agencies. OSM may provide assistance to DOR in resolving conflicts with Federal land management agencies. OSM will be responsible for ensuring that any information OSM receives from an applicant is promptly sent to DOR. OSM will have access to DOR files concerning operations on Federal lands. OSM will send to DOR copies of all resulting correspondence between OSM and the applicant that may have a bearing on decisions regarding the PAP. The Secretary reserves the right to act independently of DOR to carry out his responsibilities under laws other than SMCRA.

5. DOR will make a decision on approval, disapproval or conditional approval of the permit on Federal lands.

(a) Any permit issued by DOR will incorporate any lawful terms or conditions imposed by the Federal land management agency, including conditions relating to post-mining land use, and will be conducted in compliance with the requirements of the Federal land management agency.

(b) The permit will include lawful terms and conditions required by other applicable Federal laws and regulations.

(c) After making its decision on the PAP, DOR will send a notice to the applicant, OSM, the Federal land management agency, and any agency with jurisdiction or responsibility over Federal lands affected by the operations proposed in the PAP. A copy of the permit and written findings will be submitted to OSM upon request.

C. Review Procedures Where Leased Federal Coal Is involved:

1. DOR will assume the responsibilities listed in 30 CFR 740.4(c)(1), (2), (3), (4), (6) and (7), to the extent authorized.

In accordance with 30 CFR 740.4(c)(1), DOR will assume responsibility for the analysis, review and approval, disapproval, or conditional approval of the permit application component of the PAP for surface coal mining and reclamation operations in Indiana where a mining plan is required, including applications for revisions, renewals and transfer sale and assignment of such permits. OSM will, at the request of the State, assist to the extent possible in this analysis and review.

DOR will be the primary point of contact for applicants regarding the review of the PAP for compliance with the Program and State law and regulations.

DOR will be responsible for informing the applicant of all joint State-Federal determinations.

DOR will to the extent authorized, consult with the Federal land management agency and the Bureau of Land Management (BLM) pursuant to 30 CFR 740.4(c)(2) and (3), respectively. On matters concerned exclusively with regulations under 43 CFR part 3480, Subparts 3480 through 3487, BLM will be the primary contact with the applicant. BLM will inform DOR of its actions and provide DOR with a copy of documentation on all decisions.

DOR will send the OSM copies of any correspondence with the applicant and any information received from the applicant regarding the PAP. OSM will send to DOR copies of all correspondence with the applicant which may have a bearing on the PAP. As a matter of practice, OSM will not independently initiate contacts with applicants regarding completeness or deficiencies of the PAP with respect to matters covered by the Program.

DOR will also be responsible for obtaining the comments and determinations of other Federal agencies with jurisdiction or responsibility over Federal lands affected by the operations proposed in the PAP. DOR will request all Federal agencies to furnish their findings or any requests for additional information to DOR within 45 days of the date of receipt of the PAP. OSM will assist DOR in obtaining this information, upon request of DOR.

DOR will be responsible for approval and release of performance bonds under 30 CFR

740.4(c)(4) in accordance with Article IX of this Agreement, and for review and approval under 30 CFR 740.4(c)(6) of exploration operations not subject to 43 CFR Part 3480, Subparts 3480–3487.

DOR will prepare documentation to comply with the requirements of NEPA under 30 CFR 740.4(c)(7); however, OSM will retain the responsibility for the exceptions in 30 CFR 740.4(c)(7)(i)–(vii).

2. The Secretary will concurrently carry out his responsibilities under 30 CFR 740.4(a) that cannot be delegated to DOR under the Federal lands program, MLA, the National Environmental Policy Act (NEPA), this Agreement, and other applicable Federal laws. The Secretary will carry out these responsibilities in a timely manner and will avoid to the extent possible, duplication of the responsibilities of the State as set forth in this Agreement and the Program. The Secretary will consider the information in the PAP and, where appropriate, make decisions required by SMCRA, MLA, NEPA, and other Federal laws.

Responsibilities and decisions which can be delegated to the State under other applicable Federal laws may be specified in working agreements between OSM and DOR, with concurrence of any Federal agency involved, and without amendment to this Agreement.

Where necessary to make the determination to recommend that the Secretary approve the mining plan, OSM will consult with and obtain the concurrences of the BLM, the Federal land management agency and other Federal agencies as required.

The Secretary reserves the right to act independently of DOR to carry out his responsibilities under laws other than SMCRA or provisions of SMCRA not covered by the Program, and in instances of disagreement over SMCRA and the Federal lands program.

3. OSM will assist DOR in carrying out DOR's responsibilities by:

(a) Coordinating resolution of conflicts and difficulties between DOR and other Federal agencies in a timely manner.

(b) Assisting in scheduling joint meetings, upon request, between State and Federal agencies.

(c) Where OSM is assisting DOR in reviewing the PAP, furnishing to DOR the work product within 50 calendar days of receipt of the State's request for such assistance, unless a different time is agreed upon by OSM and DOR.

(d) Exercising its responsibilities in a timely manner, governed to the extent possible by the deadlines established in the Program.

4. Review of the PAP:

(a) OSM and DOR will coordinate with each other during the review process as needed. DOR will keep OSM informed of findings and technical analyses made during the review process which bear on the responsibilities of OSM or other Federal agencies. OSM will ensure that any information it receives which has a bearing on decisions regarding the PAP is promptly sent to DOR.

(b) DOR will review the PAP for compliance with the Program and State law and regulations.

(c) OSM will review the operation and reclamation plan portion of the permit application, and any other appropriate portions of the PAP for compliance with the non-delegable responsibilities of SMCRA and for compliance with the requirements of other Federal laws and regulations.

(d) OSM and DOR will develop a work plan and schedule for PAP review and each will identify a person as the project leader. The project leaders will serve as the primary points of contact between OSM and DOR throughout the review process. Not later than 50 days after receipt of the PAP, unless a different time is agreed upon, OSM will furnish DOR with its review comments on the PAP and specify any requirements for additional data. To the extent practicable, DOR will provide OSM all available information that may aid OSM in preparing any findings.

(e) DOR will prepare a State decision package, including written findings and supporting documentation, indicating whether the PAP is in compliance with the Program. The review and finalization of the State decision package will be conducted in accordance with procedures for processing PAPs agreed upon by DOR and OSM.

(f) DOR may make a decision on approval or disapproval of the permit on Federal lands in accordance with the Program prior to the necessary Secretarial decision on the mining plan, provided that DOR advises the operator in the permit that Secretarial approval of the mining plan must be obtained before the operator may conduct coal development or mining operations on the Federal lease. DOR will reserve the right to amend or rescind any requirements of the permit to conform with any terms or conditions imposed by the Secretary in his approval of the mining plan.

(g) The permit will include, as applicable, terms and conditions required by the lease issued pursuant to the MLA and by any other applicable Federal laws and regulations, including conditions imposed by the Federal land management agency relating to post-mining land use, and those of other affected agencies, and will be conditioned on compliance with the requirements of the Federal land management agency with jurisdiction.

(h) After making its decision on the PAP, DOR will send a notice to the applicant, OSM, the Federal land management agency, and any agency with jurisdiction or responsibility over Federal land affected by operations proposed in the PAP. A copy of the written findings and the permit will also be submitted to OSM.

5. OSM will provide technical assistance to DOR when requested, if available resources allow. OSM will have access to DOR files concerning operations on Federal lands.

D. Review Procedures for Permit Revisions; Renewals; and Transfer Assignment or Sate of Permit Rights:

1. Any permit revision or renewal for an operation on Federal lands will be reviewed and approved or disapproved by DOR after consultation with OSM on whether such revision or renewal constitutes a mining plan modification pursuant to 30 CFR 746.18. OSM will inform DOR within 30 days of receiving a copy of a proposed revision or renewal, whether the permit revision, or renewal constitutes a mining plan modification. Where approval of a mining plan modification is required, OSM and DOR will follow the procedures outlined in paragraphs C.1. through C.5. of this Article.

2. OSM may establish criteria consistent with 30 CFR 746.18 to determine which permit revisions and renewals clearly do not constitute mining plan modifications.

3. Permit revisions or renewals on Federal lands which are determined by OSM not to constitute mining plan modifications under paragraph D.1. of this Article or that meet the criteria for not being mining plan modifications as established under paragraph D.2. of this Article will be reviewed and approved following the procedures set forth under Indiana law and the State Program and paragraphs B.1. through B.5. of this Article.

4. Transfer, assignment or sale of permit rights on Federal lands shall be processed in accordance with Indiana law and the State Program and 30 CFR 740.13(e).

Article VII: Inspections

A. DOR will conduct inspections on Federal lands in accordance with 30 CFR 740.4(c)(5) and prepare and file inspection reports in accordance with the Program.

B. DOR will, subsequent to conducting any inspection pursuant to 30 CFR 740.4(c)(5), and on a timely basis, file with OSM a legible copy of the completed State inspection report.

C. DOR will be the point of contact and primary inspection authority in dealing with the operator concerning operations and compliance with the requirements covered by the Agreement, except as described hereinafter. Nothing in this Agreement will prevent inspections by authorized Federal or State agencies for purposes other than those covered by this Agreement. The Department of the Interior may conduct any inspections necessary to comply with 30 CFR parts 842 and 843 and its obligations under laws other than SMCRA.

D. OSM will give DOR reasonable notice of its intent to conduct an inspection under 30 CFR 842.11 in order to provide State inspectors with an opportunity to join in the inspection.

When OSM is responding to a citizen complaint of an imminent danger to the public health and safety, or of significant, imminent environmental harm to land, air or water resources, pursuant to 30 CFR 842.11(b)(1)(ii)(C), it will contact DOR no less than 24 hours prior to the Federal inspection, if practicable, to facilitate a joint Federal/State inspection. All citizen complaints which do not involve an imminent danger or significant, imminent environmental harm will be referred to DOR for action. The Secretary reserves the right to conduct inspections without prior notice to DOR to carry out his responsibilities under SMCRA.

Article VIII: Enforcement

A. DOR will have primary enforcement authority under SMCRA concerning

compliance with the requirements of the Agreement and the Program in accordance with 30 CFR 740.4(c)(5). Enforcement authority given to the Secretary under other Federal laws and Executive orders including, but not limited to, those listed in Appendix A (attached) is reserved to the Secretary.

B. During any joint inspection by OSM and DOR, DOR will have primary responsibility for enforcement procedures, including issuance of orders of cessation, notices of violation, and assessment of penalties. DOR will inform OSM prior to issuance of any decision to suspend or revoke a permit on Federal lands.

C. During any inspection made solely by OSM or any joint inspection where DOR and OSM fail to agree regarding the propriety of any particular enforcement action, OSM may take any enforcement action necessary to comply with 30 CFR parts 843, 845, and 846. Such enforcement action will be based on the standards in the Program, SMCRA, or both, and will be taken using the procedures and penalty system contained in 30 CFR parts 843, 845, and 846.

D. DOR and OSM will promptly notify each other of all violations of applicable laws, regulations, orders, or approved mining permits subject to this Agreement, and of all actions taken with respect to such violations

E. Personnel of DOR and the Department of the Interior, including OSM, will be mutually available to serve as witness in enforcement actions taken by either party.

F. This Agreement does not affect or limit the Secretary's authority to enforce violations of Federal laws other than SMCRA.

Article IX: Bonds

A. DOR and the Secretary will require each operator who conducts operations on Federal lands to submit a performance bond payable to the State of Indiana and the United States to cover the operator's responsibilities under SMCRA and the Program. Such performance bond will be conditioned upon compliance with all requirements of the SMCRA, the Program, State rules and regulations, and any other requirements imposed by the Secretary or the Federal land management agency. Such bond will provide that if this Agreement is terminated, the portion of the bond covering the Federal lands will be payable only to the United States. DOR will advise OSM of annual adjustments to the performance bond pursuant to the Program.

B. Performance bonds will be subject to release and forfeiture in accordance with the procedures and requirements of the Program. Where surface coal mining and reclamation operations are subject to an approved mining plan, a performance bond shall be released by the State after the release is concurred in by OSM.

C. Submission of a performance bond does not satisfy the requirements for a Federal lease bond required by 43 CFR Subpart 3474 or lessee protection bond required in addition to a performance bond, in certain circumstances, by section 715 of SMCRA.

Article X: Designating Land Areas Unsuitable for all or Certain Types of Surface Coal Mining and Reclamation Operations and Activities and Valid Existing Rights (VER) and Compatibility Determinations

A. Unsuitability Petitions

1. Authority to designate Federal lands as unsuitable for mining pursuant to a petition, including the authority to make substantial legal and financial commitment determinations pursuant to section 522(a)(6) of SMCRA, is reserved to the Secretary.

2. When either DOR or OSM receives a petition to designate land areas unsuitable for all or certain types of surface coal mining operations that could impact adjacent Federal or non-Federal lands pursuant to section 522(c) of SMCRA, the agency receiving the petition will notify the other of its receipt and the anticipated schedule for reaching a decision, and request and fully consider data, information and recommendations of the other. OSM will coordinate with the Federal land management agency with jurisdiction over the petition area, and will solicit comments from the agency.

B. Valid Existing Rights and Compatibility Determinations

The following actions will be taken when requests for determinations of VER pursuant to section 522(e) of SMCRA or for determinations of compatibility pursuant to section 522(e)(2) of SMCRA, and received prior to or at the time of submission of a PAP that involves surface coal mining and reclamation operations and activities:

1. For Federal lands within the boundaries of any areas specified under section 522(e)(1) of SMCRA, OSM will determine whether VER exists for such areas.

For private in holdings within section 522(e)(1) areas, DOR, with the consultation and concurrence of OSM, will determine whether surface coal mining operations on such lands will or will not affect the Federal interest (Federal lands as defined in section 701(4) of SMCRA). OSM will process VER determination requests on private in holdings within the boundaries of section 522(e)(1) areas where surface coal mining operations affects the Federal interest.

2. For Federal lands within the boundaries of any national forest where proposed operations are prohibited or limited by section 522(e)(2) of SMCRA and 30 CFR 761.11(b), OSM will make the VER determinations. OSM will process requests for determinations of compatibility under section 522(e)(2) of SMCRA.

3. For Federal lands, DOR will determine whether any proposed operation will adversely affect any publicly owned park and, in consultation with the State Historic Preservation Officer, places listed in the National Register of Historic Sites, with respect to the prohibitions or limitations of section 522(e)(3) of SMCRA. DOR will make the VER determination for such lands using the State Program. DOR will coordinate with any affected agency or agency with jurisdiction over the proposed surface coal mining and reclamation operations.

In the case that VER is determined not to exist under section 522(e)(3) of SMCRA or 30 CFR 761.11(c), no surface coal mining operations will be permitted unless jointly approved by DOR and the Federal, State or local agency with jurisdiction over the publicly owned park or historic place.

4. DOR will process and make determinations of VER on Federal lands, using the State Program, for all areas limited or prohibited by section 522(e)(4) and (5) of SMCRA as unsuitable for mining. For operations on Federal lands, DOR will coordinate with any affected agency or agency with jurisdiction over the proposed surface coal mining and reclamation operation.

Article XI: Termination of Cooperative Agreement

This Agreement may be terminated by the Governor or the Secretary under the provisions of 30 CFR 745.15.

Article XII: Reinstatement of Cooperative Agreement

If this Agreement has been terminated in whole or in part it may be reinstated under the provisions of 30 CFR 745.16.

Article XIII: Amendment of Cooperative Agreement

This Agreement may be amended by mutual agreement of the Governor and the Secretary in accordance with 30 CFR 745.14.

Article XIV: Changes in State or Federal Standards

A. The Secretary or the Governor may from time to time promulgate new or revised performance or reclamation requirements or enforcement and administration procedures. Each party will, if it determines it to be necessary to keep this Agreement in force, change or revise its regulations or request necessary legislative action. Such changes will be made under the procedures of 30 CFR part 732 for changes to the Program and under the procedures of section 501 of SMCRA for changes to the Federal lands program.

B. DOR and the Secretary will provide each other with copies of any changes to their respective laws, rules, regulations or standards pertaining to the enforcement and administration of this Agreement.

Article XV: Changes in Personnel and Organization

Each party to this Agreement will notify the other, when necessary, of any changes in personnel, organization and funding, or other changes that may affect the implementation of this Agreement to ensure coordination of responsibilities and facilitate cooperation.

Article XVI: Reservation of Rights

This Agreement will not be construed as waiving or preventing the assertion of any rights that have not been expressly addressed in this Agreement that the State or the Secretary may have under laws other than SMCRA or their regulations including but not limited to those listed in Appendix A.

Dated: October 26, 1999.

Frank O'Bannon,

Governor of Indiana.

Bruce Babbitt,

Secretary of the Interior.

Appendix A

1. The Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.*, and implementing regulations.
2. The Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, and implementing regulations, including 43 CFR part 3480.
3. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and implementing regulations, including 40 CFR part 1500.
4. The Endangered Species Act, as amended, 16 U.S.C. 1531 *et seq.*, and implementing regulations, including 50 CFR part 402.
5. The Fish and Wildlife Coordination Act, as amended, 16 U.S.C. 661 *et seq.*; 48 Stat. 401.
6. The National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*, and implementing regulations, including 36 CFR part 800.
7. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, and implementing regulations.
8. The Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, and implementing regulations.
9. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, and implementing regulations.
10. The Reservoir Salvage Act of 1960, amended by the Preservation of Historical and Archaeological Data Act of 1974, 16 U.S.C. *et seq.*
11. Executive Order 11593 (May 13, 1971), Cultural Resource Inventories on Federal Lands.
12. Executive Order 11988 (May 24, 1977), for flood plain protection.
13. Executive Order 11990 (May 24, 1977), for wetlands protection.
14. The Mineral Leasing Act for Acquired Lands, 30 U.S. 351 *et seq.*, and implementing regulations.
15. The Stock Raising Homestead Act of 1916, 43 U.S.C. 291 *et seq.*
16. The Constitution of the United States.
17. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*
18. 30 CFR Chapter VII.
19. The Constitution of the State of Indiana.
20. Indiana Surface Coal Mining and Reclamation Act (P.L. 1–1995, SEC. 27) at Ind. Code 14–34 *et seq.*
21. Indiana Department of Natural Resources, Coal Mining and Reclamation Operations, Rules and Regulations, 310 Ind. Admin. Code 12.

[FR Doc. 99–32741 Filed 12–17–99; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

[SPATS No. OK–026–FOR]

Oklahoma Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is approving an amendment to the Oklahoma regulatory program (Oklahoma program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Oklahoma submitted its bond release guidelines with a policy statement relating to revegetation success standards for diversity on lands reclaimed for use as pastureland and grazingland. Oklahoma also submitted evidence of consultation with the U.S. Soil Conservation Service (SCS) regarding the use of test plots as a statistically valid sampling technique for demonstrating success of productivity on prime farmland. Oklahoma intends to revise its program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: December 17, 1999.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6548. Telephone: (918) 581–6430. Internet: mwolfrom@tokgw.osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Oklahoma Program
II. Submission of the Proposed Amendment
III. Director's Findings
IV. Summary and Disposition of Comments
V. Director's Decision
VI. Procedural Determinations

I. Background on the Oklahoma Program

On January 19, 1981, the Secretary of the Interior conditionally approved the Oklahoma program. You can find background information on the Oklahoma program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the January 19, 1981, **Federal Register** (46 FR 4902). You can find later actions concerning the Oklahoma program at 30 CFR 936.15 and 936.16.

II. Submission of the Proposed Amendment

On February 17, 1994, Oklahoma proposed to amend its program by revising its bond release guidelines (Administrative Record No. OK–959.01). On January 10, 1995 (60 FR 2512), we approved this amendment, with additional requirements codified at 30 CFR 936.16(c) and (g). By letter dated September 30, 1999, Oklahoma sent us additional information and documentation to support the provisions in its bond release guidelines that we had approved with additional requirements (Administrative Record No. OK–984). In response to 30 CFR 936.16(c), Oklahoma provided policy statements relating to its bond release guidelines for pastureland and grazingland. In response to 30 CFR 936.16(g), Oklahoma submitted evidence of consultation with the SCS regarding the use of test plots as a statistically valid sampling technique for demonstrating success of productivity on prime farmland.

We announced receipt of the additional information and documentation in the October 22, 1999, **Federal Register** (64 FR 56983). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of Oklahoma's additional information and supporting documentation for its bond release guidelines. The public comment period closed on November 22, 1999. Because no one requested a public hearing or meeting, we did not hold one.

III. Director's Findings

Following, under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are our findings concerning the amendment.

A. Bond Release Guidelines: Section II. Pastureland and Section III. Grazingland; 30 CFR 936.16(c).

In the January 10, 1995, **Federal Register**, we approved sections II and III of Oklahoma's bond release guidelines with the following required amendment codified at 30 CFR 936.16(c):

> (c) By March 13, 1995, Oklahoma shall revise sections II.B and III.B in the Bond Release Guidelines to identify the method it will use in developing a phase III revegetation success standard for diversity on lands reclaimed for use as pastureland and grazingland.

In its letters dated May 21, 1996, and September 30, 1999 (Administrative Record No. OK–960.04 and OK–984, respectively), Oklahoma included policy statements that identify the

methods it will use in developing a revegetation success standard for diversity on lands reclaimed for use as pastureland and grazingland. In its letter dated May 21, 1996, Oklahoma indicated that its diversity standards are based primarily on the seed mix and the comparison of this seed mix to the stand established after reclamation. In its letter dated September 30, 1999, Oklahoma stated that the currently approved provisions in its bond release guidelines contain the required diversity standards. Oklahoma's bond release guidelines for phase II at subsections II.A.1.g and III.A.1.g allow perennial species that are not listed in the approved reclamation plan, but which the Department approves as being desirable and compatible with the postmining land use, to make up 20 percent of the total ground cover. Any one of these species cannot exceed 5 percent of the ground cover. We also note that subsections II.A.1.f and III.A.1.f require, for phase II bond release on pastureland and grazingland, that no more than 10 percent litter and 10 percent desirable annual or biennial forbs can be counted as acceptable ground cover in any single sampling unit. For phase III bond release on pastureland and grazingland, subsections II.B.1.a and III.B.1.a refer the reader to the phase II standards. Oklahoma's bond release guidelines for phase III at subsections II.B.2.a and III.B.2.a require the applicant to demonstrate that the reclaimed area has had acceptable production of desirable living plants for at least two years of the liability period, except the first year. Oklahoma defines ''desirable plant species'' in Appendix A of its bond release guidelines to mean:

> Those permanent perennial species listed in the approved reclamation plan plus a limited percentage of approved annual species planted in conjunction with the permanent vegetation and invading species that are compatible with the approved postmining land use.

Oklahoma stated that its provisions ensure that 80 percent of the ground cover is composed of the species listed in the approved reclamation plan and that it is comprised of vegetation that meets the requirement for seasonality, permanence, and regeneration on both pastureland and grazingland. We also note that Oklahoma's revegetation success provisions ensure that ground cover is made up of a variety of approved plant species.

In the March 23, 1982, preamble of the proposed rule to modify the revegetation sections of the permanent regulatory program (47 FR 12597), we defined and explained the term ''diversity'' as used in section 515(b)(1) of SMCRA and the Federal regulations at 30 CFR 816.111(a)(1) and 817.111(a)(1).

> Diverse means sufficiently varied amounts and types of vegetation to achieve ground cover and support the postmining land uses. The precise numbers required to achieve this diversity should be determined by regional climatic and soil conditions. However, the ultimate test will be the sufficiency of the plant communities to assure survival of adequate number and varieties to achieve the postmining land use and the required extent of ground cover.

In the September 2, 1983, preamble of the final rule for the Federal regulations at 30 CFR 816.111(a)(1) and 817.111(a)(1), we stated that diversity could be achieved by planting a mixture of grasses and legumes (48 FR 40143). Oklahoma's provisions at subsections II.A.1.g and III.A.1.g of its bond release guidelines, along with its definition of ''desirable plant species'' in Appendix A, ensure that a variety of approved plant species will be used to achieve ground cover that support the postmining land uses of pastureland and grazingland. Oklahoma's bond release guidelines at subsections II.B.2.a and III.B.2.a, along with its policy statements, ensure that the applicant must demonstrate species diversity on reclaimed pastureland and grazingland before release of phase III bond. Specifically, the approved species will be verified by revegetation data that is collected to prove productivity on pastureland and grazingland. We find that Oklahoma has identified the methods it will use in developing a phase III revegetation success standard for diversity on lands reclaimed for use as pastureland and grazingland. Therefore, we are removing the required amendment at 30 CFR 936.16(c).

B. Bond Release Guidelines: Section V. Prime Farmland Cropland; 30 CFR 936.16(g).

In the January 10, 1995, **Federal Register**, we approved subsections V.B.2.d and V.B.2.e of Oklahoma's bond release guidelines with the following required amendment codified at 30 CFR 936.16(g):

> (g) By March 13, 1995, Oklahoma must submit, before Oklahoma allows the use of test plots as proposed at subsections V.B.2.d and V.B.2.e in the Bond Release Guidelines, evidence of consultation with the U.S. Soil Conservation Service regarding the use of test plots as a statistically valid sampling technique for demonstrating success of productivity on prime farmlands.

Oklahoma submitted a letter from the SCS dated March 2, 1993, as evidence of consultation with the SCS regarding the use of test plots as a statistically valid sampling technique for demonstrating success of productivity on prime farmland. In this letter, the SCS stated that it had reviewed Oklahoma's proposal on sampling techniques for row crops on prime farmland. The SCS referred Oklahoma to Dr. James Stiegler at the Oklahoma State University for technical evaluation of its statistical methods of sampling. In a letter dated March 15, 1996, Oklahoma asked Dr. Stiegler to review the section of its guidelines concerning the use of test plots on prime farmland cropland to prove the productivity of reclaimed soils. Oklahoma asked Dr. Stiegler to determine if Oklahoma's methods of selecting and sampling the test plots will result in valid results that will accurately demonstrate reclamation of prime farmland. Oklahoma submitted a letter from Dr. Stiegler dated April 24, 1996. In this letter, Dr. Stiegler stated:

> I have looked over the material that you have provided to me regarding the statistical adequacy of using test plots to prove the productivity of reclaimed soils. The method of selecting and sampling of the test plots as described will result in valid data to support soil productivity.

The letter from the SCS provides adequate evidence that Oklahoma consulted with the SCS regarding the use of test plots for demonstrating success of productivity on prime farmland. The letter from Dr. James Stiegler provides adequate evidence that Oklahoma's guidelines at subsections V.B.2.d and V.B.2.e contain statistically valid sampling techniques for demonstrating success of productivity on prime farmlands. Therefore, we are removing 30 CFR 936.16(g). Oklahoma may allow the use of test plots, as proposed at subsections V.B.2.d and V.B.2.e, for demonstrating success of productivity on prime farmland cropland.

IV. Summary and Disposition of Comments

Public Comments

We requested public comments on the amendment, but did not receive any.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Oklahoma program (Administrative Record No. OK–984.01). We did not receive any comments.

Environmental Protection Agency (EPA)

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written agreement from the EPA for those provisions of the

program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Oklahoma proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask the EPA to agree on the amendment.

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from the EPA (Administrative Record No. OK–984.01). The EPA responded on November 5, 1999, that it had no objection to the proposed amendments (Administrative Record No. OK–984.05).

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On October 15, 1999, we requested comments on Oklahoma's amendment (Administrative Record No. OK–984.01), but neither responded to our request.

V. Director's Decision

Based on the above findings, we approve the amendment as sent to us by Oklahoma on September 30, 1999.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 936, which codify decisions concerning the Oklahoma program. We are making this final rule effective immediately to expedite the State program amendment process and to encourage Oklahoma to bring its program into conformity with the Federal standards. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12866

The Office of Management and Budget (OMB) exempts this rule from review under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on State regulatory programs and program amendments must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

This rule does not require an environmental impact statement since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Therefore, this rule will ensure that existing requirements previously published by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifies under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 8, 1999.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 936 is amended as set forth below:

PART 936—OKLAHOMA

1. The authority citation for Part 936 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 936.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 936.15 Approval of Oklahoma regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * *
September 30, 1999	December 17, 1999	Oklahoma Bond Release Guidelines—Subsections II.A.1.f and g, II.B.1.a, II.B.2.a; III.A.1.f and g, III.B.1.a, III.B.2.a; V.B.2.d and V.B.2.e; Appendix A; Policy Statements dated May 21, 1996, and September 30, 1999.

§ 936.16 [Amended]

3. Section 936.16 is amended by removing and reserving paragraphs (c) and (g).

[FR Doc. 99–32737 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01–99–180]

RIN 2115–AA97

Safety Zone: Ambassador Construction Fireworks, Hudson River, Anchorage Channel

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the Hudson River for the Ambassador Construction Fireworks display. This action is necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic on a portion of the Hudson River.

DATES: This rule is effective from 7:45 p.m. e.s.t. to 9:15 p.m. e.s.t. on December 17, 1999. There is no rain date for this event.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01–99–180) and are available for inspection or copying at Waterways Oversight Branch, Coast Guard Activities New York, 212 Coast Guard Drive, Staten Island, New York 10305, room 205, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant J. Lopez, Waterways Oversight Branch, Coast Guard Activities New York (718) 354–4193.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On October 29, 1999, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone: Ambassador Construction Fireworks, Hudson River, Anchorage Channel in the **Federal Register** (64 FR 58366). We received no letters commenting on the proposed rule. No public hearing was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Due to the date the Application for Approval of Marine Event was received, there was insufficient time to promulgate a NPRM and a final rule that would be effective at least 30 days after it was published. The Coast Guard published an NPRM with a 30-day comment period, but this did not leave sufficient time to publish the final rule 30 days before it's effective date. Any delay encountered in this regulation's effective date would be unnecessary and contrary to public interest since immediate action is needed to prevent traffic from transiting a portion of the Hudson River and Anchorage Channel, Manhattan, New York, and provide for the safety of life on navigable waters. Additionally, this temporary safety zone is only for a one and a half hour long local event and it should have negligible impact on vessel transits due to the fact that vessels can safely transit around the zone and they are not precluded from using any portion of the waterway except the safety zone area itself. The public was notified of this event when the NPRM was published in the Local Notice to Mariners on November 4, 1999.

Background and Purpose

Bay Fireworks submitted an Application for Approval of a Marine Event for a fireworks display on the Hudson River. This regulation establishes a temporary safety zone in all waters of the Hudson River and Anchorage Channel within a 360-yard radius of the fireworks barge in approximate position 40°42′00″ N 074°01′17″ W (NAD 1983), about 340 yards south of The Battery, Manhattan, New York. The temporary safety zone is in effect from 7:45 p.m. e.s.t. to 9:15 p.m. e.s.t. on December 17, 1999. There is no rain date for this event. After publication of the NPRM the sponsor requested the start time of the event be changed from 8:15 p.m. e.s.t. to 7:45 p.m. e.s.t. The Coast Guard Captain of the Port, New York does not anticipate any negative impact from this and has authorized the time change. The temporary safety zone prevents vessels from transiting a portion of the Hudson River and Anchorage Channel, and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through the western 780 yards of the 1400-yard wide Hudson River, the eastern 300 yards of the 730-yard wide Anchorage Channel, and the East River during the event. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this event. Public notifications will be made prior to the event via local notice to mariners, and marine information broadcasts. The Coast Guard limited the comment period for this NPRM to 30 days because the temporary safety zone is only for a one and a half hour long local event and it should have negligible impact on vessel transits.

Discussion of Comments and Changes

The Coast Guard received no letters commenting on the proposed rulemaking. One change was made to the proposed rule. After publication of the NPRM the sponsor requested the starting time of the event be changed from 8:15 p.m. e.s.t. to 7:45 p.m. e.s.t. The Coast Guard Captain of the Port, New York does not anticipate any negative impact from this and has authorized the time change. The Coast Guard does not consider this half-hour earlier starting time to be a material change, therefore a supplemental notice of proposed rulemaking was not published.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it 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).

The Coast Guard expects the economic impact of this final rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. Although this regulation prevents traffic from transiting a portion of the lower Hudson River and Anchorage Channel during the event, the effect of this regulation will not be significant for several reasons: the minimal time that vessels will be restricted from the area, that vessels are not precluded from getting underway, or mooring at, piers at The Battery, Manhattan, that vessels may safely transit through the Hudson River and Anchorage Channel during the event, and advance notifications which will be made to the local maritime community by the Local Notice to Mariners, and marine information broadcasts.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a

substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit through the affected portion of the Hudson River and Anchorage Channel during the times this zone is activated.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons: Vessel traffic can safely pass through the western 780 yards of the 1400-yard wide Hudson River, the eastern 300 yards of the 730-yard wide Anchorage Channel, and the East River during the event. Additionally, vessels are not precluded from getting underway, or mooring at, piers at The Battery, Manhattan. Before the effective period, we will issue maritime advisories widely available to users of the Port of New York/New Jersey by the local notice to mariners, and marine information broadcasts.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that Order.

The Coast Guard Captain of the Port, New York does not anticipate implications for federalism due to the change of the event starting time from 8:15 p.m. e.s.t. to 7:45 p.m. e.s.t.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. This rule will not impose an unfunded mandate. No comments were received during the comment period regarding Unfunded Mandates. The Coast Guard Captain of the Port, New York does not anticipate implications on Unfunded Mandates due to the change of the event starting time from 8:15 p.m. e.s.t. to 7:45 p.m. e.s.t.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. No comments were received during the comment period regarding the Taking of Private Property. The Coast Guard Captain of the Port, New York does not anticipate implications for Taking of Private Property due to the change of the event starting time from 8:15 p.m. e.s.t. to 7:45 p.m. e.s.t.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. No comments were received during the comment period regarding Civil Justice Reform. The Coast Guard Captain of the Port, New York does not anticipate implications for Civil Justice Reform due to the change of the event starting time from 8:15 p.m. e.s.t. to 7:45 p.m. e.s.t.

Protection of Children

We have analyzed this rule under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that under figure 2–1, paragraph 34(g), of Commandant Instruction M16475.1C, this rule is categorically excluded from further environmental documentation. This rule fits category 34(g) since implementation of this action will not result in any significant cumulative impacts on the human environment, substantial controversy or substantial change to existing environmental conditions, impacts which are more than minimal on properties protected under 4(f) of the DOT Act as superseded by Public Law 97–449, and section 106 of the National Historic Preservation Act, and inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment. A ''Categorical Exclusion Determination'' is available in the docket for inspection or copying where indicated under **ADDRESSES**.

The Coast Guard received no comments during the comment period regarding Environmental Impacts. The Coast Guard Captain of the Port, New York does not anticipate implications on the environment due to the change of the event starting time from 8:15 p.m. e.s.t. to 7:45 p.m. e.s.t.

List of Subjects

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add temporary § 165.T01–180 to read as follows:

§ 165.T01–180 Safety Zone: Ambassador Construction Fireworks, Hudson River, Anchorage Channel.

(a) *Location.* The following area is a safety zone: All waters of the Hudson River and Anchorage Channel within a 360-yard radius of the fireworks barge in approximate position 40°42′00″ N 074°01′17″ W (NAD 1983), about 340 yards south of The Battery, Manhattan, New York.

(b) *Effective Period.* This section is effective from 7:45 p.m. e.s.t. to 9:15 p.m. e.s.t. on December 17, 1999. There is no rain date for this event.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene-patrol personnel. These personnel comprise commissioned, warrant, and petty officers of the Coast Guard.

Upon being hailed by a U. S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

Dated: December 10, 1999.

R.E. Bennis,

Captain, U.S. Coast Guard, Captain of the Port, New York.

[FR Doc. 99–32844 Filed 12–15–99; 12:17 pm]

BILLING CODE 4910–15–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA074–4094a; FRL–6501–2]

Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Oxygenated Gasoline Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on a revision to the Commonwealth of Pennsylvania State Implementation Plan (SIP). The revision makes the oxygenated gasoline program a contingency measure for the five-county Philadelphia area, which means that the oxygenated gasoline program would only be required to be implemented in the five-county Philadelphia area if there is a violation of the carbon monoxide (CO) national ambient air quality standard (NAAQS). The revision also makes technical amendments to the oxygenated gasoline regulation. EPA is approving this revision in accordance with the requirements of the Clean Air Act.

DATES: This rule is effective on February 15, 2000 without further notice, unless EPA receives adverse written comment by January 18, 2000. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be mailed to David L. Arnold, Chief, Ozone and Mobile Sources Branch, Mailcode 3AP21, US Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, US Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, US Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Mrs. Kelly L. Bunker, (215) 814–2177, or by e-mail at bunker.kelly@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

Motor vehicles are significant contributors of carbon monoxide (CO) emissions. An important control measure to reduce these emissions is the use of cleaner-burning oxygenated gasoline. Extra oxygen enhances fuel combustion and helps to offset fuel-rich operating conditions, particularly during vehicle starting, which are more prevalent in the winter.

Section 211(m) of the Clean Air Act, 42 U.S.C. 7401 *et seq.* (the Act), requires that states with carbon monoxide nonattainment areas with design values of 9.5 parts per million (ppm) or more, based on data for the two year period of 1988 and 1989 or any two year period after 1989, submit revisions to their State Implementation Plan (SIP) which establish oxygenated gasoline programs. Each state's oxygenated gasoline programs must require gasoline in the specified control areas to contain not less than 2.7% oxygen by weight, except that states may adopt an averaging program employing marketable oxygen credits. Where an averaging program is adopted, gasoline containing oxygen above 2.7% by weight may offset the sale of gasoline with a oxygen content below 2.7% by weight.

The minimum 2.7% standard shall apply during that portion of the year in which the areas are prone to high ambient concentrations of CO. The Act requires that the oxygenated gasoline program apply to all gasoline sold or dispensed in the larger of the Consolidated Metropolitan Statistical Area (CMSA) or the Metropolitan Statistical Area (MSA) in which the nonattainment area is located. Under section 211(m)(2), the length of the control period, to be established by the EPA Administrator, shall not be less than four months in length unless a state can demonstrate that, because of meteorological conditions, a reduced control period will assure that there will be no carbon monoxide exceedances outside of such reduced period. EPA announced guidance on the establishment of control periods by area in the **Federal Register** on October 20, 1992.[1]

In addition to the guidance on establishment of control period by area, EPA has issued additional guidance related to the oxygenated gasoline program. On October 20, 1992, EPA announced the availability of oxygenated gasoline credit program guidelines in the **Federal Register**.[2] Under a credit program, marketable oxygen credits may be generated from the sale of gasoline with a higher oxygen content than is required (i.e. an oxygen content greater than 2.7 percent by weight). These oxygen credits may be used to offset the sale of gasoline with a lower oxygen content than is required. Where a credit program has been adopted, EPA's guidelines provide that no gallon of gasoline should contain less than 2.0% oxygen by weight. EPA issued labeling regulations under section 211(m)(4) of the Act. These labeling regulations were published in the **Federal Register** on October 20, 1992.[3]

II. Background

The Philadelphia-Camden County CO nonattainment area had a design value above 11.6 ppm based on 1988 and 1989 data and consequently was subject to the requirement to adopt an oxygenated gasoline program under section 211(m) of the Act. The oxygenated gasoline program was required to be implemented in the Pennsylvania portion of the Philadelphia CMSA. The Pennsylvania portion of the Philadelphia CMSA includes the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia.

On November 12, 1992 the Commonwealth of Pennsylvania officially submitted to EPA a revision to the Pennsylvania SIP for an oxygenated gasoline program in the Pennsylvania portion of the Philadelphia CMSA. Pennsylvania's oxygenated gasoline regulations, 25 PA Code Chapters 121 and 126, required the implementation of an averaging program employing marketable oxygen credits. EPA approved these revisions to the SIP on July 21, 1994 (59 FR 37162).

On August 19, 1995, Pennsylvania adopted two major modifications to their oxygenated gasoline regulations. The first modification allows for the discontinuance of the oxygenated gasoline program in a control area if EPA approves a redesignation request for the control area which does not require the implementation of an oxygenated gasoline program. The Pennsylvania oxygenated gasoline regulation also states that if an area is redesignated to attainment and then violates the CO standard that the program must be reinstated in

[1] *See* "Guidelines for Oxygenated Gasoline Credit Programs and Guidelines on Establishment of Control Periods under Section 211 (m) of the Clean Air Act as Amended—Notice of Availability," 57 FR 47853 (October 20, 1992).

[2] *See* note 1, above. EPA was issued guidelines for credit programs under section 211(m)(5) of the Act.

[3] *See* "Notice of Final Oxygenated Fuels Labeling Regulations under section 211(m) of the Clean Air Act as Amended—Notice of Final Rulemaking," 57 FR 47769. The labeling regulations may be found at 40 CFR 80.35.

accordance with the provisions of the maintenance plan. The second modification to Pennsylvania's oxygenated gasoline regulation was to switch from an averaging program to a per-gallon program. This modification was necessary because it became apparent that none of the facilities participating in this program used the averaging provisions of the regulation, and it is not anticipated that anyone will do so in the future. Therefore, the attest engagement and certain reporting requirements which were needed for implementation of an averaging program were no longer necessary and were removed from the regulation.

On September 8, 1995 the Commonwealth of Pennsylvania submitted to EPA a redesignation request and maintenance plan for the Philadelphia portion of the Philadelphia-Camden County CO nonattainment area. In its demonstration of maintenance, the Commonwealth showed that oxygenated gasoline in the Pennsylvania portion of the Philadelphia CMSA was not necessary for continued maintenance of the CO national ambient air quality standards (NAAQS). The oxygenated gasoline program was relegated to a contingency measure in the maintenance plan. If the redesignated area violates the CO standard then the oxygenated gasoline program would be reinstated at the beginning of the next oxygenated gasoline control period. EPA approved the redesignation request and maintenance plan on January 30, 1996 (61 FR 2926).

On September 13, 1995, the Commonwealth of Pennsylvania submitted the August 19, 1995 oxygenated gasoline regulation modifications as a formal revision to its State Implementation Plan (SIP). The submittal consisted of copies of the proposed and final oxygenated gasoline regulations, 25 Pennsylvania (PA) Code Chapters 121 and 126, copies of the *Pennsylvania Bulletin's* notice of proposed and final rulemaking, comment and response documents and proof that public notice and hearing was given on the proposed regulation. The SIP revision consists of revisions to 25 PA Code Chapter 121, General Provisions, section 121.1 Definitions, the additions of section 126.101 General, section 126.102 Sampling and testing, section 126.103 Recordkeeping and reporting and section 126.104 Labeling requirements to 25 PA Code Chapter 126 and the removal of section 126.1 Oxygenate content of gasoline from 25 PA Code Chapter 126. These regulatory revisions were adopted by the Commonwealth on April 18, 1995 and became effective on August 19, 1995. The September 13, 1995 SIP submittal is the subject of this action. EPA summarizes its analysis of the state submittal below. A more detailed analysis of the state submittal is contained in a Technical Support Document (TSD) which is available from the Region III office listed in the **ADDRESSES** section of this document.

III. EPA's Analysis of Pennsylvania's Oxygenated Gasoline Program

As discussed above, section 211(m)(2) of the Act requires that gasoline sold or dispensed for use in the specified control areas contain not less than 2.7 percent oxygen by weight. Under section 211(m)(5), the EPA Administrator issued guidelines for credit programs allowing the use of marketable oxygen credits. The Commonwealth of Pennsylvania has elected to adopt a regulation requiring 2.7% oxygen content for each gallon of gasoline sold in a control area. The following sections of this document address some specific elements of the state's submittal.

Applicability and Program Scope

Section 211(m)(2) requires oxygenated gasoline to be sold during a control period based on air quality monitoring data and established by the EPA Administrator. Pennsylvania has established the control period as November 1 to February 29 which is consistent with the EPA guidance. Section 211(m)(2) requires that the oxygenated gasoline program apply to all gasoline sold or dispensed in the larger of the CMSA or MSA in which the nonattainment area is located. The Pennsylvania oxygenated gasoline regulations require oxygenated gasoline to be sold in areas as determined by section 211(m) of the Act.

Transfer Documents

The Commonwealth of Pennsylvania has included requirements related to transfer documentation in its regulation. These transfer document requirements will enhance the enforcement of the oxygenated gasoline regulation, by providing a paper trail for each gasoline sample taken by state enforcement personnel.

Enforcement and Penalty Schedules

State oxygenated gasoline regulations must be enforceable by the state oversight agency. EPA recommends that states will visit at least 20% of regulated parties during a given control period. Inspections should consist of product sampling and record review. In addition, each state should devise a comprehensive penalty schedule. Penalties should reflect the severity of a party's violation, the compliance history of the party, as well as the potential environmental harm associated with the violation.

The Pennsylvania regulation does not address enforcement provisions; however, enforcement provisions for the oxygenated gasoline program are found in section 9 of the Pennsylvania Air Pollution Control Act as amended on June 29, 1992. The Pennsylvania Air Pollution Control Act allows for the adoption of regulations for oxygenated gasoline. Section 9 of the Pennsylvania Air Pollution Control Act states that employees of the Department of Environmental Resources who are authorized to conduct inspections or investigations are declared to be law enforcement officers and are authorized to issue or file citations for violations of any regulation adopted under the Pennsylvania Air Pollution Control Act, and that the General Counsel is authorized to prosecute the offenses. This section provides for authority to enforce the oxygenated gasoline regulation. Section 9 also provides for penalty provisions. The provisions provided are both civil and criminal, depending on the type and severity of the violation. Pennsylvania's enforcement and penalty provisions are acceptable.

Test Methods and Laboratory Review

EPA's sampling procedures are detailed in Appendix D of 40 CFR part 80. EPA has recommended that states adopt these sampling procedures. The Commonwealth of Pennsylvania has adopted EPA sampling procedures. Each state regulation must include a test method and procedures for the calculation of oxygen content in the gasoline sampled. EPA's guidance ''Guidelines for Oxygenated Gasoline Credit Programs under Section 211(m) of the Clean Air act as Amended,'' issued on October 20, 1992, allow for the use of either the oxygenate flame ionization detector (OFID) test, preferred by EPA, or the American Society for Testing and Materials (ASTM) standards test method, Designation D 4815–89, although another method could be used if approved by EPA. This guidance document also describes the calculations to determine the oxygen content of the gasoline. The Commonwealth of Pennsylvania regulations require the use of the testing methods and calculations specified in EPA's guidance.

Labeling

EPA was required to issue federal labeling regulations under section 211(m)(4) of the Act. These regulations, published in the **Federal Register** on October 20, 1992, required the following statement be posted for a per-gallon program or credit program with minimum oxygen content requirement:

''The gasoline dispensed from this pump is oxygenated and will reduce carbon monoxide pollution from motor vehicles.''

The Federal regulation also specifies the appearance and placement requirements for the labels. EPA has strongly recommended that states adopt their own labeling regulations, consistent with the Federal regulation. The Commonwealth of Pennsylvania has adopted labeling regulations consistent with the federal regulation.

IV. Final Action

EPA is approving the amendments to 25 PA Code Chapter 121, General Provisions, section 121.1 Definitions, the additions of section 126.101 General, section 126.102 Sampling and testing, section 126.103 Recordkeeping and reporting and section 126.104 Labeling requirements to 25 PA Code Chapter 126 and the removal of section 126.1 Oxygenate content of gasoline from 25 PA Code Chapter 126.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipate no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on February 15, 2000 without further notice unless EPA receives adverse comment by January 18, 2000. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

V. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from review under E.O. 12866, entitled ''Regulatory Planning and Review.''

B. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation. This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

C. Executive Order 13045

E.O. 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines (1) Is ''economically significant,'' as defined under E.O. 12866, and (2) The environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This final rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health and safety risks.

D. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act,

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 actions 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).

F. 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 annual 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 annual 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.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

I. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 15, 2000. 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 approving Pennsylvania's oxygenated gasoline regulation 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, Carbon monoxide, Incorporation by reference.

Dated: November 18, 1999.

A.R. Morris,

Acting Regional Administrator, Region III.

40 CFR part 52 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 *et seq.*

Subpart NN—Pennsylvania

2. Section 52. 2020 is amended by adding paragraphs (c)(142) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(142) Revisions to the Pennsylvania Regulations for an oxygenated gasoline program submitted on September 13, 1995 by the Pennsylvania Department of Environmental Protection:

(i) Incorporation by reference.

(A) Letter of September 13, 1995 from the Pennsylvania Department of Environmental Protection transmitting the oxygenated gasoline regulation as a SIP revision.

(B) Revisions to 25 PA Code Chapter 121, General Provisions , section 121.1 Definitions, the additions of section 126.101 General, section 126.102 Sampling and testing, section 126.103 Recordkeeping and reporting and section 126.104 Labeling requirements to 25 PA Code Chapter 126 and the removal of section 126.1 Oxygenate content of gasoline from 25 PA Code Chapter 126. These revisions became effective August 19, 1995.

(ii) Additional Material.—Remainder of September 13, 1995 submittal.

[FR Doc. 99–32373 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–79–1–7439, FRL–6510–5]

Approval and Promulgation of Implementation Plans; Texas; Repeal of Board Seal Rule and Revisions to Particulate Matter Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: On October 28, 1999 (64 FR 57983), EPA published a direct final approval of a revision to the Texas State Implementation Plan which removed the old Texas Air Control Board Board Seal rule in the Texas Natural Resource Conservation Commission (TNRCC) Chapter 101, General Rules, and revised and recodified the TNRCC Particulate Matter regulations in TNRCC Chapter 111, Control of Air Pollution from Particulate Matter. The direct final action was published without prior proposal because EPA anticipated no adverse comment. The EPA stated in the direct final rule that if EPA received adverse comment by November 29, 1999, EPA would publish a timely notice of withdrawal in the **Federal Register**. The EPA subsequently received an adverse comment on the direct final rule. Therefore, EPA is withdrawing the direct final approval action. The EPA will address the comment in a subsequent final action based on the parallel proposal also published on October 28, 1999 (64 FR 58006). As stated in the parallel proposal, EPA will not institute a second comment period on this action.

DATES: The direct final rule published October 28, 1999 is withdrawn on December 17, 1999.

ADDRESSES: Copies of documents relevant to this action are available for

public inspection during normal business hours at the following location. Anyone wanting to examine these documents should make an appointment by calling the person listed below at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Bill Deese of the EPA Region 6 Air Planning Section at (214) 665–7253.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final rule located in the Rules and Regulations section and the short informational proposed rule located in the Proposed Rules section of the October 28, 1999, **Federal Register**.

Dated: December 8, 1999.

Lynda F. Carroll,

Acting Regional Administrator, Region 6.

Therefore the amendment to 40 CFR 52.2270, published in the **Federal Register** October 28, 1999 (64 FR 57983), which was to become effective December 27, 1999, is withdrawn.

[FR Doc. 99–32647 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. NJ41–207, FRL–6509–4]

Approval and Promulgation of Implementation Plans; New Jersey; Motor Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: Elsewhere in today's **Federal Register**, the Environmental Protection Agency (EPA) has published a rulemaking action proposing to find that the State of New Jersey will have implemented its enhanced inspection and maintenance (I/M) program when mandatory testing begins on December 13, 1999 and that EPA is reinstating the interim approval under section 348 of the National Highway Systems Designation Act (NHSDA). EPA is making an interim final determination that on December 13, 1999, it is more likely than not that the program will be implemented curing the deficiencies which caused sanctions to be imposed. Therefore, the application of the offset sanction that began on June 14, 1999 is stayed and the application of the highway sanction is deferred as of December 13, 1999.

DATES: Effective December 13, 1999. Although this interim final rule will be effective on December 13, 1999, EPA is accepting comments as to whether the stay and deferral announced in this document should remain in effect. Comments must be received on or before January 18, 2000.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations: Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866 and New Jersey Department of Environmental Protection, Bureau of Air Quality Planning, 401 East State Street, CN418, Trenton, New Jersey 08625.

All comments should be addressed to Raymond Werner, Acting Branch Chief, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866.

FOR FURTHER INFORMATION CONTACT: Judy-Ann Mitchell, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4249.

SUPPLEMENTARY INFORMATION:

I. Background

New Jersey submitted changes to the existing I/M program on March 27, 1996 to satisfy the applicable requirements of both the Clean Air Act (CAA) and the National Highway System Designation Act (NHSDA). On October 31, 1996 (61 FR 56172), EPA published a notice of proposed conditional interim approval of New Jersey's enhanced I/M program. On May 14, 1997 (62 FR 26401), EPA published a final conditional interim approval of New Jersey's enhanced I/M program.

Due to New Jersey's delays in starting the enhanced I/M program, EPA notified New Jersey by a December 12, 1997 letter that the sanctions clock was started for failure to implement the enhanced I/M program, in accordance with section 179(a)(4) of the Act. The offset sanction began in New Jersey on June 14, 1999. The highway sanction would begin six months thereafter if New Jersey did not implement the program. On November 19, 1999, New Jersey notified EPA by letter that the mandatory enhanced I/M program will be implemented on December 13, 1999.

II. Interim Final Action

Based on New Jersey's commitment to the start of the program on December 13, 1999, EPA believes that it is more likely than not that the State will have taken the steps necessary to start an approvable enhanced I/M program. Initiation of sanctions clocks on December 12, 1997 was based on the fact that New Jersey did not start-up a mandatory approved enhanced I/M program. EPA is now able to conclude that since New Jersey is operating an I/M program that will be fully enforceable on December 13, 1999, the State will have met the obligation to implement the enhanced I/M program and sanctions should be stayed and deferred on December 13, 1999.

In the event that the implementation is found to be inadequate, the stay and deferral may be removed and the sanctions imposed immediately upon such a finding in either a proposed or final rulemaking regarding implementation. A proposal to reinstate the interim approval under section 348 of the NHSDA and to stop the sanctions clock and lift any sanctions applied is published elsewhere in this **Federal Register**. Pursuant to 40 CFR 52.31(d)(4)(ii), the stay and deferral may be reinstated if EPA proposes to take action to find that the deficiency of having failed to implement the enhanced I/M program has not been corrected.

EPA is publishing a separate document that will serve as the proposed reinstatement of the interim approval and finding that the State of New Jersey implemented the enhanced I/M program on December 13, 1999. If comments are received which cause EPA to conclude that the enhanced I/M program has not been implemented, EPA will not proceed with the final rulemaking and both the offset and highway sanctions will be applied immediately via a letter and a **Federal Register** notice. Therefore, any comments which could affect this interim final determination must be submitted in response to the proposal to reinstate the interim approval and to stop the sanctions clock and lift the stay and deferral of the sanction. All public comments received will then be addressed in a subsequent final notice either reinstituting the sanctions or stopping this sanctions process pursuant to 40 CFR 51.31(d)(5). Parties interested in commenting should do so at this time.

III. Administrative Requirements

Because New Jersey will have met the start-up requirements as defined by

EPA, relief from sanctions should be provided as quickly as possible. Therefore, EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for comment before this action takes effect.[1] 5 U.S.C. 553(b)(B). The EPA believes that notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest. Through this interim final determination action authorized by the EPA rule on sanctions, 40 CFR 52.31(d)(ii), the Agency concludes that it is more likely than not that the State will have satisfactorily implemented the I/M program, therefore eliminating the basis for imposition of sanctions. Therefore, it is not in the public interest to apply sanctions when the State has submitted an enforceable program which will start-up on December 13, 1999. Moreover, it would be impracticable to go through notice-and-comment rulemaking on a finding that the State is no longer subject to that requirement prior to the date sanctions would take effect. Therefore, EPA believes that it is necessary to use the interim final rulemaking process to stay and defer sanctions while EPA completes its rulemaking process regarding the lifting of the sanctions. In addition, EPA is invoking the good cause exception to the 30-day advance notice requirement of the APA because the purpose of this notice is to relieve a restriction. *See* 5 U.S.C. 553(d)(1).

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation. This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation.

In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because it does not create any new requirements. Therefore, because this rule does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions 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).

[1] As previously noted, however, by this action EPA is providing the public with a chance to comment on EPA's determination after the effective date through the notice and comment process announced in this **Federal Register** regarding the permanent stopping of the sanctions clock and EPA will consider any comments received in determining whether to reverse the action taken in this interim final rule.

F. 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 annual 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 this action imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major'' rule as defined by 5 U.S.C. 804(2).

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

I. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 15, 2000. Filing a petition for reconsideration by the Administrator of this interim 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, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Ozone, Volatile organic compounds.

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

Dated: December 7, 1999.

Jeanne M. Fox,

Regional Administrator, Region 2.

[FR Doc. 99–32515 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[IN 109–1a; FRL–6507–5]

Approval of Hospital/Medical/Infectious Waste Incinerator State Plan For Designated Facilities and Pollutants: Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving Indiana's State Plan for Hospital/Medical/Infectious Waste Incinerators (HMIWI), submitted on September 30, 1999. The State Plan adopts and implements the Emissions Guidelines (EG) applicable to existing HMIWIs. This approval means that EPA finds the State Plan meets Clean Air Act (Act) requirements. Once effective, this approval makes the State Plan federally enforceable.

DATES: This rule is effective on February 15, 2000, unless EPA receives adverse written comments by January 18, 2000. If adverse written comment is received, EPA will publish a timely withdrawal of the rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be sent to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

You can inspect copies of the State Plan submittal at the following address: U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (We recommend you contact Ryan Bahr, Environmental Engineer, at (312) 353–4366 before visiting the Region 5 Office).

FOR FURTHER INFORMATION CONTACT: Ryan Bahr, Environmental Engineer, at (312) 353–4366.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'', ''us'', or ''our'', are used we mean EPA. The supplemental information is organized in the following order:

I. What is EPA approving in this action?
II. The HMIWI State Plan Requirement.
What is an HMIWI State Plan?
Why are we requiring Indiana to submit an HMIWI State Plan?
Why do we need to regulate HMIWI emissions?
What criteria must an HMIWI State Plan meet to be approved?
III. The Indiana HMIWI State Plan.
Where are the Indiana HMIWI requirements codified?
Who is affected by the State Plan?
Who is exempt from the State Plan?
What does the State Plan require?
When must the State Plan requirements be met if you plan to continue operation of your HMIWI?
What must you do to obtain an extended compliance schedule if you plan to install control equipment or make process changes and continue operation?
What must you do if you intend to permanently shut down?
What are the permit application deadlines?
What else does the State Plan include?
What public review opportunities were provided?
IV. Review and Approval of the Indiana HMIWI State Plan.
Why is the Indiana HMIWI State Plan approvable?
V. EPA Rulemaking Action.
VI. Administrative Requirements.
A. Executive Order 12866
B. Executive Orders 13132
C. Executive Order 13045
D. Executive Order 13084
E. Regulatory Flexibility Act
F. Unfunded Mandates
G. Submission to Congress and the Comptroller General
H. National Technology Transfer and Advancement Act
I. Petitions for Judicial Review

I. What is EPA approving in this action?

We are approving the September 30, 1999, Indiana State Plan submission which implements the requirements of sections 111(d) and 129 of the Act for existing HMIWIs. This approval, once effective, will make the Indiana HMIWI rules included in the plan federally enforceable.

II. The HMIWI State Plan Requirement.

What Is an HMIWI State Plan?

An HMIWI State Plan is a plan to control air pollutant emissions from existing incinerators which burn hospital waste or medical/infectious waste. The plan also includes source and emission inventories of these incinerators in the State.

Why Are We Requiring Indiana to Submit an HMIWI State Plan?

Sections 111(d) and 129 of the Act require States to submit State Plans to control emissions from existing HMIWIs in the State. The State Plan requirement was triggered when we published the Emissions Guidelines (EG) for HMIWIs on September 15, 1997 (see 62 FR 48348). The EG is codified at 40 CFR part 60, subpart Ce.

Section 129, we are requires us to promulgate EGs for several types of existing solid waste incinerators. These EGs establish the Maximum Achievable Control Technology (MACT) standards that States must adopt to comply with the Act. The HMIWI EG also establishes requirements for monitoring, operator training, permits, and a waste management plan that must be included in State Plans.

The intent of the State Plan requirement is to reduce several types of air pollutants associated with waste incineration.

Why Do We Need to Regulate HMIWI Emissions?

The State Plan establishes control requirements which reduce the following emissions from HMIWIs: particulate matter, sulfur dioxide, hydrogen chloride, nitrogen oxides, carbon monoxide, lead, cadmium, mercury, dioxin, and dibenzofurans.

These pollutants can cause adverse effects to the public health and the environment. Dioxin, lead, and mercury bioaccumulate through the food web. Serious developmental and adult effects in humans, primarily damage to the nervous system, have been associated with exposures to mercury. Exposure to dioxin and furans can cause skin disorders, cancer, and reproductive effects such as endometriosis. Dioxin and furans can also affect the immune system. Acid gases affect the respiratory tract, as well as contribute to the acid rain that damages lakes and harms forests and buildings. Exposure to particulate matter has been linked with adverse health effects, including aggravation of existing respiratory and cardiovascular disease and increased risk of premature death. Nitrogen oxide emissions contribute to the formation of ground level ozone, which is associated with a number of adverse health and environmental effects.

What Criteria Must an HMIWI State Plan Meet To be Approved?

The following Table summarizes the criteria for approving an HMIWI State Plan:

Requirement	Elements
Sections 111(d) and 129: State Plan must be at least as protective as the EG.	—Applicability. —Emission Limits. —Compliance Schedules. —Performance Testing. —Monitoring/Inspection. —Operator Training/Certification. —Waste Management Plan. —Recordkeeping/Reporting.
40 CFR part 60, subpart B: Criteria for an approvable section 111(d) plan.	—Demonstration of Legal Authority —Enforceable Mechanism. —Evidence of public hearing. —Source and Emission Inventories. —State Progress Report Commitment.
Section 129(e): Title V permit requirement.	State Plans must ensure that affected HMIWI facilities submit Title V permit applications to the State by September 15, 2000.

We issued a guidance document describing in more detail the requirements for an approvable HMIWI State Plan, entitled ''Hospital/Medical/Infectious Waste Incinerator Emission Guidelines: Summary of the Requirements for Section 111(d)/129 State Plans,'' published November 1997. Indiana used this document to develop its State Plan.

III. The Indiana HMIWI State Plan

Where Are the Indiana HMIWI Requirements Codified?

Indiana's State Plan requirements for HMIWIs are codified at 326 Indiana Administrative Code (IAC) 11–6. Indiana adopted the rule on September 2, 1998. Indiana published the rule in the Indiana Register on March 1, 1999, and it became effective on March 11, 1999.

Who Is Affected By the State Plan?

Consistent with the EG, Indiana's HMIWI rules cover existing HMIWIs, with the exception of certain exempt HMIWIs, which only need to meet certain recordkeeping and certification requirements. The table below summarizes the Indiana HMIWI applicability criteria and associated requirements:

Category	Requirements
HMIWI for which construction commenced on or before June 20, 1996.	Subject to control requirements specified in the EG.
Co-fired combustor ...	Not subject to control requirements specified in the EG but: Must have an enforceable requirement (e.g. a permit condition) limiting operation to co-fired combustor status; and, Must keep records on weight of wastes and fuels burned on a calendar quarter basis.
HMIWIs which combust only these wastes: —pathological	Not subject to control requirements specified in the EG but: Must keep records on a calendar quarter basis demonstrating that only exempt wastes are burned; and,
—low-level radioactive. —chemotherapeutic.	Must provide State and EPA certification that the HMIWI burns only these wastes.
Hospitals that send waste to an off-site HMIWI.	Not subject to control requirements specified in the EG.

For an HMIWI to be considered a ''co-fired combustor,'' it must be subject to an enforceable condition limiting combustion of hospital or medical infectious waste to 10% or less of total waste burned, by weight, on a calendar quarter basis. For purposes of the co-fired combustor exemption, pathological waste, chemotherapeutic waste, and low-level radioactive wastes are considered ''other'' wastes when calculating the percentage of hospital waste and medical/infectious waste combusted.

HMIWIs which combust pathological wastes, low-level radioactive waste, or

chemotherapeutic wastes part of the time can be exempt from control requirements during those periods if they notify Indiana pursuant to this operating scenario.

Who is exempt from the State Plan?

Incinerators that would otherwise meet the HMIWI definition are completely exempt from the rule if they meet any of the following criteria:

You are exempt if:

You are a combustor required to have a permit under Section 3005 of the Solid Waste Disposal Act, 42 U.S.C. 6925;

You are a municipal waste combustor subject to 40 CFR part 60, subparts Cb, Ea or Eb;

You are a pyrolysis unit (i.e., a unit that uses endothermic gasification to treat hospital waste or medical/infectious waste in order to render such waste harmless);

You are a cement kiln firing hospital waste or medical/infectious waste; or,

You are an HMIWI subject to the New Source Performance Standards (NSPS) for HMIWIs, 40 CFR part 60, subpart Ec.

What does the State Plan require?

If you are an HMIWI subject to control requirements under the Indiana HMIWI rule, you must comply with the requirements summarized below:

Summary of the Indiana HMIWI Control Requirements

Emission Limitations Separate limits are established for three categories of HMIWIs: —small —medium —large	—dioxins/furans. —hydrogen chloride. —sulfur dioxide. —oxides of nitrogen. —lead. —cadmium. —mercury. —particulate matter. —opacity. —carbon monoxide.
Compliance provisions.	—performance testing. —operating parameter monitoring. —operating parameter compliance. —recordkeeping and reporting.
Operator provisions	—Training. —Certification. —On-site Operator Manual.
Permit	—Must apply for a Part 70 permit.
Waste Management Plan Requirements	
Facilities Incinerating Hospital, Medical or Infectious Waste.	Prepare a plan that identifies ways to reduce the amount and toxicity of incinerated waste, and provides an implementation schedule where feasible. Submit the plan at the same time the initial performance test results are reported. Submit annual waste management progress reports.

If you would like to know the emission limit applicable to small, medium and large HMIWIs, please reference 326 IAC 11–6–4.

The Indiana rule also prescribes various criteria and considerations in developing the plan, and specifies the components which the plan must include.

When must the State Plan requirements be met if you plan to continue operation of your HMIWI?

Under the Indiana HMIWI rule, a subject HMIWI must be in compliance with the rule requirements by March 11, 2000, unless the source meets the requirements for an extended compliance schedule. HMIWIs who plan to install air pollution control equipment and who comply with the requirements to obtain an extended schedule must comply by March 31, 2002.

However, even if a source has an extended schedule, the Indiana rule requires compliance with the rule's operator training and certification provisions by March 11, 2000.

What must you do to obtain an extended compliance schedule if you plan to install control equipment or make process changes and continue operation?

HMIWIs seeking an extended compliance schedule must have submitted a control plan on or before June 30, 1999, which contained a plan for the HMIWI to meet the rule's increments of progress. Indiana's rule requires compliance with the following measurable and enforceable increments of progress:

Increments of progress	Due date
Submit a final control plan to the Indiana Department of Environmental Management.	June 30, 1999.
Award contracts for emission control systems or for process modifications, or issuance of orders for the purchase of component parts to accomplish emission control or process modifications.	March 31, 2000.
Initiate on-site construction or installation of emission control equipment or process change.	March 31, 2001.
Complete on-site construction or installation of emission control equipment or process change.	September 30, 2001.
Be in final compliance	March 31, 2002.

What must you do if you intend to permanently shut down?

For all HMIWIs that intend to permanently shut down, the source must shut down by March 11, 2000, unless the source is installing alternative control technology and the State approves its petition for an extension. If a source petitions the State for an extension, the source must submit its petition by November 11, 1999. The petition must include an analysis that:

(1) Demonstrates that additional time is needed,

(2) considers the option of transporting the waste off-site, and

(3) includes a detailed compliance plan with measurable and enforceable increments of progress that assure final compliance by March 31, 2002.

What are the permit application deadlines?

The Indiana HMIWI rule requires all HMIWIs subject to the rule's emission limits to submit a part 70 permit application by March 11, 2000. Each source's application needs to address the provisions of 326 IAC 11–6. This means that all HMIWI that have not previously applied for a part 70 permit must submit their application by March 11, 2000. For those HMIWI whose original application did not address the provisions of 326 IAC 11–6, they must now update their application by March 11, 2000, to include Indiana's rule 326 IAC 11–6.

What else does the State Plan include?

The State Plan includes: a demonstration of legal authority to implement the EG, documentation of public hearing, comments and responses, a source and emissions inventory, and a provision for State progress reports to EPA. These materials were submitted to satisfy the section

111(d) requirements under 40 CFR part 60, subpart B.

What public review opportunities were provided?

The Indiana Department of Environmental Management held public hearings on the HMIWI rule on May 6, 1998, and September 2, 1998. IDEM did not receive any comments on the rule. IDEM published public notices on June 30, 1999, in newspapers throughout the state opening a comment period on the State Plan and providing the opportunity for a public hearing. IDEM did not receive a request for a hearing nor any comments on the plan materials.

IV. Review and Approval of the Indiana HMIWI State Plan.

Why is the Indiana HMIWI State Plan approvable?

We compared the Indiana HMIWI rule 326 IAC 11–6 to our HMIWI EG. We find the Indiana rule to be at least as stringent as the EG. Also, the Indiana State Plan satisfies the requirements for an approvable section 111(d) plan under subparts B and Ce of 40 CFR part 60. For these reasons, we are approving the Indiana HMIWI State Plan.

V. EPA Rulemaking Action.

We are approving, through direct final rulemaking action, Indiana's sections 111(d) and 129 State Plan for HMIWIs. The EPA is publishing this action without prior proposal because EPA views this as a noncontroversial action and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, the EPA is proposing to approve the state plan revision should adverse written comments be filed. This action will be effective February 15, 2000 without further notice unless EPA receives relevant adverse written comment by January 18, 2000. Should the Agency receive such comments, it will publish a final rule informing the public that this action will not take effect. 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 on February 15, 2000.

VI. Administrative Requirements.

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, entitled ''Regulatory Planning and Review.''

B. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces E.O. 12612 (Federalism) and E.O. 12875 (Enhancing the Intergovernmental Partnership). E.O. 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the E.O. to include regulations that 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.'' Under E.O. 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in E.O. 13132. Thus, the requirements of section 6 of the E.O. do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation.

In addition, E.O. 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 governmental jurisdictions.

This final rule will not have a significant impact on a substantial number of small entities because approvals under section 111(d) of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal

inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning state plans on such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. 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 annual 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 annual 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.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major'' rule as defined by 5 U.S.C. 804(2).

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

I. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 15, 2000. 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 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Hospital/medical/infectious waste incinerators, Reporting and recordkeeping requirements.

Dated: November 30, 1999.

Francis X. Lyons,

Regional Administrator, Region 5.

40 CFR part 62 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

Subpart P—Indiana

2. A new center heading and sections 62.3640, 62.3641, and 62.3642 are added to subpart P to read as follows:

Metals, Acid Gases, Organic Compounds and Nitrogen Oxide Emissions From Existing Hospital/Medical Infectious Waste Incinerators

§ 62.3640 Identification of plan.

Indiana submitted, September 30, 1999, a State Plan for implementing the Emission Guidelines affecting Hospital/Medical Infectious Waste Incinerators (HMIWI). The enforceable mechanism for this plan is 326 Indiana Administrative Code 11–6. The rule was adopted by the Indiana Pollution Control Board on September 2, 1998. The rule was published in the Indiana Register on March 1, 1999, and became effective on March 11, 1999.

§ 62.3641 Identification of sources.

The Indiana State Plan for existing Hospital/Medical/Infectious Waste Incinerators (HMIWI) applies to all HMIWIs for which construction commenced either on or before June 20, 1996.

§ 62.3642 Effective Date.

The Federal effective date of the Indiana State Plan for existing Hospital/Medical/Infectious Waste Incinerators is February 15, 2000.

[FR Doc. 99–32176 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300955; FRL–6395–5]

RIN 2070–AB78

Bifenthrin; Extension of Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation extends a time-limited tolerance for residues of the insecticide bifenthrin and its metabolites in or on raspberries at 3.0 part per million (ppm) for an additional 1-year period. This tolerance will expire and is revoked on December 31, 2000. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on raspberries. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act 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 the Federal Insecticide, Fungicide, and Rodenticide Act.

DATES: This regulation is effective December 17, 1999. Objections and requests for hearings, identified by docket control number OPP–300955,

must be received by EPA on or before February 15, 2000.

ADDRESSES: Written objections and hearing requests may be submitted by mail, in person, or by courier. Please follow the detailed instructions for each method as provided in Unit III. of the ''SUPPLEMENTARY INFORMATION.'' To ensure proper receipt by EPA, your objections and hearing requests must identify docket control number OPP–300955 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Andrea Beard, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone number: (703) 308–9356; and e-mail address: beard.andrea@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under ''FOR FURTHER INFORMATION CONTACT.''

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically.* You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations'' and then look up the entry for this document under the ''**Federal Register**--Environmental Documents.'' You can also go directly to the **Federal Register** listings at http://www.epa.gov/fedrgstr/.

2. *In person.* The Agency has established an official record for this action under docket control number OPP–300955. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA issued a final rule, published in the **Federal Register** of July 10, 1998 (63 FR 37280) (FRL–5797–7), which announced that on its own initiative under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, as amended by the Food Quality Protection Act of 1996 (FQPA) (Public Law 104–170) it established a time-limited tolerance for the residues of bifenthrin and its metabolites in or on raspberries at 3.0 ppm, with an expiration date of December 31, 1999. EPA established the tolerance because 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 the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Such tolerances can be established without providing notice or period for public comment.

EPA received a request to extend the use of bifenthrin on raspberries for this year's growing season due to the situation remaining an emergency. The subject pests, weevils, have developed resistance to available alternative controls, and there is an extremely low tolerance for weevil contamination in raspberries. Rejection by the processors of contaminated raspberries can result in significant economic losses for the growers. After having reviewed the submission, EPA concurs that emergency conditions exist. EPA has authorized under FIFRA section 18 the use of bifenthrin on raspberries for control of weevils in Oregon and Washington.

EPA assessed the potential risks presented by residues of bifenthrin in or on raspberries. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. The data and other relevant material have been evaluated and discussed in the final rule of July 10, 1998 (63 FR 37280). Based on that data and information considered, the Agency reaffirms that extension of the time-limited tolerance will continue to meet the requirements of section 408(l)(6). Therefore, the time-limited tolerance is extended for an additional 1-year period. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the Code of Federal Regulations (CFR). Although this tolerance will expire and is revoked on December 31, 2000, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on raspberries after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA and the application occurred prior to the revocation of the tolerance. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

III. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA of 1996, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a

tolerance issued by EPA under new section 408(d), as was provided in the old FFDCA sections 408 and 409. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket control number OPP–300955 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before February 15, 2000.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as 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.

Mail your written request to: Office of the Hearing Clerk (1900), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. You may also deliver your request to the Office of the Hearing Clerk in Rm. M3708, Waterside Mall, 401 M St., SW., Washington, DC 20460. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 260–4865.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit III.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.2. Mail your copies, identified by docket control number OPP–300955, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.2. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 file format or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

IV. Regulatory Assessment Requirements

This final rule extends a time-limited tolerance under FFDCA section 408. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any prior consultation as specified by Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998); special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or require OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a FIFRA section 18 petition under FFDCA section 408, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to

include regulations that 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.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4).

V. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: December 2, 1999.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180–[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346(a) and 371.

§ 180.442 [Amended]

2. In § 180.442, by amending the entry for ''raspberries,'' in the table in paragraph (b) by changing the date ''12/31/99'' to read ''12/31/00''.

[FR Doc. 99–32763 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 243

[FRL–6505–6]

RIN 2050–AE66

Revisions to Guidelines for the Storage and Collection of Residential, Commercial, and Institutional Solid Waste

AGENCY: Environmental Protection Agency.

ACTION: Direct Final Rule.

SUMMARY: The Environmental Protection Agency is revising Guidelines for the Storage and Collection of Residential, Commercial, and Institutional Solid Waste to incorporate by reference new voluntary consensus standards from the American National Standards Institute (ANSI). We are making these revisions in response to a petition for rulemaking from the Waste Equipment Technology Association who requested that we update the references to ANSI standards. This revision assures that the Guidelines include references to the most current national safety standards.

DATES: This final action will become effective on March 17, 2000 unless EPA receives adverse comment by January 18, 2000. If we receive adverse comment, we will publish a withdrawal of this direct final rule in the **Federal Register** informing the public that the rule will not take effect. The Director of the **Federal Register** approved the incorporation by reference of the publications listed in rule March 17, 2000.

ADDRESSES: Commenters must send an original and two copies of their comments referencing docket number F–99–COLF–FFFFF to: (1) if using regular US Postal Service mail: RCRA Docket Information Center, Office of Solid Waste (5305G), U.S. Environmental Protection Agency Headquarters (EPA, HQ), 401 M Street, SW, Washington, DC 20460–0002, or (2) if using special delivery, such as overnight express service: RCRA Docket Information Center (RIC), Crystal Gateway One, 1235 Jefferson Davis Highway, First Floor, Arlington, VA 22202. Comments may also be submitted electronically through the Internet to: rcra-docket@epa.gov. Comments in electronic format should also be identified by the docket number F–99–COLF–FFFFF and must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

You can view supporting materials for this document in the RCRA Information Center (RIC). The RIC is located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA, and is open from 9 a.m. to 4 p.m., Monday through Friday, excluding federal holidays. The Docket Identification Number for this notice is F–99–COLF–FFFFF.

To review docket materials, we recommend that you make an appointment by calling 703 603–9230. You may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page.

The index is available electronically. See the **SUPPLEMENTARY INFORMATION** section for information on accessing the index.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at 800 424–9346 or TDD 800 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call 703 412–9810 or TDD 703 412–3323.

For more detailed information on specific aspects of this rulemaking, contact Mr. Dwight Hlustick, U. S. Environmental Protection Agency, Office of Solid Waste (5306W), 401 M Street, SW, Washington, DC 20460, 703 308–8647, [HLUSTICK .DWIGHT@EPAMAIL.EPA.gov].

SUPPLEMENTARY INFORMATION: The index of supporting information is available on the Internet. Follow these instructions to access the index electronically:

WWW: http://www.epa.gov/osw/
FTP: ftp.epa/gov
Login: anonymous
Password: your Internet address

Files are located in /pub/epaoswer.

The following supporting materials are available for viewing in the RCRA Information Center (RIC):

Petition for Rulemaking—Proposed Modification to the Requirements and Recommended Procedures for Solid Waste Collection Equipment (40 CFR Part 243), submitted to Robert Dellinger and Larry Starfield (US EPA), submitted from Waste Equipment Technology Association, March 24, 1997.

Mobile Refuse Collection and Compaction Equipment—Safety Requirements, 1992, American National Standards Institute, ANSI Z245.1–1992.

Stationary Compactors—Safety Requirements, 1997, American National Standards Institute, ANSI Z245.2–1997.

Waste Containers—Safety Requirements, 1994, American National Standards Institute, ANSI Z245.30–1994.

Waste Containers—Compatibility Dimensions, 1996, American National

Standards Institute, ANSI Z245.60–1996.

Regulated Entities. The entities that will be potentially regulated by this action are public or private owners or operators of solid waste collection and transport equipment, and include the following:

Category	Examples of regulated entities
Federal Government.	Agencies procuring waste services.
Industry	Owners or operators of solid waste collection services.
Municipal and Tribal Governments.	Owners or operators of solid waste collection services.

This table is a guide for readers that describes which entities are likely to be affected by this action. It lists the types of entities EPA is now aware could potentially be impacted by today's action. It is possible that other types of entities not listed in the table could also be affected. To determine whether you would be impacted by this action, you should carefully examine the applicability criteria. If you have questions about whether this action applies to a particular facility, please consult Mr. Dwight Hlustick, U. S. Environmental Protection Agency, Office of Solid Waste (5306W), 401 M Street, SW, Washington, DC 20460, 703 308–8647, [HLUSTICK .DWIGHT@EPAMAIL.EPA.gov].

Preamble Outline

I. Under what authority is EPA promulgating this rule?
II. What is the background for this rule?
III. What does this rule do?
IV. How does this rule comply with applicable statutes and executive orders?
A. Executive Order 12866 (OMB Review):
B. Regulatory Flexibility Act
C. Unfunded Mandates Reform Act
D. Paperwork Reduction Act
E. Executive Order 12875: Enhancing the Intergovernmental Partnership
F. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Risks and Safety Risks
H. National Technology Transfer and Advancement Act of 1995
I. Executive Order 12898: Environmental Justice
J. Executive Order 12088 (Compliance of Federal Agencies with the Solid Waste Disposal Act):
K. Submission to Congress and General Accounting Office

I. Under What Authority is EPA Promulgating This Rule?

The Agency is promulgating this rule under the authority of Sections 1008(a)(3), 2002(a)(1), and 4004(a) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 USC 6907(a)(3), 6912(a)(1), and 6944(a).

II. What is the Background for This Rule?

EPA promulgated the Part 243—Guidelines for the Storage and Collection of Residential, Commercial, and Institutional Solid Waste in 1976. In 40 CFR 243.202–1(d), these guidelines referenced safety standards that had been established as consensus standards. The reference was to American National Standards Institute (ANSI) standard Z245.1—Safety Standards for Refuse Collection Equipment.

ANSI's current policy is to revise each standard every five years. This means that the safety standards referenced in 40 CFR 243.202–1(d) have been revised since 1976.

The original safety standard referenced in the 1976 guideline has been expanded in scope. In 1976, ANSI Z245.1 covered the following types of collection equipment;

(1) Rear-loading compaction equipment,
(2) Side-loading compaction equipment,
(3) Front-loading compaction equipment,
(4) Tilt-frame equipment,
(5) Hoist-type equipment,
(6) Satellite vehicles,
(7) Special collection compaction equipment, and
(8) Stationary compaction equipment.

Now Z245.1 has evolved into the following series of four separate standards.

(1) Z245.1—Mobile Refuse Collection and Compaction Equipment—Safety Requirements;
a. Front-loading equipment,
b. Rear-loading equipment,
c. Satellite vehicles
d. Side-loading equipment,
e. Tilt-frame and hoist-type equipment,
f. Mechanized container collecting vehicles,
g. Recycling vehicles, and
h. Transfer trailers;
(2) Z245.2—Stationary Compactors—Safety Requirements;
(3) Z245.3—Waste Containers—Safety Requirements; and
(4) Z245.6—Waste Containers—Compatibility Dimensions.

In today's rule, EPA is revising the Part 243 guidelines to incorporate the above four standards. Each type of equipment covered in the original guideline is still covered in these revisions. In addition, EPA has added voluntary consensus standards for waste containers which did not exist at the time of the original rulemaking.

The waste container standards were added because waste containers are an integral part of most waste collection systems.

The petitioners also requested that balers be included in this regulation. Although they are an important part of some waste collection systems, they are not an integral part of many waste collection systems and they were not included in the original regulation. There may also be some question whether balers should be considered part of a waste collection system. Therefore, EPA is not including standards for balers in this rule.

III. What Does This Rule Do?

Overview of This Rule

This rule changes three sections; §§ 243.100, 243.200–1, and 243.202–1. The changes are made through incorporation by reference. All of the changes are made in the ''Requirements'' sections of the guideline. ''Requirements'' are minimum levels of performance that solid waste collection operations are required to meet. These guidelines are mandatory for Federal agencies and recommended to State, interstate, regional, and local governments for their activities.

Specific Changes

The changes to § 243.100 paragraphs (c) and (g) update references to an Executive Order. The current regulations refer to Executive Order 11752. That Executive Order has been replaced by Executive Order 12088. Today's rule changes the text to refer to the new Executive Order 12088.

The changes to § 243.200–1 add a new paragraph (e). The new paragraph (e) adds the Safety Requirements and Compatibility Dimensions to the Waste Containers requirement of the guidelines. These guidelines address requirements for waste containers used for storage of solid waste and for materials that have been separated for the purpose of recycling.

The changes to § 243.202–1 update the safety requirements for both mobile equipment and stationary compactors. The safety requirements for mobile equipment are updated from the 1976 standards to new standards finalized in 1992. The safety requirements for stationary compactors are updated from

the 1976 standards to new standards finalized in 1997. The safety requirements are applicable to many types of solid waste collection vehicles and to stationary compactors.

Why EPA Is Making These Changes

We are making these changes at the request of Waste Equipment Technology Association to modify the ANSI standards because we believe the newer standards have a number of improved safety provisions. For example, the updated standards require the use of grab handles, riding steps, and slip resistant surfaces on loading platforms. Therefore, we believe, that if the industry follows these new standards, the accident rate for solid waste collection industry should be reduced. These features should reduce risks both to people who collect solid waste as well as to the general public.

IV. How Does This Rule Comply With Applicable Statutes and Executive Orders?

A. Executive Order 12866 (OMB Review)

Under Executive Order 12866, EPA must determine whether a regulatory action is significant and therefore subject to OMB review and the other provisions of the Executive Order. A significant regulatory action is defined by Executive Order 12866 as one 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 rights and obligations or 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 Executive Order 12866.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare, and make available for public comment, a regulatory flexibility analysis that describes the impact of a proposed or final rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant adverse impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains EPA's determination.

The effect of this rule is to encourage purchasers of waste containers and solid waste collection vehicles to procure equipment that meets current industry voluntary consensus standards for safety. The rule contains recommendations, not requirements, to State and local governments; therefore, it does not impose new burdens on small entities. Additionally, it is the Agency's understanding that all new solid waste collection equipment meets the current ANSI standards. As a result, this rule does not impose new burdens on small entities. Therefore, pursuant to 5 U.S.C. 605b, I hereby certify that this rule will not have a significant adverse impact on a substantial number of small entities. Hence, this rule does not require a regulatory flexibility analysis.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of regulatory actions on State, local, and Tribal governments, and the private sector. Under Section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, Section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of alternatives and adopt the least costly, most cost effective or least burdensome alternative that achieves the objective of the rule. The provisions of Section 205 do not apply when they are inconsistent with applicable law. Moreover, Section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under Section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA's analysis of compliance with the Unfunded Mandates Reform Act of 1995 found that this rule imposes no enforceable duty on any State, local or tribal governments or the private sector. Thus, today's rule is not subject to the requirements of sections 202 and 205 of UMRA. States are encouraged to participate in the development of voluntary consensus standards such as the ones referenced in this rule.

D. Paperwork Reduction Act

Today's rule is in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* We found that no information is being collected from the States, Federal Agencies, or industry for the existing rule and today's revision would not require the collection of any additional information. Therefore, we do not need to prepare an Information Collection Request (ICR).

E. Executive Order 13132 (Federalism)

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a

regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OM), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. ''This is so because the incorporation of these revised ANSI standards into the Part 243 guidelines imposes no mandate on states or local governments. Instead, we provide the Part 243 guidelines only as recommendations for states, interstate, regional, and local governments. Part 243 sets forth requirements only for federal agencies. See 40 CFR section 243.100(c).'' Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule change does not significantly or uniquely affect the communities of Indian tribal governments. The impact of these revisions on tribal governments is minimal and no different than any other governmental entity affected. These revisions do not require any new mandates for the tribes, but merely update existing voluntary standards. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (applies to any rule that: (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it is not an economically significant rule as defined by E.O. 12866, and because it does not affect decisions involving the environmental health or safety risks to children.

H. National Technology Transfer and Advancement Act of 1995

Under Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), EPA is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

This direct final rule complies with the requirements of the NTTAA because it utilizes voluntary consensus standards developed by the American National Standards Institute (ANSI). The ANSI is a voluntary consensus standards-setting body under the NTTAA.

I. Executive Order 12898: Environmental Justice

Under Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' as well as through EPA's April 1995, ''Environmental Justice Strategy, OSWER Environmental Justice Task Force Action Agenda Report,'' and National Environmental Justice Advisory Council, EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities, and all people live in clean and sustainable communities.

The Agency believes that today's rule change revising voluntary consensus standards into guidelines for waste containers and solid waste collection vehicles will not have an adverse environmental or economic impact on any minority or low-income group, or on any other type of affected community since these standards will not significantly affect the location of any solid waste collection facility. These are updated safety standards to assure minimal safety requirements for waste collection equipment.

J. Executive Order 12088 (Compliance of Federal Agencies With the Solid Waste Disposal Act)

Executive Order 12088 requires each head of a Federal Agency to comply with standards issued under several laws, including the Solid Waste Disposal Act. Executive Order 12088 revoked an older Executive Order 11752. Part 243 included two outdated references to Executive Order 11752 at §§ 243.100 (c) and (g). Today's rule replaced the old references to Executive Order 11752 with Executive Order 12088.

K. Submission to Congress and General Accounting Office

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective March 17, 2000, unless EPA receives adverse comment by January 18, 2000.

List of Subjects in 40 CFR Part 243

Environmental protection, Government property, Incorporation by reference, Waste treatment and disposal.

Dated: December 3, 1999.

Carol M. Browner,

Administrator.

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

PART 243—GUIDELINES FOR THE STORAGE AND COLLECTION OF RESIDENTIAL, COMMERCIAL, AND INSTITUTIONAL SOLID WASTE

1. The authority citation for Part 243 is revised to read as follows:

Authority: 42 U.S.C. 6907(a)(3), 6912(a)(1), and 6944(a).

2. Section 243.100 is amended by revising paragraphs (c) and (g) to read as follows:

§ 243.100 Scope.

* * * * *

(c) The ''Requirement'' sections contained herein delineate minimum levels of performance required of solid waste collection operations. Under section 211 of the Solid Waste Disposal Act, as amended, and Executive Order 12088, the ''Requirement'' sections of these guidelines are mandatory for Federal agencies. In addition, they are recommended to State, interstate, regional, and local governments for use in their activities.

* * * * *

(g) The Environmental Protection Agency will give technical assistance and other guidance to Federal agencies when requested to do so under section 3(D)1 of Executive Order 12088.

* * * * *

3. Section 243.200–1 is amended by adding a new paragraph (e) to read as follows:

§ 243.200–1 Requirement.

* * * * *

(e) Waste containers used for the storage of solid waste (or materials which have been separated for recycling) must meet the standards established by the American National Standards Institute (ANSI) for waste containers as follows: Waste Containers—Safety Requirements, 1994, American National Standards Institute, ANSI Z245.30–1994; and Waste Containers—Compatibility Dimensions, 1996, American National Standards Institute, ANSI Z245.60–1996.

(1) The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You may obtain a copy from American National Standards Institute, 11 W. 42nd Street, New York, NY 10036. You may inspect a copy at the Environmental Protection Agency's RCRA Information Center, 1235 Jefferson Davis Highway, Arlington, VA or at the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC.

4. Section 243.202–1 is amended by revising (d) to read as follows (the undesignated paragraph following paragraph (d) is not changed):

§ 243.202–1 Requirement.

* * * * *

(d) Collection equipment used for the collection, storage, and transportation of solid waste (or materials which have been separated for recycling) must meet the standards established by the American National Standards Institute as follows: Mobile Refuse Collection and Compaction Equipment—Safety Requirements, 1992, American National Standards Institute, ANSI Z245.1–1992; and Stationary Compactors—Safety Requirements, 1997, American National Standards Institute, ANSI Z245.2–1997.

(1) The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You may obtain a copy from American National Standards Institute, 11 W. 42nd Street, New York, NY 10036. You may inspect a copy at the Environmental Protection Agency's RCRA Information Center, 1235 Jefferson Davis Highway, Arlington, VA or at the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC.

* * * * *

[FR Doc. 99–32075 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 99–2698; MM Docket No. 99–23; RM–9423; RM–9767]

Radio Broadcasting Services; Tipton, Mangum, Eldorado, Granite, OK, Archer City, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Good Government Radio, dismisses its request to allot Channel 249C2 to Tipton, OK, substitute Channel 282A for Channel 249A at Mangum, OK, and substitute Channel 245A for Channel 246A at Eldorado, OK. *See* 64 FR 5623, February 4, 1999. This action also grants the proposal of Texas Grace Communications to substitute Channel 248C1 for Channel 248C2 at Archer City, TX, modify its construction permit for Station KRZB to specify the higher class channel, and allot Channel 282C3 to Granite, OK, as the community's first local aural service. Channel 248C1 can be allotted to Archer City in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.9 kilometers (13.6 miles) west, at coordinates 33–36–58 NL; 98–51–42 WL, to accommodate Texas Grace's requested site. Channel 282C3 can be allotted to Granite with a site restriction of 1.2 kilometers (.76 miles) east, at coordinates 34–57–38 NL; 99–22–00 WL, to avoid a short-spacing to Station KQFX, Channel 282C1, Borger, TX. A filing window for Channel 282C3 at Granite, OK, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

DATES: Effective January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 99–23, adopted November 24, 1999, and released December 3, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC

Reference Center (Room 239), 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

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: 47 U.S.C. 154, 303, 334. 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Granite, Channel 282C3.

3. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 248C2 and adding Channel 248C1 at Archer City.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 99–32703 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 64, No. 242
Friday, December 17, 1999

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

Animal and Plant Health Inspection Service

9 CFR Parts 54 and 79

[Docket No. 99–067–1]

Scrapie Pilot Projects

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations concerning the voluntary scrapie flock certification program and the interstate movement of sheep and goats to exempt flocks from certain regulatory requirements when the flocks are participating in scrapie control pilot projects authorized by the Animal and Plant Health Inspection Service. We believe this action is necessary so that pilot projects can achieve their goal of furthering progress toward the eradication of scrapie. This action would affect a small number of flock owners participating in scrapie control pilot projects.

DATES: We invite you to comment on this docket. We will consider all comments that we receive by January 18, 2000.

ADDRESSES: Please send your comment and three copies to: Docket No. 99–067–1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Please state that your comment refers to Docket No. 99–067–1.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS rules, are available on the Internet at http://www.aphis.usda.gov/ppd/rad/webrepor.html.

FOR FURTHER INFORMATION CONTACT: Dr. Diane Sutton, Senior Staff Veterinarian, National Animal Health Programs Staff, 4700 River Road Unit 43, Riverdale, MD 20737–1235; (301) 734–7709.

SUPPLEMENTARY INFORMATION:

Background

Scrapie is a degenerative and eventually fatal disease affecting the central nervous systems of sheep and goats. To control the spread of scrapie within the United States, the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), administers regulations at 9 CFR part 79, which restrict the interstate movement of certain sheep and goats. APHIS also administers the Voluntary Scrapie Flock Certification Program (the VSFCP), described in the regulations at 9 CFR part 54.

For more than 40 years, USDA has had programs to eradicate or reduce the incidence of scrapie in the United States, using a variety of approaches. APHIS is continually working to develop new and more effective approaches to control scrapie. As part of this effort, APHIS is currently working with flock owners to develop pilot projects that may involve using techniques and procedures different from those contained in the current regulations. Some of the pilot projects under development cannot proceed unless the current regulations are waived for the participating flocks. For example, current flock plans require that animals identified as *high-risk animals* be removed from flocks, while some pilot project protocols would allow high-risk animals to remain in flocks so that alternative flock cleanup strategies can be studied.

APHIS will develop pilot projects in States in which State animal health agencies have indicated a willingness to change their usual requirements and procedures in order to try pilot approaches for scrapie management. In order for a flock owner to participate in a pilot project, the State agency must be willing to modify requirements for flock management, quarantine and movement of animals, and animal identification, to the extent that these matters are affected by the protocol of the particular pilot project. A flock owner who chooses to participate in a pilot project must agree to follow the procedures identified for the project, and must have the necessary records, personnel, and facilities to maintain the flock in accordance with the terms of the pilot project. Flock owners who are interested in exploring the idea of participating in a pilot project can contact APHIS or their State animal health agency to discuss the possibility, and State or APHIS inspectors who already work with flock owners may also ask owners of flocks that are likely candidates if they want to be involved in a pilot project.

Pilot projects are conducted under the close supervision and control of APHIS and are carefully designed to mitigate the risk of the further spread of scrapie. We believe that providing waivers for participants in pilot projects is essential to achieve more effective approaches to control scrapie. Therefore, we propose to amend the regulations to define the term *scrapie control pilot* project and to allow the Administrator to waive specified requirements of parts 54 and 79 for flocks participating in scrapie control pilot projects.

We propose to define *scrapie control pilot project* in parts 54 and 79 as follows: ''A pilot project authorized by the Administrator in writing, designed to perform research or test or improve program procedures for scrapie control. In addition to APHIS, participants may include State animal health agencies, flock owners, and other parties as necessary.''

We propose to add a provision to parts 54 and 79 that permits the Administrator to waive certain requirement of parts 54 and 79, and the Scrapie Flock Certification Program Standards referenced by them, for participants in a scrapie control pilot project. We propose that the Administrator may waive either or both of the following requirements when a particular pilot project makes them unnecessary to control scrapie:

1. The determination that an animal is a high-risk animal, if the scrapie control pilot project plan contains testing or other procedures that indicate that an animal, despite meeting the definition of high-risk animal, is unlikely to spread scrapie; and

2. The requirement that high-risk animals must be removed from a flock in accordance with a flock plan, if the scrapie control pilot project plan contains alternative procedures to prevent the further spread of scrapie without removing high-risk animals from the flock.

This change would primarily affect flock owners who volunteer to participate in pilot projects. In general, these owners would be relieved of specified regulatory restrictions that would otherwise apply to them and would be able to retain or move their animals more freely than they could if certain requirements of the regulations were not waived for pilot projects. Currently these owners are losing the economic value of sheep that may not be scrapie infected. The pilot projects may correct this situation so that flock owners can retain the animals.

Executive Order 12866 and Regulatory Flexibility Act

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

This proposed rule would allow the Administrator to exempt sheep and goat flocks participating in scrapie control pilot projects from certain requirements of the regulations. Because APHIS resources will allow us to develop and administer only a limited number of pilot projects, this proposed rule would affect no more than 75 sheep flocks containing approximately 3,400 sheep that may be engaged in pilot projects in any given year. It could affect substantially fewer if owners of flocks eligible for pilot projects decline to participate. APHIS expects to engage in scrapie pilot projects over approximately the next 5 years. Based on current plans for pilot projects, this proposed rule would probably affect no more than 20 flocks the first year. The primary effects on these flock owners would be beneficial, in that animal testing and genotyping under the pilot projects would allow them to keep animals that would otherwise have to be destroyed under the regulations. All flock owners would eventually accrue long-term benefits from the control or eradication of scrapie in the form of reduced loss of animals from the disease and opening of additional international markets.

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

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This proposed rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects

9 CFR Part 54

Animal diseases, Goats, Indemnity payments, Scrapie, Sheep.

9 CFR Part 79

Animal diseases, Quarantine, Sheep, Transportation.

Accordingly, we propose to amend 9 CFR parts 54 and 79 as follows:

PART 54—CONTROL OF SCRAPIE

1. The authority citation for part 54 would continue to read as follows:

Authority: 21 U.S.C. 111, 114, 114a, and 134a–134h; 7 CFR 2.22, 2.80, and 371.2(d).

2. In § 54.1, the following definition would be added in alphabetical order to read as follows:

§ 54.1 Definitions.

* * * * *

Scrapie control pilot project. A pilot project authorized by the Administrator in writing, designed to perform research or test or improve program procedures for scrapie control. In addition to APHIS, participants may include State animal health agencies, flock owners, and other parties as necessary.

* * * * *

3. A new § 54.14 would be added to read as follows:

§ 54.14 Waiver of requirements for scrapie control pilot projects.

(a) The Administrator may waive the following requirements of this part for participants in a scrapie control pilot project by recording the requirements waived in the scrapie control pilot project plan:

(1) The determination that an animal is a high-risk animal, if the scrapie control pilot project plan contains testing or other procedures that indicate that an animal, despite meeting the definition of high-risk animal, is unlikely to spread scrapie; and

(2) The requirement that high-risk animals must be removed from a flock if the scrapie control pilot project plan contains alternative procedures to prevent the further spread of scrapie without removing high-risk animals from the flock.

(b) [Reserved]

PART 79—SCRAPIE IN SHEEP AND GOATS

1. The authority citation for part 79 would continue to read as follows:

Authority: 21 U.S.C. 111–113, 115, 117, 120, 121, 123–126, 134b, and 134f; 7 CFR 2.20, 2.80, and 371.2(d).

2. In § 79.1, the following definition would be added in alphabetical order to read as follows:

§ 79.1 Definitions.

* * * * *

Scrapie control pilot project. A pilot project authorized by the Administrator in writing, designed to perform research or test or improve program procedures for scrapie control. In addition to APHIS, participants may include State animal health agencies, flock owners, and other parties as necessary.

* * * * *

3. A new § 79.4 would be added to read as follows:

§ 79.4 Waiver of requirements for scrapie control pilot projects.

(a) The Administrator may waive the following requirements of this part for participants in a scrapie control pilot project by recording the requirements waived in the scrapie control pilot project plan:

(1) The determination that an animal is a high-risk animal, if the scrapie control pilot project plan contains testing or other procedures that indicate that an animal, despite meeting the definition of high-risk animal, is unlikely to spread scrapie; and

(2) The requirement that high-risk animals must be removed from a flock, if the scrapie control pilot project plan contains alternative procedures to prevent the further spread of scrapie without removing high-risk animals from the flock.

(b) [Reserved]

Done in Washington, DC, this 13th day of December 1999.

Craig A. Reed,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 99–32734 Filed 12–16–99; 8:45 am]

BILLING CODE 3410–34–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASO–24]

Proposed Amendment of Class E Airspace; Wise, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend Class E airspace at Wise, VA. A Global Positioning System (GPS) Standard Instrument Approach procedure (SIAP), helicopter point in space approach, has been developed for Whitesburg Appalachian Regional Hospital, Whitesburg, KY. As a result, additional controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to accommodate the SIAP and for Instrument Flight Rules (IFR) operations at Whitesburg Appalachian Regional Hospital. This action proposes to amend the Class E5 airspace for Wise, VA, to the northwest in order to include the point in space approach serving Whitesburg Appalachian Regional Hospital.

DATES: Comments must be received on or before January 18, 2000.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Docket No. 99–ASO–24, Manager, Airspace Branch, ASO–520, P.O. Box 20636, Atlanta, Georgia 30320.

The official docket may be examined in the Office of the Regional Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, telephone (404) 305–5627.

FOR FURTHER INFORMATION CONTACT: Nancy B. Shelton, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5627.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 99–ASO–24.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. All comments submitted will be available for examination in the Office of the Regional Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Manager, Airspace Branch, ASO–520, Air Traffic Division, P.O. Box 20636, Atlanta, Georgia 30320. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR Part 71) to amend Class E airspace at Wise, VA. A GPS SIAP, helicopter point in space approach, has been developed for Whitesburg Appalachian Regional Hospital, Whitesburg, KY. Additional controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAP and for IFR operations at Whitesburg Appalachian Regional Hospital. Class E airspace designations for airspace areas extending upward fro 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR 71.1 The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) Does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposed to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

AEA VA E5 Wise, VA [Revised]

Lonesome Pine Airport, Wise, VA

(Lat. 36°59′15″ N, 82°31′49″ W)
Whitesburg Appalachian Regional Hospital, Whitesburg, KY
Point In Space Coordinates
(Lat. 37°07′16″ N, long, 82°50′34″ W)

That airspace extending upward from 700 feet or more above the surface within a 10-mile radius of Lonesome Pine Airport and that airspace within a 6-mile radius of the point in space (lat 37°07′16″ N, long. 82°50′34″ W) serving Whitesburg Appalachian Regional Hospital, Whitesburg, KY.

* * * * *

Issued in College Park, Georgia, on December 9, 1999.

Wade T. Carpenter,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 99–32768 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASO–25]

Proposed Amendment of Class E Airspace; Lexington, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend Class E airspace at Lexington, KY. A Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP), helicopter point in space approach, has been developed for Saint Joseph's Hospital and The University of Kentucky Medical Center, Lexington, KY. As a result, additional controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to accommodate the SIAP and for Instrument Flight Rules (IFR) operations at Saint Joseph's Hospital and The University of Kentucky Medical Center. This action proposes to amend the Class E5 airspace for Lexington, KY, to the east in order to include the point in space approach serving Saint Joseph's Hospital and The University of Kentucky Medical Center.

DATES: Comments must be received on or before January 18, 2000.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Docket No. 99–ASO–25, Manager, Airspace Branch, ASO–520, P.O. Box 20636, Atlanta, Georgia 30320.

The official docket may be examined in the Office of the Regional Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, telephone (404) 305–5627.

FOR FURTHER INFORMATION CONTACT: Nancy B. Shelton, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5627.

SUPPLEMENTARY INFORMATION: .

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 99–ASO–25.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. All comments submitted will be available for examination in the Office of the Regional Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Manager, Airspace Branch, ASO–520, Air Traffic Division, P.O. Box 20636, Atlanta, Georgia 30320. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR Part 71) to amend Class E airspace at Lexington, KY. A GPS SIAP, helicopter point in space approach, has been developed for Saint Joseph's Hospital and The University of Kentucky Medical Center. Additional controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAP and for IFR operations at Saint Joseph's Hospital and The University of Kentucky Medical Center. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) Does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

The consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATING OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO KY E5 Lexington, KY [Revised]

Lexington, Blue Grass Airport, KY
(Lat. 38°02′13″ N, long. 84°36′20″ W)
Saint Joseph's Hospital and The University of Kentucky Medical Center, Lexington, KY
Point In Space Coordinates
(Lat. 38°01′15″ N, long. 84°30′59″ W)

That airspace extending upward from 700 feet or more above the surface within a 7-mile radius of Blue Grass Airport and that airspace within a 6-mile radius of the point in space (lat. 38°01′15″ N, long. 84°30′59″ W) serving Saint Joseph's Hospital and The University of Kentucky Medical Center, Lexington, KY.

* * * * *

Issued in College Park, Georgia, on December 9, 1999.

Wade T. Carpenter,

Acting Manager, Air Traffic Division Southern Region.

[FR Doc. 99–32767 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASO–23]

Proposed Amendment of Class E Airspace; London, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend Class E airspace at London, KY. A Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP), helicopter point in space approach, has been developed for Manchester Memorial Hospital, Manchester, KY. As a result, additional controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to accommodate the SIAP and for Instrument Flight Rules (IFR) operations at Manchester Memorial Hospital. This action proposes to amend the Class E5 airspace for London, KY, to the northeast in order to include the point in space approach serving Manchester Memorial Hospital.

DATES: Comments must be received on or before January 18, 2000.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Docket No. 99–ASO–23, Manager, Airspace Branch, ASO–520, P.O. Box 20636, Atlanta, Georgia 30320.

The official docket may be examined in the Office of the Regional Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, telephone (404) 305–5627.

FOR FURTHER INFORMATION CONTACT: Nancy B. Shelton, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5627.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 99–ASO–23.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. All comments submitted will be available for examination in the Office of the Regional Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Manager, Airspace Branch, ASO–520, Air Traffic Division, P.O. Box 20636, Atlanta, Georgia 30320. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR Part 71) to amend Class E airspace at London, KY. A GPS SIAP, helicopter point in space approach, has been developed for Manchester Memorial Hospital, Manchester, KY. Additional controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAP and for IFR operations at Manchester Memorial Hospital. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9G, dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) Does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration

proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO KY E5 London, KY [Revised]

London—Corbin Airprot—Magee Field, KY
(Lat. 37°05′14″ N, long 84°04′37″ W)
Manchester Memorial Hospital, Manchester, KY
Point In Space Coordinates
(Lat. 37°10′28″ N, long. 83°46′35″ W)

That airspace extending upward from 700 feet or more above the surface within an 11-mile radius of London—Corbin Airport—Magee Field and that airspace within a 6-mile radius of the point in space serving Manchester Memorial Hospital, Manchester, KY.

* * * * *

Issued in College Park, Georgia, on December 9, 1999.

Wade T. Carpenter,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 99–32766 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–42208; File No. S7–28–99]

Regulation of Market Information Fees and Revenues

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: The Securities and Exchange Commission is reviewing the arrangements currently in place for disseminating market information to the public. It particularly is focusing on the fees charged for market information and the role of revenues derived from such fees in funding the operation and regulation of the markets. To further its review, the Commission is inviting public comment on these matters. This release describes the current arrangements for disseminating market information and provides tables setting forth the fees, revenues, and expenses of the self-regulatory organizations and the joint plans they have formed to disseminate market information; discusses the relevant statutory standards that govern market information fees and revenues; analyzes the financial structures of the self-regulatory organizations and the cost of market information; and identifies a number of issues on which the Commission specifically is requesting comment. Following receipt of the public's comments and completion of its review, the Commission intends to take further action to assure that market information arrangements properly reflect changes that have occurred in the securities industry and remain consistent with statutory standards.

DATES: Comments are due on or before March 31, 2000.

ADDRESSES: Interested persons should submit three copies of their written data, views, and opinions to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–28–99. Comments submitted by E-mail should include this file number in the subject line. Comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Daniel M. Gray at (202) 942–4164, Mignon McLemore at (202) 942–0169, or Anitra T. Cassas at (202) 942–0089, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–1001.

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I. Introduction

The Securities and Exchange Commission (''Commission'') is reviewing the arrangements for disseminating ''market information''—information concerning quotations for and transactions in equity securities and options that are actively traded in the U.S. markets. It is focusing particularly on the fees charged for market information and on the role of revenues derived from such fees in funding the self-regulatory organizations that are a national securities exchange or a national securities association (collectively, ''SROs'').[1] Based on its

[1] Currently, the national securities exchanges are the American Stock Exchange LLC (''Amex''), the

Continued

review thus far, the Commission believes that changes may be warranted in these areas. Because the potential changes raise complex factual and policy issues and could have far-reaching effects on the SROs and the securities markets, the Commission has decided to invite public comment before taking further action. This release is intended to assist the public in formulating comments by setting forth the relevant factual and legal context for market information issues in sections II through IV and the Appendix, and by identifying a variety of specific issues in section V on which the Commission is particularly interested in receiving comments.

All participants in the U.S. markets have access to a consolidated, real-time stream of market information for any of the thousands of equity securities and options that are actively traded. The information for each security is ''consolidated'' in that it is continually collected from the various market centers that trade the security and then disseminated in a single stream of information. It is ''real-time'' in that there is very little delay between the time that a quotation is made or a transaction is effected and the time that this information is made available to investors and any others who use the information. This consolidated, real-time stream of market information has been an essential element in the success of the U.S. securities markets. It is the principal tool for enhancing the transparency of the buying and selling interest in a security, for addressing the fragmentation of buying and selling interest among different market centers, and for facilitating the best execution of customers' orders by their broker-dealers.

Broad public access to consolidated market information was not the fortuitous result of private market forces, but of planning and concerted effort by the Congress, the Commission, the SROs, and the securities industry as a whole. Prior to the 1970's, the various SROs had acted individually in deciding who would be entitled to receive their market information and on what terms. In the early 1970's, the Commission took the initial steps toward creating a central market system in which investors would have access to information from all markets. Congress adopted this fundamental policy determination when it enacted the Securities Acts Amendments of 1975 (''1975 Amendments'').[2] In particular, it authorized the Commission to facilitate the creation of a national market system for securities, the heart of which was to be communications systems that would disseminate consolidated market information. Using this authority, the Commission adopted a number of rules pursuant to which the SROs act jointly in disseminating market information. Under this regulatory framework, the SROs have developed and funded the systems that have been so successful in disseminating a highly-reliable, real-time stream of consolidated market information throughout the United States and the world.

The Commission believes that the statutory framework and objectives established by Congress for the national market system in 1975 continue to be just as relevant today. A number of developments in the securities industry, however, led the Commission to initiate its review of the arrangements currently in place for disseminating market information. Each of these developments is attributable, in large part, to improved technology for communicating and organizing information.

First, new technology has greatly expanded the opportunity for retail investors to obtain access to real-time market information through ''on-line'' accounts with their broker-dealers. Not surprisingly, the demand by retail investors for this high-quality information has grown exponentially in the last five years. Revenues derived from fees applicable to retail investors have grown from $3.7 million in 1994 to $38.9 million in 1998, and now represent approximately 9% of total market information revenues.[3] Notably, revenues derived from fees applicable to professional subscribers also grew very substantially in the last five years, from $231.1 million in 1994 to $351.1 million in 1998, and still account for approximately 85% of total market information revenues. In addition, most of the fees applicable to retail investors have been reduced in recent months by 50% to 80%. Nevertheless, the Commission remains concerned that retail investor fees have not properly kept pace with changing technology and increased demand.

One of the most important functions that the Commission can perform for retail investors is to ensure that they have access to the information they need to protect and further their own interests. Communications technology now has progressed to the point that broad access to real-time market information should be an affordable option for most retail investors, as it long has been for professional investors. This information could greatly expand the ability of retail investors to monitor and control their own securities transactions, including the quality of execution of their transactions by broker-dealers. The Commission intends to assure that market information fees applicable to retail investors do not restrict their access to market information, in terms of both number of subscribers and quality of service. In addition, such fees must not be unreasonably discriminatory when compared with the fees charged to professional users of market information. Comment is requested on these issues in section V below.

The second development prompting the Commission's review of market information arrangements is the changing structure of the securities industry, particularly the growth of alternative trading systems (''ATSs'') that compete with markets operated by the SROs.[4] Some of these ATSs, which are operated by for-profit entities, have applied for registration or indicated an interest in registering as exchanges and thereby becoming SROs themselves. Moreover, existing SROs are exploring the possibility of converting from membership organizations to for-profit corporations as one means to compete more effectively. Thus, the current structure of industry self-regulation, which largely has been in place since the securities laws originally were enacted in the 1930's, may be about to change in fundamental ways.

These potential changes in the structure of industry self-regulation raise a number of difficult policy issues, some of which relate directly to the arrangements for disseminating market information. The creation of for-profit SROs may require closer monitoring of the SROs' fees and financial structures, including their funding and use of resources. For example, the value of a market's information is dependent on the quality of the market's operation and regulation. Information is worthless if it is cut off during a systems outage

Boston Stock Exchange, Incorporated (''BSE''), the Chicago Board Options Exchange, Incorporated (''CBOE''), the Chicago Stock Exchange, Incorporated (''CHX''), the Cincinnati Stock Exchange (''CSE''), the New York Stock Exchange, Inc. (''NYSE''), the Pacific Exchange, Inc. (''PCX''), and the Philadelphia Stock Exchange, Inc. (''Phlx''). The national securities association is the National Association of Securities Dealers, Inc. (''NASD'').

[2] Pub. L. 94–29, 89 Stat. 97 (1975).

[3] The fees applicable to professional subscribers and retail investors, as well as the revenues derived from such fees for 1994 and 1998, are set forth in Tables 1–8 in the Appendix. The fee structures are described in section II.E below.

[4] *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (''ATS Release'').

(particularly during a volatile, high-volume trading day when reliable access to market information is most critical), tainted by fraud or manipulation, or simply fails to reflect accurately the buying and selling interest in a security. Consequently, there is a direct connection between the value of a market's information and the resources allocated to operating and regulating that market.

The Commission is committed to ensuring that the U.S. securities markets continue to be operated and regulated in accordance with the high standards mandated by Congress in the Securities Exchange Act of 1934 (''Exchange Act'').[5] It is the SROs—the organizations that have registered under sections 6 and 15A of the Act—that are charged with the front-line responsibilities for operating and regulating the primary U.S. markets. To meet these responsibilities, the SROs historically have relied on market information fees as one of their important sources of funding. In 1998, for example, the SROs collectively had total revenues of $1.97 billion and total operating expenses of $1.68 billion.[6] Market information revenues represented 21% ($410.6 million) of the SROs' total revenues. This percentage has remained remarkably steady over the last five years, despite the rapid growth in market information revenues. In other words, the growth in market information revenues has simply kept pace with the growth of other SRO revenues during the prolonged expansion in trading volume of the last five years.[7] The SROs are no more, but also no less, dependent on market information revenues today than they were in 1994.

The Commission believes that the revenues derived from market information fees continue to be an appropriate part of SRO funding. It is concerned, however, that the current arrangements for setting fees and distributing revenues may need to be revised, particularly in light of the potential changes in the structure of industry self-regulation. Section V requests comment on a number of matters being considered by the Commission. These include (1) a conceptual approach to evaluating the fairness and reasonableness of fees that, among other things, could establish a link between the cost of market information and the total amount of market information revenues, (2) a conceptual approach to distributing market information revenues to the SROs that could provide for more direct funding of SRO functions that enhance the integrity and reliability of market information, (3) greater public disclosure concerning fees, revenues, and the SROs' use of revenues, and (4) broader industry and public participation in the process of setting and administering fees. After receiving the public's comments and completing its review, the Commission intends to take further action to assure that the arrangements for disseminating market information continue to reflect the objectives set forth in the Exchange Act.

II. Joint SRO Arrangements for Disseminating Market Information

Public discussion about the dissemination of market information often has been framed in terms of the question: ''Who owns market information?''[8] This question presumes, however, that essentially state law concepts of ownership prevail in this area. In fact, market information, at least since 1975, has been subject to comprehensive regulation under the Exchange Act, particularly the national market system requirements of Section 11A.[9] To implement the national market system, the Commission has required the SROs to act *jointly* pursuant to various national market system plans in disseminating *consolidated* market information.

These plans govern all aspects of the arrangements for disseminating market information. Among other things, they require the individual SROs to funnel market information to a central processor, which then consolidates the information into a single stream for dissemination to the public. In this way, the public is assured of access to a highly reliable source of information that is fully consolidated from all the various market centers that trade a particular security. The plans also govern two of the most important rights of ownership of the information—the fees that can be charged and the distribution of revenues derived from those fees. As a consequence, no single market can be said to fully ''own'' the stream of consolidated information that is made available to the public. Although markets and others may assert a proprietary interest in the information that they contribute to this stream, the practical effect of comprehensive federal regulation of market information is that proprietary interests in this information are subordinated to the Exchange Act's objectives for a national market system.[10]

A. Overview

The arrangements currently in place for disseminating market information are the product of a variety of different national market system plans that operate in accordance with a variety of different Exchange Act rules. The arrangements are most usefully organized, particularly from the standpoint of their fees, revenues, and expenses, according to the four networks or systems that the SROs have developed to disseminate market information for four different categories of securities: (1) Network A—securities listed on the NYSE; (2) Network B—securities listed on Amex or the regional exchanges; (3) Nasdaq System—securities qualified for inclusion in the Nasdaq Stock Market, Inc. (''Nasdaq'') and certain other securities traded in the over-the-counter (''OTC'') market; and (4) OPRA System—exchange-listed options. For simplicity's sake, the two networks and two systems will hereinafter be referred to collectively as the ''Networks.''

The collection and dissemination of market information by the Networks are addressed primarily by four Exchange Act rules. Rule 11Aa3–1[11] governs the dissemination of transaction reports and last sale information in national market system securities (equity securities listed on a national securities exchange or included in the National Market tier of Nasdaq).[12] In general, this rule requires an SRO to file a transaction reporting plan for such securities, and it requires an SRO's members to transmit the information required by the plans to the SRO. Rule 11Ac1–1[13] governs the dissemination of quotations in national market system securities and additional Nasdaq System securities. In general, it requires an SRO to establish procedures for making available its members'

[5] 15 U.S.C. 78a–78mm.

[6] Itemized revenues and expenses for the SROs in 1994 and 1998 are set forth in Tables 9–17 in the Appendix.

[7] While SRO revenues and costs have grown rapidly during the expansion in trading volume, they still have been outpaced by the growth in revenues, costs, and profits of the securities industry as a whole. *See* section IV.B below.

[8] *See*, *e.g.*, Susan B. Garland, ''Whose Info Is It, Anyway?'', *Business Week*, Sept. 13, 1999, at 114, 118; Diana B. Henriques, ''Who Holds the Deed to Stock Data?'', *N.Y. Times*, Mar. 28, 1999, at 7.

[9] *See* section III.A below for a discussion of the SROs' legal rights with respect to market information prior to implementation of the national market system in the mid-1970's.

[10] The Exchange Act's national market system objectives are discussed in section III.B below.

[11] 17 CFR 240.11Aa3–1.

[12] A ''national market system security'' is defined in Rule 11Aa2–1, 17 CFR 11Aa2–1, as any ''reported security'' as defined in Rule 11Aa3–1. Currently, reported securities under Rule 11Aa3–1 are equity securities that are listed on a national securities exchange or that are included in the National Market tier of Nasdaq.

[13] 17 CFR 240.11Ac1–1.

quotations to information vendors, and it requires the SRO's members to communicate quotation information in compliance with the procedures. Rule 11Ac1–2 [14] governs the display of transaction reports and quotation information in national market system securities and additional Nasdaq System securities. In general, it requires all information vendors, if they provide broker-dealers with any market information for a security, to provide a consolidated display of information for the security from all reporting market centers. Finally, Rule 11Aa3–2 [15] sets forth the procedures for the filing and Commission approval of national market system plans and plan amendments.

The respective plans, participants, administrators, and information processors associated with each of the four Networks are set forth below.

1. Network A

Network A is operated pursuant to the Consolidated Tape Association Plan (''CTA Plan'') and the Consolidated Quotation Plan (''CQ Plan). It disseminates market information for any common stock, long-term warrant, or preferred stock admitted to dealings on the NYSE.[16] All of the SROs are participants in the CTA Plan and CQ Plan. The Consolidated Tape Association (''CTA'') is a committee made up of one representative of each of the participants. It administers the CTA Plan and is registered as a securities information processor (''SIP'') under Section 11A(b) of the Exchange Act.[17] The administrator of Network A's day-to-day operations is the NYSE, and its information processor is the Securities Industry Automation Corporation (''SIAC'').[18] Amendments to the CTA Plan and the CQ Plan are subject to Commission review under Rule 11Aa3–2.

2. Network B

Network B also is operated pursuant to the CTA Plan and the CQ Plan. It disseminates market information for any common stock, long-term warrant, or preferred stock admitted to dealings on the Amex or the regional exchanges, but not also admitted to dealings on the NYSE or included in the Nasdaq market.[19] Its day-to-day administrator is Amex, and its information processor is SIAC. Although they are operated pursuant to the same plans, Network B and Network A are treated separately with respect to most of their financial matters and fee structures.[20]

3. Nasdaq System

The Nasdaq System disseminates real-time market information for securities included in the two tiers of the Nasdaq market—the National Market (''NNM'') and the SmallCap Market (''SCM'') [21]—as well as certain other securities traded in the over-the-counter (''OTC'') market.[22] Information for NNM securities is collected and disseminated pursuant to the NASD's rules and the Joint Self-Regulatory Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Exchange-listed Nasdaq/National Market System Securities and for Nasdaq/National Market System Securities Traded on an Unlisted Trading Privilege Basis (''Nasdaq/UTP Plan''). The participants in the Nasdaq/UTP Plan are Amex, CHX, NASD, and Phlx. The BSE is a limited participant.[23] The Nasdaq/UTP Plan provides for an operating committee composed of one representative for each participant. Market information for SCM and other securities traded in the OTC market is collected and disseminated pursuant to the NASD's rules. The day-to-day administrator and information processor for the Nasdaq System is Nasdaq. Nasdaq is a registered SIP under section 11A(b). Amendments to the Nasdaq/UTP Plan are subject to Commission review under Rule 11Aa3–2. Amendments to the NASD's rules (including changes in market information fees relating to all Nasdaq System securities) are subject to Commission review under Section 19(b) of the Exchange Act.

4. OPRA System

The OPRA System is operated pursuant to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan''). It disseminates market information for series of options contracts traded in a securities market maintained by a party to the OPRA Plan.[24] The parties to the OPRA Plan are Amex, CBOE, NYSE,[25] PCX, and Phlx. The OPRA System is administered by the Options Price Reporting Authority (''OPRA''), a committee made up of one representative from each of the parties to the OPRA Plan. OPRA is a registered SIP under section 11A(b). CBOE provides administrative services for the OPRA Plan, and SIAC provides processing services. Amendments to the OPRA Plan are subject to Commission review under Rule 11Aa3–2. Although the OPRA Plan has been approved as a national market system plan under Rule 11Aa3–2, it has not been approved by the Commission pursuant to Rule 11Aa3–1, which requires SROs to file a transaction reporting plan for certain equity securities. OPRA System securities therefore are not ''reported securities'' and are not subject to Rules 11Aa3–1, 11Ac1–1, 11Ac1–2, or 11Ac1–4. Nevertheless, the OPRA Plan itself imposes a variety of requirements on its participants and vendors of its information. For example, Section VII(b) of the OPRA Plan provides that vendor agreements must contain standards requiring the non-discriminatory dissemination of information from all markets and that vendors' equipment must be capable of displaying all information regardless of the market in which a transaction or quotation took place.

B. Governance

The CTA Plan, CQ Plan, Nasdaq/UTP Plan, and OPRA Plan (collectively, the ''Plans'') incorporate rules for governing their affairs that are quite similar. Each is administered by a committee composed of one representative from each of their respective participants. A majority vote of representatives generally is sufficient to approve Plan actions. Amendments to the Plans, however, must be executed by each participant, except that fee increases or new fees can be adopted by a 2/3 vote.[26] Each of the Plans provides for the delegation of its operational functions to individuals, entities, or committees.[27] Finally, each of the Plans provides for the admission of new participants.

[14] 17 CFR 240.11Ac1–2.

[15] 17 CFR 240.11Aa3–2.

[16] CTA Plan, Sections I(p) and VII(a)(i).

[17] The CQ Plan is administered by an Operating Committee that is substantially the same as the CTA.

[18] SIAC is jointly owned by the NYSE and Amex and is a registered SIP under Section 11A(b).

[19] CTA Plan, Sections I(q) and VII(a).

[20] *See, e.g.,* CTA Plan, Section XII(a) (''Except as otherwise indicated, each income, expense and cost item, and each formula therefor described in this Section XII, applies separately to each of the two CTA networks and its respective Participants.'').

[21] *See* NASD Rule 4200(a)(27).

[22] *See, e.g.,* NASD Rule 7010(a).

[23] A ''limited participant'' is a national securities exchange whose participation in the Nasdaq/UTP Plan is restricted to reporting market information.

[24] OPRA Plan, Section III(a).

[25] The NYSE no longer trades listed options.

[26] *See, e.g.,* CQ Plan, Sections IV(c) and IX(b)(iii); Nasdaq/UTP Plan, Section IV.C.2.

[27] *See, e.g.,* CTA Plan, Section IV(a) (''CTA will be primarily a policy-making body as distinguished from one engaged in operations of any kind. CTA, directly or by delegating its functions to individuals, committees established by it from time to time, or others, will administer this CTA Plan and will have the power and exercise the authority conferred upon it by this CTA Plan as described herein.'').

C. Collection and Processing of Information

The Plans require participants to collect and promptly report market information to the Plan processors. The processors are responsible for receiving the information from the participants, consolidating the information, and then disseminating it in accordance with the Plans. The CQ Plan and the Nasdaq/UTP Plan provide for the dissemination of a consolidated best bid and offer that identifies the market centers that published these quotes.[28] The OPRA Plan (the only other Plan that disseminates quotation information) does not provide for dissemination of a consolidated best bid and offer.

With the expansion in trading volume of recent years, the amount of information handled by the Plan processors has expanded dramatically. For example, in 1994, SIAC processed 73 million transaction reports and 115 million quotations for Network A and Network B. In 1998, these figures increased to 190 million transaction reports and 444 million quotations, for an increase, respectively, of 160% and 268%. By comparison, the total revenues of Network A and Network B increased by only 51% between 1994 and 1998.[29] Similarly, in 1994 the trading volume in Nasdaq securities was 74 billion shares. In 1998, the trading volume was 202 billion shares, for an increase of 173%.

D. Financial Matters

The Plans have adopted rules governing their financial matters that are similar to one another.[30] All revenues derived from fees charged for a Network's market information are included in a single pool. The Network's operating expenses (amounts incurred by the Network's administrator and processor in performing their Network functions) are paid directly out of the Network's revenues. A Network's operating expenses do not, however, include any of the costs incurred by the individual SROs in reporting their information to the Network processors.[31] After deduction of operating expenses, each Network's revenues generally are distributed to its participants in accordance with their proportional share of the total transaction volume for the Network.[32] Finally, each of the Plans also requires that its participants annually be provided with audited statements of its financial affairs.[33] The revenues, expenses, and distributions for each of the Networks are set forth in Tables 5–8 in the Appendix.

E. Fee Structures

The Plans and NASD rules establish the terms and conditions under which market information is disseminated by the Networks. In general, they require that market information be disseminated only to those persons that have been approved by their respective administrators and entered into the appropriate agreements.[34] These persons can be divided into two major categories—vendors and subscribers.[35] Vendors are in the business of distributing information to others. As a general matter, they accept the stream of information made available by the Network processors and, in turn, disseminate the information to their customers, often providing enhanced information services as well. Subscribers receive information for their own use, typically from vendors and broker-dealers.

The various fee structures that have been established by the Networks[36] for the dissemination of market information reflect this vendor/subscriber dichotomy. Vendors contract directly with the Networks for the right to receive information and distribute it to their customers (*e.g.*, broker-dealers and institutional investors). Vendors pay a variety of access and administrative fees to the Networks.[37] Subscribers may contract directly with the Networks for receipt of market information, but generally obtain access to information through a vendor, which passes the subscriber fees on to the Network. Broker-dealers that both use information internally and distribute it to others (*e.g.*, their brokerage customers) act as both vendors and subscribers.

Each of the Networks receives the great majority of its revenues through subscriber fees. The most significant subscriber fees fall into two categories—monthly and per-query. Monthly fees entitle the subscriber to an unlimited amount of real-time market information during the month. They are charged to professional subscribers on a per-device basis and to nonprofessional subscribers on a per-customer basis. The nonprofessional subscriber fees are much less than the professional subscriber fees. In general, nonprofessional subscribers are defined as those who use market information solely for their personal, non-business use and do not distribute the information to others. Under the per-query fee structures, subscribers are required to pay an amount for each request for a packet of real-time market information.[38] Although the per-query fee structure is available to professional subscribers, it was developed by the Networks in recent years primarily for retail investors who want to obtain real-time information through their personal computers.[39] Recently, Nasdaq, Network A, and Network B have substantially reduced their nonprofessional subscriber and per-

[28] CQ Plan, Sections I(b) and VI(c); Nasdaq/UTP Plan, Section VI.C.I.

[29] The total revenues for Network A and Network B were $161.3 million in 1994 and $243.0 million in 1998. *See* Tables 5 and 7 in the Appendix. A fuller comparison of the growth in market data revenues and expenses compared to other securities industry benchmarks is provided in section IV.B.2 below.

[30] The OPRA Plan is somewhat different from the others in that it provides for three separate ''accounting centers''—basic, index options, and foreign currency options—for the allocation of revenues and expenses. OPRA Plan, Section VIII(a).

[31] *See, e.g.*, CTA Plan, Section XII(c)(v) (''Except as otherwise provided in this Section XII(c), each Participant and each other reporting party shall be responsible for paying the full cost and expense (without any reimbursement or sharing) incurred by it in collecting and reporting to the Processor in New York City last sale price information relating to Eligible Securities or associated with its market surveillance function.''); OPRA Plan, Section VIII(a)(ii) (''Each party shall be responsible for paying the full cost incurred by it in collecting and reporting to the Processor last sale reports and quotation information related to eligible securities for dissemination through the OPRA System.'').

[32] *See* CTA Plan, Section XII(a); CQ Plan, Section IX(a); OPRA Plan, Section XIII(b). The Nasdaq/UTP Plan distribution formula is a little different from the other plans in that it is based on an average of the percentage of total transaction volume and the percentage of total share volume. The Nasdaq/UTP Plan also provides for certain minimum payments to new participants. *See* Nasdaq/UTP Plan, Exhibit A. Thus far, CHX is the only non-NASD participant in the Nasdaq/UTP Plan to receive a distribution.

[33] CTA Plan, Section XII(a)(v); CQ Plan, Section IX(a)(v); Nasdaq/UTP Plan, Section XIV(C); OPRA Plan, Section VIII(a)(v).

[34] A detailed discussion of the process for obtaining market information from the Networks, including the applicable forms and their terms and conditions, is provided in a report on market data pricing commissioned by the Securities Industry Association. Arthur Andersen LLP, *Report on Market Data Pricing* 8–15 (June 1999) (''Andersen Report'').

[35] *See, e.g.*, CTA Plan, Section IX(a) (specifying a ''Consolidated Vendor Form'' and a ''Consolidated Subscriber Form'').

[36] Fees are set separately for each of the four Networks.

[37] *See* Andersen Report, note 34 above, at Exhibit 4 (listing the various fees and charges imposed on vendors and subscribers).

[38] A packet generally includes a variety of information relating to a single security (*e.g.*, last sale price, best bid, best offer, and volume).

[39] *See, e.g.*, Securities Exchange Act Release No. 35393 (February 17, 1995), 60 FR 10625 (NASD's purpose in establishing a per-query fee structure was ''to provide retail customers with a cost-effective alternative to calling their brokers for current market information'').

query fees.[40] In addition, for Network A and Network B the amount of per-query fees for a subscriber is capped each month at the amount of the monthly nonprofessional subscriber fee.[41]

The monthly professional, monthly nonprofessional, and per-query subscriber fees for each Network, as they currently exist and as they existed at the end of 1998 and 1994, are set forth in Tables 1–4 in the Appendix. The revenues derived from these subscriber fees for each Network in 1998 and 1994 are included in Tables 5–8 in the Appendix.

Under both the monthly and per-query fee structures, the Networks require vendors and subscribers to disclose a substantial amount of information about their business operations and use of market information, including the requirement that they monitor and report the number of devices, customers, and queries for which they must pay fees. There are substantial administrative costs associated with this process for vendors and subscribers, as well as the Networks.[42] The burdens imposed on vendors and subscribers by these fee structures are increased by the necessity to account separately to each Network, particularly when the relevant policies and procedures vary from Network to Network. Comment is requested in section V below on ways to reduce the cost of administering fee structures.

Finally, the Networks have experimented with an ''enterprise'' fee structure under which an entity would pay a set amount each month for the market information services that it receives from a Network. For example, the OPRA System established an enterprise rate in 1997 that is based primarily on the number of registered representatives associated with a particular firm.[43] In addition, Network A recently established an enterprise arrangement that caps at $500,000 the amount a registered broker-dealer is required to pay in a month for the use of market information by its employees and by its brokerage-account customers.[44]

F. Commission Oversight

Rule 11Aa3–2 establishes the procedures that govern amendments to each of the Plans. In addition, section 19(b) and Rule 19b–4 thereunder govern proposed rule changes by the NASD that relate to the Nasdaq System. In general, all amendments to the Plans and NASD rules must be filed with the Commission, published for public comment, and approved by the Commission. Under Rule 11Ac3–2(c)(3)(i), however, the Plans may submit their proposed fees as effective on filing (notice of the filing is still published for public comment). Within 60 days after filing, the Commission may abrogate the proposal and require that it be refiled for Commission approval. The NASD, in contrast, generally has submitted for Commission approval the proposed fees paid by non-members for Nasdaq System market information, rather than as effective on filing under Section 19(b)(3)(A)(ii). Under either of these procedures, fee changes are subject to Commission review.

The CTA Plan, CQ Plan, and NASD Rules contain provisions that authorize ''pilot programs'' that have not been filed for Commission review. For example, Section IX(e) of the CTA Plan provides as follows:

> (A) CTA network's administrator, on behalf of the CTA network's Participants, may enter into arrangements of limited duration, geography, and scope with vendors and other persons for pilot test operations designed to develop, or permit the development of, new last sale price information services and uses under terms and conditions other than those specified in Sections IX(a) and XII * * * Any such arrangement shall afford the CTA network's Participants an opportunity to receive market research obtained from the pilot test operations and/or to participate in the pilot test operations. The CTA network's administrator shall promptly report to CTA the commencement of each such arrangement and, upon its conclusion, any market research obtained from the pilot test operations.[45]

NASD Rule 7100(b) contains a similar provision:

> To facilitate the development of new information services and uses under appropriate terms and conditions, arrangements of limited duration, geography and/or scope may be entered into with Broker/Dealers, Vendors and other persons which may modify or dispense with some or all of the charges contained in this Rule or the terms and conditions contained in standard agreements. The arrangements contemplated will permit the testing and pilot operation of proposed new information services and uses to evaluate their impact on and to develop the technical, cost and market research information necessary to formulate permanent charges, terms and conditions for filing with and approval by the Commission.

Pursuant to these provisions, Network A, Network B, and the Nasdaq System have implemented some pilot programs that have lasted for many years without being filed for Commission approval.[46] Although the Networks have used these pilot program provisions to test new fees and services, the Commission does not believe that the provisions were intended to be used for such long-running programs. The Commission also is concerned that the public receive notice of, and an opportunity to comment on, the fees charged for market information. Comment is requested in section V below on procedures that would encourage innovation by the Networks without unduly restricting the opportunity for public notice and comment.

III. Exchange Act Standards Governing Market Information Fees and Revenues

Market information fees are addressed most directly by three provisions of the Exchange Act, all of which were added to the Act by the 1975 Amendments. First, section 11A(c)(1)(C) grants rulemaking authority to the Commission to assure that all SIPs may obtain market information from an exclusive processor of that information on terms that are ''fair and reasonable.'' Second, section 11A(c)(1)(D) grants rulemaking authority to the Commission to assure that all persons may obtain market information on terms that are ''not unreasonably discriminatory.''[47]

[40] Securities Exchange Act Release No. 42138 (Nov. 15, 1999), 64 FR 63350 (Network B fee reduction); Securities Exchange Act Release No. 41977 (Oct. 5, 1999), 64 FR 55503 (Network A fee reduction); Securities Exchange Act Release No. 41499 (June 9, 1999), 64 FR 32910 (Nasdaq System fee reduction).

[41] For Network A, per-query fees are capped at the $1 monthly fee that applies to the first 250,000 nonprofessional customers of a vendor.

[42] The administrative burdens associated with the monthly and per-query fee structures are discussed at length in the Andersen Report, note 34 above.

[42] *See* Securities Exchange Act Release No. 38204 (Jan. 24, 1997), 62 FR 4553.

[44] *See* Securities Exchange Act Release No. 41977, note 40 above.

[45] Section VII(e) of the CQ Plan contains a provision that is nearly identical to the CTA Plan provision.

[46] *See, e.g.,* Securities Exchange Act Release No. 40689 (Nov. 19, 1998), 63 FR 65626 (NASD proposed rule change to make permanent a pilot program for delivery of market information through automated voice response services that had been in operation for eleven years); Securities Exchange Act Release No. 39235 (Oct. 14, 1997), 62 FR 54886 (Network A proposal to include a per-query fee in its permanent fee schedule; noting that Network A had conducted pilot programs for per-query fees since 1991).

[47] Although the Commission has not yet exercised its rulemaking authority under section 11A(c)(1)(C) or (D) to specify the fees that can be charged for market information, these provisions plainly indicate Congress' intent that an exclusive processor's fees be ''fair and reasonable'' and ''not unreasonably discriminatory.'' Consequently, these requirements are applicable to the Commission's review of fees in the context of a proposed rule change by an SRO under section 19(b) or a national market system plan under Rule 11Aa3–2(c), as well as proceedings under section 11A(b)(5) to review a registered SIP's limitation on access to market information. In each of these contexts, the

Finally, sections 6(b)(4) and 15A(b)(5) require that the rules of a national securities exchange or a national securities association provide for the ''equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons'' using its facilities.

Terms such as ''fair,'' ''reasonable,'' and ''equitable'' often need standards to guide their application in practice. One standard commonly used to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the amount of costs incurred to provide the service.[48] Some type of cost-based standard is necessary in the monopoly context because, on the one hand, it precludes the excessive profits that would result if revenues were allowed to far outstrip costs, and, on the other hand, it precludes underfunding of a service if the revenues were held far below costs (or subsidization of the service by other sources of revenues).[49] Congress explicitly adopted a strict cost-of-service standard in the 1975 Amendments in the context of its decision to restrict the permissibility of fixed commission rates. Section 6(e)(1)(B) was added to the Exchange Act and precludes approval of an SRO's proposal for fixed commission rates unless the Commission finds, among other things, that the proposed rates ''are reasonable in relation to the costs of providing the service for which the fees are charged.''

In section 11A, however, Congress did not require the Commission to undertake a similar, strictly cost-of-service (or ''ratemaking'') approach to its review of market information fees in every case. Such an inflexible standard, although unavoidable in some contexts,[50] can entail severe practical difficulties. Instead, Congress, consistent with its approach to the national market system in general, granted the Commission some flexibility in evaluating the fairness and reasonableness of market information fees. Specifically, Congress articulated general findings and objectives for the national market system in section 11A and directed the Commission to act accordingly in overseeing its development. Congress thereby allowed the Commission to adopt a more flexible approach than ratemaking.[51]

In formulating its findings and objectives for the national market system, Congress was influenced to a great extent by the problems it perceived in the arrangements for disseminating market information prior to 1975. Consequently, an understanding of the standards by which Congress intended the Commission to evaluate market information fees requires an understanding of, first, the legal status of market information prior to 1975 and, second, the findings and objectives that Congress adopted for the establishment of a national market system. This section will conclude with a discussion of the Commission's review of market information fees in the years since 1975.

A. Legal Status of Market Information Prior to 1975

Prior to the 1970's, no statute or Commission rule required the SROs to disseminate market information to the public or to consolidate their information. Each SRO acted individually and disseminated information on its own terms. The SROs decided what information to disseminate, to whom to disseminate the information, and the amount of fees to charge. The result was that they did not provide consolidated information to broker-dealers and investors. In addition, the NYSE, which operated the largest market, severely restricted public access to market information, particularly its quotations.

During the early 1970's, the Commission initiated a comprehensive review of the securities markets that ultimately led to significant changes in market structure, including the arrangements for disseminating market information. In particular, it articulated the goal of a central market system. The attainment of that goal eventually led to the removal of an SRO's right to restrict public access to its information and to the wide availability of consolidated market information.

1. Exchange Control of Market Information

The nature of an exchange's interest in its market information was litigated in a series of Supreme Court cases decided between 1905 and 1926, the so-called ''ticker cases.''[52] Central to the Court's holding in all three cases were the exchanges' agreements with members, non-members and telegraphic distributors that restricted the redistribution of market information. Generally, the agreements required prior exchange approval of any intended recipient of the information.[53]

The first of the ticker cases to examine the legal status of an exchange's market information was *Board of Trade* v. *Christie Grain & Stock Co.*[54] In *Christie*, the Chicago Board of Trade (''CBOT'') sought to enjoin the defendants from illegally obtaining and distributing the CBOT's quotations of prices.[55] The Supreme Court held that the CBOT could prevent the grain companies from using the market information. Justice Holmes, writing for the majority, observed:

> (T)he plaintiff's collection of quotations is entitled to the protections of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's.[56]

In holding that the CBOT had the right to restrict the dissemination of its

Commission is required to determine whether a proposed fee is consistent with the provisions of the Exchange Act.

[48] *See, e.g., MCI Telecommunications Corp.* v. *FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (''A basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost.'') (footnote omitted); James C. Bonbright, *et al., Principles of Public Utility Rates* 109 (2d ed. 1988) (''[O]ne standard of reasonable rates can fairly be said to outrank all others in the importance attached to it by experts and public opinion alike—the standard of costs of service, often qualified by the stipulation that the relevant cost is necessary, true (*i.e.*, private and social) cost or cost reasonably and prudently incurred.'').

[49] *See* Bonbright, note 48 above, at 109 (''Rates found to be far in excess of cost are at least highly vulnerable to the charge of unreasonableness. Rates found well below cost are likely to be tolerated, if at all, only as a necessary and temporary evil. For if rates are not compensatory, they are not subsidy free.'').

[50] *See* section III.C below for a discussion of the Commission's adoption of a strict cost-of-service standard in the context of a limitation of access proceeding under section 11A(b)(5) involving the NASD and Institutional Networks Corporation (''Instinet'').

[51] In section V.A below, the Commission requests comment on a flexible, cost-based approach to assessing the fairness and reasonableness of market information fees.

[52] *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236 (1905); *Hunt* v. *New York Cotton Exchange*, 205 U.S. 322 (1907); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926). Many years have passed since these cases were decided. They are discussed in this release not because they necessarily would be decided the same way today, but to set forth the legal context surrounding the initiation of the national market system.

[53] For example, the NYSE generally made last-sale prices available to members, non-members, and telegraphic distributors pursuant to this type of agreement. *See* Letter from Robert W. Haack, President, NYSE, to William J. Casey, Chairman, SEC, dated May 22, 1972 (''NYSE Letter''). Some of the regional exchanges, however, did not restrict access to their market information. For example, the PCX publicized its transactions on a tickertape, which was made available to the vendors and the press, but imposed no restrictions on the use or dissemination of the information. *See* Letter from Thomas P. Phelan, President, PCX, to Ronald F. Hunt, Secretary, SEC, dated May 19, 1972.

[54] 198 U.S. 236 (1905).

[55] Certain telegraph companies were the only entities authorized to receive and distribute the CBOT's quotations, pursuant to an agreement that they not furnish the quotations to ''bucket shops.'' The defendants did not receive the quotations through these telegraph companies. 198 U.S. at 245.

[56] *Id.* at 250.

quotations, the Court focused on the nature of market information: ''Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough.'' [57]

The holding in *Christie* was reaffirmed two years later in *Hunt* v. *New York Cotton Exchange*.[58] In upholding an injunction enjoining the defendant from receiving and using exchange quotations of sales from an authorized telegraph company, the Court, citing *Christie*, stated that ''[i]t is established that the quotations are property and are entitled to the protection of the law'' and that ''the exchange may keep them to itself or communicate them to others.'' [59]

The major exchanges relied on the ticker cases to assert proprietary rights in their market information and to defend those rights vigorously. In a letter commenting on Commission proposals to require dissemination of consolidated market information, Amex stated its position as follows:

> We believe it is questionable whether the SEC has proceeded properly in proposing these Rules and we have attached, as Appendix A, a legal opinion which discusses this matter. It is long-standing and clearly established legally that the Exchange has a proprietary right in its transaction data and quotation information. It is not clear from the terms of the proposed Rules whether or to the extent to which they might impinge on the Exchange's right.[60]

The NYSE, which operated the largest market, had exercised its proprietary right to control its information by placing severe restrictions on public access to its quotations:

> It has always been the position of the Exchange that NYSE bid-asked quotations on a continuous basis are a prerogative of Exchange membership. Since 1928, when bid-asked quotations were first made available outside the Exchange, they have always been supplied only to the offices of members and member organizations pursuant to written agreements containing the same type of provisions as are included in last-sale agreements.[61]

In sum, market information, to the extent it was disseminated, was not consolidated, and the largest market refused to provide public access to its quotations. It was against this backdrop that the Commission took the first steps towards creating a central market system.

2. Initiation of a Central Market Structure

Recognizing that the public needed greater access to higher quality market information, the Commission focused on two objectives for market information in a series of statements on the future structure of the securities markets: Unrestricted public access and consolidated information. These objectives were embodied in the concept of a central market system, which the Commission endorsed in a letter transmitting the Institutional Investor Study Report to Congress in 1971.[62] In the letter, the Commission stated that a ''major goal and ideal of the securities markets and the securities industry has been the creation of a strong central market system for securities of national importance, in which all buying and selling interest in these securities could participate and be represented under a competitive regime.'' [63] In February 1972, the Commission issued its Statement on the Future Structure of the Securities Markets, which emphasized that ''an essential step toward formation of a central market system is to make information on prices, volume, and quotes for all securities in all markets available to all investors'' and that ''(s)uch a communications system would thus serve to link the now scattered markets for listed securities.'' [64]

The first steps toward practical implementation of a central market system were taken in 1972 when the Commission proposed rules to provide for the consolidated reporting of transactions and quotations.[65] In response to these proposals, the NYSE and Amex raised objections to the Commission's authority under the Exchange Act. For example, the NYSE made the following assertion with respect to the Commission's authority to adopt the quotations rule:

> To deprive or reduce the valuable property interest of the Exchange in its quotations is not only beyond the authority of the SEC under sections 17(a) and 23(a) of the Securities Exchange Act, but, furthermore, such action would deprive the Exchange of property in violation of the due process provisions of the Constitution of the United States.[66]

Despite these objections, the Commission was determined to achieve the goals of public access to consolidated market information. It did not believe, however, that this objective was incompatible with allowing the exchanges to charge reasonable fees for such information. For example, with respect to the transaction reporting rule, the Commission clarified that the ''imposition by self-regulatory organizations and vendors of reasonable, uniform charges for distribution of (transaction reports) in connection with compliance with the Rule will be permitted.'' [67] The Commission also emphasized that it was the SROs who should be primarily responsible for disseminating consolidated information: ''(B)ecause of their unique role in the statutory scheme, including their obligation to enforce the federal securities laws subject to the Commission's review, (the SROs) are the most appropriate bodies to collect, process and make available consolidated, real-time quotation data.'' [68]

In early 1975, the Commission sent letters to the national securities exchanges requesting that they eliminate any rules or practices that restricted access to or use of any quotation information disseminated by the exchange. The Commission's request emphasized the importance of wide public access:

> (Q)uotation information is of significant value to the market place as a whole insofar as a quotation reflects the considered judgment of a market professional as to various factors affecting the market, including the current price levels and size of buying and selling interest. Thus, restrictions on dissemination of that information detract from the efficiency of the market place in reflecting all available fundamental and market information respecting an issuer's securities.[69]

Just prior to enactment of the 1975 Amendments, the Commission announced that the exchanges had

[57] *Id.* at 251.

[58] 205 U.S. 322 (1907).

[59] *Id.* at 333, 336.

[60] Letter from Paul Kolton, President, Amex, to Ronald F. Hunt, Secretary, SEC, dated May 22, 1972.

[61] *See* NYSE Letter, note 53 above.

[62] SEC, Institutional Investor Study Report, H.R. Doc. No. 92–64, 92d Cong., 1st Sess. (1971).

[63] *Id.* at xxiv.

[64] Statement of the Securities and Exchange Commission on the Future Structure of the Securities Markets (February 2, 1972), 37 FR 5286.

[65] Securities Exchange Act Release No. 9529 (March 8, 1972), 37 FR 5760 (proposing Rule 17a–14 for quotation dissemination); Securities Exchange Act Release No. 9530 (March 8, 1972), 37 FR 5761 (proposing Rule 17a–15 for transaction reporting).

[66] NYSE Letter, note 53 above.

[67] Securities Exchange Act Release No. 9731 (August 14, 1972) (reproposing the transaction reporting rule).

[68] Securities Exchange Act Release No. 10969 (August 14, 1974), 39 FR 31920 (reproposing the quotation dissemination rule).

[69] Securities Exchange Act Release No. 11288 (March 11, 1975), 40 FR 15015. In making this request, however, the Commission stated that it did ''not view as a restriction reasonable charges for providing access to, or permitting use of, quotation information.'' *Id.* at n. 8.

complied with the Commission's request and that, as a consequence, vendors could disseminate quotation information ''to any subscriber for any purpose, subject only to compliance with such procedures as disseminating exchanges have established, or may in the future establish, to provide for the collection of reasonable exchange charges for such information.'' [70] In this regard, revenues derived from market information fees already were an important source of SRO funding. In 1975, for example, market information revenues represented 14.7% of the NYSE's total revenues and 28.2% of the Amex's total revenues.[71]

B. The 1975 Amendments

With the enactment of the 1975 Amendments, Congress left no doubt that the Commission was statutorily authorized to oversee the establishment of a national market system for securities. Consistent with the central market approach initiated by the Commission, the two ''paramount objectives'' of the national market system were to be ''the maintenance of stable and orderly markets'' and ''the centralization of all buying and selling interest so that each investor will have the opportunity for the best possible execution of his order, regardless of where in the system it originates.'' [72] To achieve these objectives, Congress recognized that ''communication systems, particularly those designed to provide automated dissemination of last sale and quotation information with respect to securities, will form the heart of the national market system.'' [73] Rather than attempt to dictate the specific elements of a national market system, however, Congress chose to rely on an ''approach designed to provide maximum flexibility to the Commission and the securities industry in giving specific content to the general concept of the national market system.'' [74]

Congress implemented this approach by adding section 11A to the Exchange Act. Section 11A(a) directs the Commission to facilitate the establishment of a national market system in accordance with specific congressional findings and objectives. Among these findings were that new data processing and communications techniques created the opportunity for more efficient and effective market operations, and that the linking of all markets through such data processing and communications facilities would increase the information available to broker-dealers and investors. The objectives set forth in section 11A(a) to guide the Commission in its oversight of the national market system were to assure (1) economically efficient execution of securities transactions, (2) fair competition among broker-dealers, among exchange markets, and between exchange markets and markets other than exchange markets, (3) the availability to broker-dealers and investors of market information, (4) the practicability of brokers executing investors' orders in the best market, and (5) an opportunity for investors' orders to be executed without the participation of a dealer.

Although it intended to rely on competitive forces to the greatest extent possible to shape the national market system, Congress also recognized that the Commission would need ample authority to achieve the goal of providing investors and broker-dealers with a central source of consolidated market information:

> The conferees expect, however, in those situations where competition may not be sufficient, such as the creation of a composite quotation system or a consolidated transactional reporting system, the Commission will use the powers granted to it in this bill to act promptly and effectively to insure that the essential mechanisms of an integrated secondary trading system are put in place as rapidly as possible.[75]

Accordingly, Congress granted the Commission ''pervasive rulemaking power to regulate securities communications systems.'' [76]

Congress was particularly concerned about entities that would be exclusive processors of market information for the SROs. It noted that any such processor would be ''in effect, a public utility, and thus it must function in a manner which is absolutely neutral with respect to all market centers, all market makers, and all private firms.'' [77] Section 11A was intended to ''grant the SEC broad powers over any exclusive processor and impose on that agency a responsibility to assure the processor's neutrality and the reasonableness of its charges in practice as well as in concept.'' [78]

Section 11A(b)(1) requires registration with the Commission of any SIP that is an exclusive processor. An ''exclusive processor'' is defined in section 3(a)(22)(B) as any SIP or SRO that, directly or indirectly, engages on an exclusive basis in collecting, processing, or distributing the market information of an SRO. If a registered SIP limits the access of any person to its services, section 11A(b)(5) provides for Commission review of the limitation. The Commission may uphold the limitation on access if it is consistent with the Exchange Act and the rules thereunder and the person subject to the prohibition or limitation has not been discriminated against unfairly. If the Commission cannot make this finding or if the prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, the Commission must set aside the limitation.

Although an SRO is excluded from the definition of a SIP in section 3(a)(22)(A) and therefore is not required to register under section 11A(b), Congress specifically included within the definition of ''exclusive processor'' in section 3(a)(22)(B) any SRO that acted ''on its own behalf'' in performing these functions. Moreover, the legislative history of this section indicates a congressional intention that SROs acting as exclusive processors be regulated ''in the same manner and to the same extent'' as SIPs that are registered under section 11A(b).[79]

Section 11A(c)(1) specifies the Commission's rulemaking authority over market information. In addition to assuring that exclusive processors make their market information available to SIPs on terms that are ''fair and reasonable'' (subparagraph C) and that all persons have access to information on terms that are ''not unreasonably discriminatory'' (subparagraph D), the Commission is directed to prevent deceptive or fraudulent information (subparagraph A), to assure the prompt, accurate, reliable, and fair dissemination of market information and that the form and content of information was fair and useful (subparagraph B), to assure that all broker-dealers transmitted orders in a manner consistent with the establishment of a national market system (subparagraph E), and to assure equal regulation of all markets and broker-dealers effecting transactions in national market system securities (subparagraph F).[80]

[70] Securities Exchange Act Release No. 11406 (May 7, 1975).

[71] NYSE, *1975 Annual Report* 16; Amex, *1975 Annual Report* 14.

[72] S. Rep. No. 94–75, 94th Cong., 1st Sess. 7 (1975) (''Senate Report'').

[73] H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 93 (1975) (''Conference Report'').

[74] *Id.* at 92.

[75] *Id.*

[76] *Id.* at 93.

[77] Senate Report, note 72 above, at 11.

[78] *Id.* at 12.

[79] *Id.* at 10.

[80] Congress explicitly defined ''equal regulation'' in the Exchange Act in terms of the effect of regulation on competition. Section 3(a)(36) provides

Continued

Finally, Congress addressed the issue of funding for national market system facilities. Sections 6(b)(4) and 15A(b)(5) require that the rules of a national securities exchange or national securities association ''provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using'' the exchange's or association's facilities. The legislative history of this provision indicates Congress' intent that the fees collected from all persons using an SRO's facilities could appropriately be directed to funding the ''costs associated with the development and operation of a national market system.'' [81]

In summary, Congress granted the Commission broad flexibility in the 1975 Amendments in determining whether the fees charged by an exclusive processor for market information are ''fair and reasonable,'' ''not unreasonably discriminatory,'' and an ''equitable allocation'' of reasonable fees among persons who use an SRO's facilities. The most important objectives for the Commission to consider in evaluating fees are to assure (1) the wide availability of market information, (2) the neutrality of fees among markets, vendors, broker-dealers, and users, (3) the quality of market information—its integrity, reliability, and accuracy, and (4) fair competition and equal regulation among markets and broker-dealers.

C. Commission's Review of Market Information Fees

The Commission most often has reviewed market information fees as proposed rule changes by the NASD under Section 19(b) and by the Plans under Rule 11Aa3–2(c). In this context, the Commission has relied to a great extent on the ability of the SROs and Plans to negotiate fees that are acceptable to SRO members, information vendors, investors, and other interested parties. This approach was adopted soon after the 1975 Amendments were enacted. For example, the 1978 Commission release adopting Rule 11Ac1–1, which requires the dissemination of quotations by SROs, addressed a dispute between the SROs and vendors concerning fees for quotation information.[82] The release states that ''[t]he Commission expects that the vendors and self-regulatory organizations will resolve these matters satisfactorily without Commission intervention prior to the effective date of the Rule. However, the Commission will monitor the progress of these discussions to assure that compliance with the Rule and the other provisions of the Act are achieved and will take appropriate action if necessary.'' [83]

As a means to arrive at fair and reasonable fees, the negotiation process is buttressed by the public notice and comment procedures that accompany proposed rule changes. If negotiations do not lead to a mutually acceptable fee, interested parties know that they will have an opportunity to submit their views on proposed fees directly to the Commission. In this regard, it bears noting that no comments were submitted to the Commission in 1995 when the NASD proposed to establish a per-query fee of one cent as an alternative to its monthly fee for nonprofessional subscribers, which was then $4 per month.[84] Similarly, no comments were submitted to the Commission in 1996 when OPRA proposed to establish a similar per-query fee of two cents.[85] It was not until October 1997, when the CTA proposed to establish a per-query fee of one cent as a permanent part of its fee schedule,[86] that the Commission received comments opposing the amount of these per-query fees. The negative comments focused attention on the fees applicable to retail investors, which was one of the important factors that led the Commission to undertake its comprehensive review of market information fees. As discussed in section V below, the Commission is considering whether there are ways to enhance the participation of interested parties in the fee-setting process.

In addition to commenting on proposed rule changes, vendors or subscribers who believe that a fee is high enough to constitute an unjustifiable limitation of their access to market information may, under section 11A(b)(5), apply to the Commission to institute proceedings to review the fee. The Commission has addressed market information fees in this context on two occasions. The first involved OPRA and several information vendors; the second involved the NASD and Institutional Networks Corporation (''Instinet''). These proceedings are discussed next.

1. OPRA Order

In 1978, the Commission issued an order addressing OPRA's decision to impose an access fee on information vendors (''OPRA Order'').[87] OPRA's justification for the proposed fee was to recoup the costs of developing and operating its new high speed consolidated options reporting system. The vendors challenged OPRA's statutory authority to impose an access fee, but the Commission decided that the language of Sections 11A(b)(3), 11A(b)(5), and 11A(c) ''indicates that a registered securities information processor is permitted to impose terms of access on vendors, including access fees.'' The Commission specifically declined, however, to evaluate the amount of the fee:

> The Commission's determination here is limited solely to a finding that the Act permits some form of an access fee to be charged by OPRA, in its capacity as a registered securities information processor. It does not address whether the costs incorporated by OPRA into the access fee represent limitations on access which are permitted under the Act, or whether the level of the fee charged by OPRA is reasonable.'' [88]

Thus, the OPRA Order indicates that costs are a relevant factor in determining the reasonableness of a fee for market information, but goes no further.

2. Instinet Order

In 1984, the Commission evaluated a market information fee in a limitation of access proceeding involving the NASD and Instinet. The Commission issued an order finding that a proposed NASD fee for quotation information represented an unwarranted denial of access, primarily because the NASD had failed to submit an adequate cost-based justification for its proposed fee (''Instinet Order'').[89] The Commission repeatedly emphasized, however, that the scope of its decision was limited to the particular competitive situation presented in the proceedings.

The NASD was not simply charging a fee for a stream of basic market information and then allowing vendors to provide that information to subscribers in whatever form they chose. Rather, the NASD also was in the

that a ''class of persons or markets is subject to 'equal regulation' if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under this title which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this title.'' The legislative history of this section emphasizes that equal regulation ''is a competitive concept intended to guide the Commission in its oversight and regulation of the trading markets and the conduct of the Securities industry.'' *Id.* at 94.

[81] Conference Report, note 73 above, at 92.

[82] Securities Exchange Act Release No. 14415 (January 26, 1978), 43 FR 4342.

[83] *Id.*

[84] Securities Exchange Act Release No. 35721 (May 16, 1995), 60 FR 27148.

[85] Securities Exchange Act Release No. 37686 (September 16, 1996), 61 FR 49801.

[86] Securities Exchange Act Release No. 39235 (October 14, 1997), 62 FR 54886.

[87] *In the Matter of Bunker Ramo Corp., GTE Information Systems, Inc., and Options Price Reporting Authority,* Securities Exchange Act Release No. 15372 (November 29, 1978).

[88] *Id.*

[89] Securities Exchange Act Release No. 20874 (April 17, 1984), 49 FR 17640.

business of providing enhanced information products to its own direct subscribers. Under these circumstances, the fees that the NASD charged to vendors could directly and substantially affect the ability of these vendors to compete in the market for providing enhanced information.[90] The Commission found that the requirement of section 11A(b)(5)(B)—that a limitation on access ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes'' of the Exchange Act—could be satisfied only if the fee was strictly limited to the NASD's costs of providing the information to vendors:

> [B]ecause Instinet seeks to distribute certain NASDAQ quotation information in competition with the NASD, which is an exclusive processor of that information, the proposed fees must be cost-based and calculated by allocating the percentage of system use of each quotation service offered by the NASD (''functional analysis''), to ensure the neutrality and reasonableness of the NASD's charges to Instinet and its subscribers.[91]

The Commission also emphasized, however, that it was the peculiar competitive context of the proceedings that led to its decision to require a strict, cost-based justification. It specifically distinguished fees for services that the NASD did *not* provide in competition with vendors:

> When the Commission approved the current NASDAQ fee schedule, it was addressing a situation markedly different from the situation in the current case. * * * In instances such as Level 1 service, the NASD has no incentive to establish fees that would influence a subscriber's choice of particular vendors from which to receive the service; because the NASD does not market the service on a retail level, it theoretically is immaterial to the NASD from whom particular subscribers receive the data. *In such cases, it well may be appropriate for the NASD to have a limited amount of flexibility in determining how to base its fees,* although all NASD fees must be consistent with the Act.[92]

The Instinet Order was affirmed in *National Assoc. of Securities Dealers, Inc.* v. *SEC.*[93] The court agreed with the Commission's analysis of the competitive context of the NASD's proposed fee: ''Had the Commission approved NASD's value-of-service fee proposal, Instinet's subscribers effectively would have been required to pay NASD retail rates for a wholesale service.''[94] Although it recognized that strict cost allocation was a difficult task, the court affirmed the Commission's view that a such an approach was necessary given the NASD's competitive position in relation to Instinet:

> Avoidance of cross-subsidization of services is a legitimate, non-arbitrary reason for requiring difficult cost allocations. * * * If permitted such a subsidy, NASD would have been given an unfair competitive edge over Instinet in a market in which NASD already had the advantage of its former monopoly position. We find these reasons sufficient to support the Commission's decision to require NASD to make an admittedly difficult and imprecise cost allocation.[95]

The practical difficulties of implementing this strict, cost-of-service approach are demonstrated by the subsequent history of the fee involved in the Instinet Order (later named the ''NQDS'' fee). In August 1985, the NASD proposed a revised fee of $79 per month.[96] The Commission did not approve this proposal, but instead instituted proceedings to determine whether it should be disapproved, based primarily on the question whether the fee included some costs that were inconsistent with the Instinet Order.[97] In September 1986, the NASD proposed another NQDS fee of $50.75 per month.[98] This proposal was supported by an extensive and complex ratemaking analysis. It included a comprehensive allocation of costs to pools consisting of six resources[99] and eleven services.[100] The major categories of costs were summarized as (1) operational costs, which were allocated to the six resource pools based on identifiable personnel, equipment, and physical facilities dedicated to those operations, (2) systems and product/service development costs, which were allocated to the six resource cost pools based on the historical or anticipated level of effort to be devoted to the respective resources, (3) overhead and general and administrative costs, which were allocated directly to resource and service cost pools to the extent that a causal relationship existed between those resources or services and the incurrence of the affected costs, and (4) residual overhead and general and administrative costs, which were allocated to resource and service cost pools based on the total cost input base.

The Commission had not acted on this proposal when the NASD, in July 1990, proposed yet another NQDS fee of $50 per month.[101] This fee, however, included last sale information in addition to quotation information. The Commission approved the fee in October 1990.[102] Notably, the Commission did not undertake any cost-based explanation of the $50 fee, nor did it express any opinion on the extensive cost-of-service analysis that had been included in the NASD's September 1988 proposal. Instead, it noted that, ''in reviewing the fairness and reasonableness of the proposal, the Commission finds it significant that the proposed fee of $50 is the result of negotiations among the concerned parties after protracted proceedings.''[103] The $50 fee approved for NQDS information in 1990 has remained unchanged up to the present.

IV. SRO Financial Structures and the Cost of Market Information

The financial structures of the individual SROs have not resulted from the imposition of any single blueprint for what an SRO should be. Rather, the current structure of each SRO is a result of its particular history and competitive position. Each SRO is, to a great extent, unique. For this reason, generalizations about the SROs are as apt to gloss over important differences as they are to highlight similarities. Nevertheless, important similarities do exist, particularly between the two largest SROs—the NYSE and NASD—which perform all of the self-regulatory functions, have the broadest access to the different sources of SRO funding, and therefore have the most complex cost structures. This section first will outline the various Exchange Act functions performed by the SROs and analyze their financial structures. It then will discuss the cost of market information in light of this analysis.

[90] The NASD provided its most basic quotation service, Nasdaq Level 1 (which included only the best bid and offer), solely through vendors. In contrast, it provided its enhanced Nasdaq Level 2 service (which included a full montage showing each market maker and its quotations) directly to subscribers. Instinet also wanted to participate in the market for providing the full montage to subscribers. The NASD had proposed to charge Instinet's subscribers a fee based on the fee it charged its own subscribers, thereby charging a retail price to a competitor in the wholesale market.

[91] *Id.*

[92] *Id.* (emphasis added).

[93] 801 F.2d 1415 (D.C. Cir. 1986).

[94] 801 F.2d at 1419.

[95] 801 F.2d at 1420–1421.

[96] Securities Exchange Act Release No. 22376 (August 30, 1985), 50 FR 36692.

[97] Securities Exchange Act Release No. 22935 (February 21, 1986), 51 FR 6957.

[98] Securities Exchange Act Release No. 26119 (September 27, 1988), 53 FR 39002.

[99] The six resources were (1) network/communications—2400-baud lines, (2) network/communications—9600-baud lines, (3) UNISYS processor, (4) Tandem processor, (5) UNISYS data storage, and (6) Tandem data storage.

[100] The eleven services were (1) Level 1, (2) Last Sale, (3) Level 2/3, (4) NQDS, (5) SOES, (6) TARS/MBARS, (7) CAES, (8) CTCI, (9) Mutual Funds, (10) NASDAQ/NMS Ticker, and (11) ACES.

[101] Securities Exchange Act Release No. 28200 (July 12, 1990), 55 FR 29446.

[102] Securities Exchange Act Release No. 28539 (October 15, 1990), 55 FR 42796.

[103] *Id.*

A. Exchange Act Functions of the SROs

Ever since the Exchange Act was enacted in 1934, self-regulation by the securities industry has been an essential component of its regulatory scheme for providing fair and orderly markets and protecting investors. The Exchange Act itself, as well as the Commission's rules and automation review policies thereunder, impose on the SROs a host of regulatory and operational responsibilities, including most of the day-to-day responsibilities for market and broker-dealer oversight. Meeting these self-regulatory responsibilities requires an enormous expenditure of expertise and funds, as evidenced in part by the fact that the SROs' combined total expenses in 1998 were $1.68 billion.[104]

Sparing the federal government much of the burden of securities regulation was one of the primary reasons that Congress incorporated industry self-regulation into the Exchange Act. For example, when Congress amended the Exchange Act in 1938 to extend the self-regulatory regime to the over-the-counter market, it noted that an approach relying solely on government regulation ''would involve a pronounced expansion of the organization of the Securities and Exchange Commission; the multiplication of branch offices; a large increase in the expenditure of public funds; an increase in the problem of avoiding the evils of bureaucracy; and a minute, detailed, and rigid regulation of business conduct by law.'' [105]

Rather than adopt this purely governmental approach, Congress determined that it was ''distinctly preferable'' to rely on ''cooperative regulation, in which the task will be largely performed by representative organizations of investment bankers, dealers, and brokers, with the Government exercising appropriate supervision in the public interest, and exercising supplementary powers of direct regulation.'' [106] Similarly, the legislative history of the 1975 Amendments noted that a principal reason for adopting a self-regulatory regime was the ''sheer ineffectiveness of attempting to assure (regulation) directly through the government on a wide scale.'' [107] Although the SROs had not always performed their role up to expectations, Congress believed that the self-regulation generally had worked well and ''should be preserved and strengthened.'' [108] In sum, the fees that enable the SROs to fulfill their self-regulatory functions play an essential role in the Exchange Act regulatory scheme.

These functions can be divided into the following four categories: market operation, market regulation, listing, and member regulation, which are described briefly below.

1. *Market Operation.* Each of the SROs is associated with a particular market that it is responsible for operating in accordance with the requirements of the Exchange Act. These include, for example, the requirements in section 6(b)(5) that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' To meet these statutory requirements, the SROs must establish and staff the physical locations and/or technological systems that are necessary for a stable and orderly market. In this regard, the Commission has promulgated two releases establishing automation review policies for the SROs to meet on a voluntary basis (''ARP Releases'').[109] Among other things, the ARP Releases recommend that each SRO produce estimates of future capacity needs, establish back-up protocols to deal with system problems, implement quality assurance and stress testing of its systems, and have in place a process for detecting and controlling internal and external threats to its systems. Meeting these stringent requirements is particularly important for the primary markets that must be able to operate smoothly on even the highest volume trading days.

2. *Market Regulation.* The SROs are responsible for promulgating rules that govern trading in their markets; establishing the necessary systems and procedures to monitor such trading; and identifying instances of suspicious trading, such as potential insider trading, market manipulation, or any other violations of the Exchange Act, the rules thereunder, or SRO rules. If an SRO identifies potential misconduct involving persons or entities that are within its jurisdiction, the SRO is responsible for conducting a further investigation and bringing a disciplinary action when appropriate. For potential misconduct outside its jurisdiction, an SRO is responsible for making referrals to the Commission or other appropriate agencies and assisting these agencies in their investigations.

3. *Listing.* The SROs promulgate and administer listing standards that govern the securities that may be traded in their markets. For corporate securities, these rules include minimum financial qualifications and reporting requirements for their issuers. The SROs are responsible for monitoring issuers and delisting the securities of those that fail to meet these minimum requirements. Obtaining a listing on an SRO market provides corporate issuers with the assurance of a well-operated and well-regulated trading market for their securities, as well as enhanced visibility and prestige in the eyes of investors. An active market for secondary trading in a corporation's securities benefits not only its shareholders, but also the corporation itself through enhanced capital-raising capacities. In addition to corporate securities, the SROs list a variety of derivative securities, such as equity options and index-based products.

4. *Member Regulation.* The SROs are responsible for promulgating and enforcing rules that govern all aspects of their members' securities business, including their financial condition, operational capabilities, sales practices, and the qualifications of their personnel. In fulfilling this function, the SROs conduct examinations on the premises of their members, monitor financial and other operational reports, and investigate potential violations of rules and bring disciplinary proceedings when appropriate. Many broker-dealers are members of more than one SRO,[110] and therefore the regulatory responsibilities for these firms, such as examinations of their financial and operational condition, have been allocated to a single SRO in accordance with section 17(d) of the Exchange Act and the rules thereunder.

B. SRO Financial Structures

1. Sources of Funding

There are four major categories of services provided by SROs for which they charge the fees that fund their

[104] *See* Tables 9 through 17 in the Appendix.

[105] S. Rep. No. 1455, 75th Cong., 3d Sess. 3 (1938).

[106] *Id.* at 4.

[107] Senate Report, note 72 above, at 22.

[108] *Id.* at 23.

[109] Securities Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490; Securities Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703.

[110] Section 15(b)(9) of the Exchange Act requires all broker-dealers to become members of a national securities association unless they limit their activities to effecting transactions in securities solely on a national securities exchange of which they are a member. As a result, all broker-dealers doing a public business currently must become members of the NASD, as well as of the exchanges on which they conduct business.

operations. These categories are (1) regulatory fees and assessments, which are paid by an SRO's members, (2) transaction services fees, which are paid by anyone who uses an SRO's facilities for executing, reporting, and clearing transactions, (3) listing fees, which are paid by corporate issuers, and (4) market information fees, which are paid by all those who use or distribute the financial information disseminated by the SROs, including information vendors, broker-dealers, institutional investors, retail investors, the options and futures markets, and others.

The amounts and the percentages of total SRO funding provided from these sources are set forth in the following table:

1998 SRO SOURCES OF FUNDING

$ millions (% of SRO Total)

	Regulatory	Transaction	Listing	Market Info	Other	SRO Total
NYSE	100.5 (14)	165.7 (23)	296.0 (41)	111.5 (15)	55.0 (7)	$728.7
NASD	234.0 (33)	126.9 (18)	137.3 (20)	152.3 (22)	49.3 (7)	699.8
Amex	17.7 (8)	91.9 (41)	16.3 (7)	82.9 (37)	15.2 (7)	224.0
CBOE	19.7 (15)	84.6 (67)	0.0 (0)	17.5 (14)	4.7 (4)	126.5
PCX	3.0 (4)	53.8 (71)	2.0 (3)	12.9 (17)	5.3 (7)	77.0
CHX	0.0 (0)	24.7 (54)	0.0 (0)	20.0 (44)	1.1 (2)	45.8
Phlx	0.0 (0)	30.2 (69)	0.0 (0)	7.1 (16)	6.4 (15)	43.7
BSE	2.5 (13)	10.4 (57)	0.8 (4)	3.8 (21)	0.9 (5)	18.4
CSE	0.5 (8)	2.6 (45)	0.0 (0)	2.6 (45)	0.1 (2)	5.8
$ Total	377.9 (19)	590.8 (30)	452.4 (23)	410.6 (21)	138.0 (8)	1969.7

Individual SROs vary widely in the extent to which they perform each of the four SRO functions and rely on the four sources of funding. As a cumulative matter, however, they received 21% ($410.6 million) of their funding from market information fees in 1998. This percentage has remained remarkably consistent, despite the rapid growth in market data revenues in recent years. For example, market information revenues provided the SROs with 20% ($246.1 million) of their funding in 1994. In addition, the reliance on market information revenues by two of the major equity markets—the NYSE and Amex—has remained relatively consistent ever since the national market system was created in the 1970's.[111] The major exception is the NASD, which was a relatively small organization and had no market information revenues in the 1970's. With the expansion of the Nasdaq market, however, the NASD now is one of the two largest SROs and receives 22% of its funding from market information revenues.

The NYSE historically has operated and regulated one of the largest and most prestigious markets in the world and has, as well, taken a leading role in the regulation of its members, which include most of the largest broker-dealers. Consistent with its broad responsibilities, the NYSE receives substantial revenues from each of the four sources of funding. In particular, the NYSE's revenues from listing fees in 1998 ($296 million) represented 41% of its total revenues and were more than double the listing revenues of all the other SROs combined. The NYSE's substantial responsibilities for regulating its members are reflected by its more than $100.5 million in revenues from regulatory fees. It also received $165.7 million from transaction services fees (classified as ''trading fees'' and ''facility and equipment fees'' in Table 9 in the Appendix) and $111.5 million from market information fees.

The NASD started from a substantially different position than the NYSE, but has grown so rapidly in the last decade that its revenues now are comparable to the NYSE's. The NASD began as a membership organization for broker-dealers conducting business in the over-the-counter markets. With the dramatic expansion of the Nasdaq market, however, the NASD now performs all of the four SRO functions to a large extent and is funded accordingly. Nevertheless, its origins are demonstrated by the fact that it received by far the largest amount of funding in 1998 from regulatory fees ($234.0 million, classified as ''member assessments,'' ''registration and qualification fees,'' ''regulatory fees and fines,'' and ''corporate finance fees'' in Table 10 in the Appendix). The prestige of the Nasdaq market is reflected by the NASD's $137.3 million in issuer listing fees. The NASD also received a larger amount of revenues from market information fees ($152.3 million) than any of the other SROs, which was bolstered by its $22.2 million in distributions from Network A and Network B for transactions in listed securities. Finally, the NASD received $126.9 million in revenues from transaction services fees.

The other SROs differ from the NYSE and NASD in three principal respects: (1) their markets generate much less trading volume, (2) they derive only a small portion of their revenues from listing fees, and (3) they are less involved in member regulation, which results in much lower revenues derived from regulatory fees. The result is that each of the SROs other than the NYSE and NASD derives a much higher percentage of its revenues from a combination of transaction service fees and market information fees.

2. Internal Cost Structures

The SROs' revenues are derived from discrete categories of fees that are disclosed separately on their financial statements. Their internal cost structures, in contrast, are much less transparent. Generally accepted accounting principles ordinarily do not require an entity to disclose an internal break-down of its costs according to business functions.[112] Consequently, most of the SROs' financial statements do not disclose the amount of costs that are associated with their respective functions or that support the various

[111] *See, e.g.*, SEC, *46th Annual Report* 110–111 (1980) (setting forth total revenues and market information revenues (then labeled ''communication revenues'') for each of the SROs from 1975 to 1979).

[112] The principal exception is SFAS No. 131, ''Disclosures About Segments of an Enterprise and Related Information.'' As discussed further below, the NASD has provided, pursuant to this accounting standard, the fullest disclosure of its internal cost structure of all the SROs. The notes to the NASD's 1998 consolidated financial statements provide disclosure of financial information for its NASD Regulation and Nasdaq-Amex business segments.

services they provide.[113] The SROs' financial statements do indicate, however, that a substantial majority of their costs relate to personnel and technology systems. For example, 74% ($405.6 million) of the NYSE's total operating expenses in 1998 were classified as ''compensation'' and ''systems and related support.'' Similarly, 79% ($491 million) of the NASD's total operating expenses in 1998 related to ''compensation,'' ''professional and contract services,'' and ''computer operation and data communications.'' The financial statements of the other SROs are similar in this respect.

In addition, while SRO total expenses have grown rapidly in recent years, from $1.05 billion in 1994 to $1.68 billion in 1998 for an increase of 60%, they have not kept pace with the growth in securities industry costs in general. For example, the total expenses of the U.S. securities industry, as represented by NYSE members doing a public business, grew from $70.2 billion in 1994 to $161.0 billion in 1998, for an increase of 129%.[114] Similarly, the percentage growth in the SROs' market data revenues (67%) and total revenues (64%) since 1994 has not kept pace with the percentage growth in the securities industry's total revenues (139%).[115] Finally, the SROs' market information revenues represent a very small portion of the securities industry's total expenses—less than one-quarter of one percent in 1998.[116]

The principal exception to the general unavailability of information about internal SRO cost structures is the NASD. Thus far, the NASD is the only SRO that has divided its regulatory and operational functions into separate subsidiaries, NASD Regulation, Inc. and Nasdaq.[117] The respective functions of NASD Regulation and Nasdaq are specified in the NASD's ''Plan of Allocation and Delegation of Functions by NASD to Subsidiaries.'' For the most part, all of the regulatory functions of the NASD, including both market and member regulation, are delegated to NASD Regulation, while the market operation and listing functions are allocated to Nasdaq.[118]

There are four separate sources of NASD financial information for 1998. First, the NASD issued consolidated financial statements for itself and its subsidiaries, which include NASD Regulation, Nasdaq, and Amex. (November–December 1998 figures for Amex are included in the NASD's 1998 consolidated financial statements). Second, Table 10 in the Appendix sets forth the NASD's revenues and expenses with the Amex figures excluded. Third, note 11 to the NASD's 1998 consolidated financial statements provides segment information for NASD Regulation and Nasdaq-Amex. Finally, the Nasdaq subsidiary is separately registered as a SIP and has filed an annual amendment to its Form SIP for 1998 that includes financial statements for Nasdaq individually. Taken together, these four sources provide a picture of the respective costs associated with the regulatory and operational functions of an SRO.

The internal breakdown of the NASD's revenues and expenses in 1998 is as follows:

1998 NASD SEGMENT INFORMATION (EXCLUDING AMEX)

($ millions)

	NASDR	Nasdaq	All Other	Consolidated
Revenues:				
Regulatory	234.0			
Transaction	.....	126.9		
Listing	.....	137.3		
Market Info	.....	152.3		
Other	23.4	10.0	15.9	.....
Total Revenues	257.4	426.5	15.9	699.8
Expenses:				
Direct Expenses	236.6	264.4	26.0	
NASDR Charge	.....	57.3		
Transfer Pricing	.....	39.6	.....	.....
Total Expenses	236.6	361.3	26.0	623.9
Operating Income before taxes	20.8	65.2	(10.1)	75.9

Nasdaq's revenues are derived primarily from transaction services, corporate listings, and market information fees, and totaled $426.5 million in 1998. Nasdaq's direct expenses totaled $264.3 million. In addition to its direct expenses, Nasdaq's expenses included a ''NASD Regulation Charge'' of $57.3 million and a ''Transfer Pricing'' charge of $39.3 million. The NASD has represented that the NASD Regulation Charge is the amount charged to Nasdaq for market regulation and enforcement services performed by NASD Regulation. Nasdaq's total expenses in 1998 were $361.3 million, leaving it with $65.2

[113] In section V.C below, the Commission requests comment on whether the SROs should be required to provide greater disclosure concerning their internal cost structures.

[114] Securities Industry Association, *1999 Securities Industry Factbook* 43 (1999) (''SIA Factbook''). The Securities Industry Association estimates that the NYSE members doing a public business accounted for approximately 72% of the total revenues of all U.S.-registered broker-dealers. *Id.* at 27.

[115] The SROs' market data revenues were $246.1 million in 1994 and $410.6 million in 1998. The SROs' total revenues were $1.20 billion in 1994 and $1.97 billion in 1998. *See* Tables 9–17 in the Appendix. The securities industry's total revenues were $71.4 billion in 1994 and $170.8 billion in 1998. SIA Factbook at 42.

[116] In addition to broker-dealers, other entities, such as institutional investors and information vendors, provide a portion of total market information revenues.

[117] The NASD did not acquire Amex as a subsidiary until October 30, 1998. Amex therefore has been treated separately from the NASD throughout this release.

[118] Nasdaq has, however, retained some responsibilities for market surveillance in its MarketWatch group.

million in operating income before taxes.

NASD Regulation's revenues totaled $257.4 million and were derived primarily from regulatory fees. Its direct expenses totaled $236.6 million and primarily were attributable to the NASD's member regulation function. NASD Regulation's net operating income before taxes was $20.8 million.

Taken together, the financial statements of the NASD and its subsidiaries reveal the following information about the costs associated with the NASD's respective SRO functions in 1998. Member regulation costs were approximately $236.6 million and were more than covered by $257.4 million in revenues primarily from regulatory fees. Costs associated with the other three SRO functions—market operation, market regulation, and listings—were approximately $361.3 million, of which at least $57.3 was associated with the market regulation function. The combined cost of the three functions was more than covered by $426.5 million in revenues derived almost entirely from transaction services fees, listing fees, and market information fees. In percentage terms, the total costs associated with the market operation, market regulation, and listing functions of Nasdaq were funded 30% by transaction services revenues, 32% by listings revenues, 35% by market information revenues, and 3% by other revenues.

C. The Cost of Market Information

As noted in section III above, Congress did not include a strict, cost-of-service standard in Section 11A of the Exchange Act, opting instead to allow the Commission some flexibility in assessing the fairness and reasonableness of fees. Nevertheless, the fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low. The Commission therefore believes that the total amount of market information revenues should remain reasonably related to the cost of market information. This section is intended to provide greater guidance to the SROs, the securities industry in general, and the public concerning the categories of costs that should be considered as part of the cost of market information. With this guidance as a background, the Commission believes that it will be possible to develop a flexible, cost-based approach to market information fees and revenues that both furthers the Exchange Act's national market system objectives and can be implemented in a reasonably efficient manner. Comment is requested on an outline of such an approach in section V.A below.

The first step in determining the cost of market information is to identify, in theory, the categories of costs that are incurred to generate and disseminate market information. The second step is to allocate appropriately the amount of the costs included in these categories, which requires a determination of whether the relevant categories are ''direct costs'' of market information or ''common costs.'' Direct costs (also referred to as incremental, separable, or traceable costs) are incurred only to provide market information and therefore can be allocated entirely to the cost of market information. Common costs, in contrast, are incurred for the provision of services in addition to market information and therefore should be allocated among each of the various services they support.[119] Failing to allocate common costs in this way would improperly inflate the cost of market information.

1. Categories of Market Information Costs

One category of costs directly associated with market information is Plan costs—the expenses incurred by the various processors and administrators of the Networks, acting on behalf of the Networks' SRO participants, to disseminate consolidated information to the public. The Commission believes that Plan costs should be classified as a direct cost and that therefore the entire amount of Plan costs should be allocated to the cost of market information.

Plan costs do not, however, include any of the costs incurred by the individual SROs in generating market information and providing it to the Plan processors. The Commission is considering an approach that would include many of these SRO costs—specifically, the costs of operating and regulating their markets in accordance with Exchange Act requirements—as part of the cost of providing market information to the public. In other words, the information that the SROs provide to the Plan processors would not be considered as cost-free. Before quotations and transaction reports can be delivered to the Plan processors and made available to the public, a market must provide a mechanism for bringing buying and selling interests together in a fair and orderly manner. In addition, the SROs must establish, monitor, and enforce trading rules, as well as otherwise regulate their markets to prevent fraudulent and manipulative acts or practices. The SROs incur substantial costs in performing these functions, and they contribute substantially to the value of the information. Therefore, the Commission is contemplating including these SRO costs as part of the cost of market information for the purpose of determining fair and reasonable fees.

This determination is supported by the language of section 11A of the Exchange Act, in which Congress recognized the direct connection between effective regulation of a market and the value of that market's information. Section 11A(c)(1)(A) grants the Commission rulemaking authority to prevent the use, distribution, or publication of fraudulent, deceptive, or manipulative market information. There is little value in market information that is tainted by fraud, deception, or manipulation.

Similarly, section 11A(c)(1)(B) grants the Commission rulemaking authority to assure the prompt, accurate, reliable and fair collection, processing, distribution, and publication of information with respect to market information, as well as the fairness and usefulness of the form and content of market information. None of these goals will be achieved by a poorly operated market that is prone to systems outages and delays or that does not provide an effective mechanism for bringing buying and selling interests together. In neither case will the public have an accurate picture of the current market for a security. Moreover, in times of significant price volatility and spikes in trading volume, it is critically important that the markets, particularly the major markets operated by the SROs,[120] remain fair and orderly and that investors continue to have access to a timely stream of market information. In Section 11A, Congress recognized this direct connection between the effective

[119] *See, e.g., Principles of Public Utility Rates,* note 48 above, at 118 (''Direct costs are incurred only and entirely for the provision of a particular service.''); Gordon Shillinglaw, ''Economic Concepts in Cost Accounting,'' *in Handbook of Cost Accounting* 4–14 (Sidney Davidson & Roman L. Weil, eds., 1978) (''A common cost is a cost incurred for the support of two or more cost objectives, not traceable to any one of them. Accountants refer to these as indirect costs or, more clearly, as nontraceable costs.'').

[120] Under Exchange Act Rule 3a1–1(b), 17 CFR 240.3a1–1(b), the Commission may require an alternative trading system to register as an exchange if it becomes a major market in any class of securities. In making its determination, the Commission would consider ''the objectives of the national market system under Section 11A.''

operation of a market and the quality of that market's information.

The Commission does not believe, however, that the cost of *member* regulation should be considered as part of the cost of market information. For example, although the financial soundness of broker-dealers is undoubtedly an essential factor in the overall integrity of the markets, the connection between this regulatory function and the quality of market information is much more attenuated than in the case of market operation and market regulation. Instead, an SRO's member regulation costs are more directly associated with the regulatory fees charged to members than with any other source of funding.

Finally, the cost of market information should not include costs that are directly associated with other SRO services (such as an SRO's advertising and marketing expenditures to obtain corporate listings).

In sum, the Commission preliminarily believes that the cost of market information should include, in addition to Plan costs, an appropriate percentage of the costs incurred by individual SROs in operating and regulating their markets.[121] These costs must be borne by the SROs to meet their Exchange Act responsibilities and therefore must be funded in one way or another. If all of these costs were excluded from the cost of market information (and fees were reduced accordingly), the principal consequence would be to force the SROs to rely more heavily on their other sources of funding—transaction fees, listing fees, and regulatory fees. In this regard, it warrants emphasis that *all* of these fees are passed on, directly or indirectly, to investors—the ultimate consumers in the securities industry. The relevant funding issue, therefore, is not whether investors ultimately will pay the costs of effective market operation and market regulation, but how these costs are funded in the first instance and whether the funding furthers the objectives of the Exchange Act.

The Commission believes that market information fees remain an appropriate part of SRO funding. When used along with transaction services fees, listing fees, and regulatory fees, they provide a solid base of financial support for the SROs. Market information fees serve an important and unique role because they provide the broadest source of SRO funding. The fees are paid by all users of market information, including, for example, options and futures market participants that otherwise would not contribute (through transaction services fees or listing fees) to the funding of the particular markets on whose information they rely.

The Commission recognizes that allowing SROs to receive market information revenues to recover part of their market operation costs would provide them with a source of funding not available to other types of entities that also operate markets, particularly alternative trading systems that are regulated as broker-dealers under Regulation ATS. As the Commission noted in the ATS Release, however, alternative trading systems have a choice between either (1) registering as a national securities exchange and accepting the many responsibilities imposed by the Exchange Act on SROs,[122] or (2) registering as a broker-dealer and complying with Regulation ATS. The choice between these two options is complex. The ATS Release compares the many different benefits and costs associated with becoming an SRO and those associated with remaining a broker-dealer.[123] If an alternative trading system believes that the benefits of becoming an SRO (including a share in market information revenues) exceed the costs, it still has the option of registering as an exchange and becoming a participant in the national market system plans.

2. Allocation of Common Costs

Although the costs incurred by the SROs in operating and regulating their markets could be included in the cost of market information, they also support other SRO services and therefore are common costs that must be allocated among these services. In particular, the costs of market operation and market regulation support the SROs' transaction and listing services, in addition to market information services. Transaction services are integrally related to the quality of a market's operation—a poor market will attract few participants. Similarly, the quality of a market and its regulatory protections for investors are among the most important factors influencing a corporate issuer's decision of where to list its securities. Consequently, the SROs' costs of market operation and market regulation must be allocated among the three relevant sources of revenue—listing fees, transaction services fees, and market information fees.

Finding an appropriate basis for allocating common costs, however, is an extremely difficult task. As one court has noted in the ratemaking context, ''(t)he very problem at issue here—allocation of common costs—arises precisely because there is no purely economic method of allocation. In this sense *no* Commission choice among the various [fully distributed cost] methods could be justified solely on economic criteria; elements of fairness and other noneconomic values inevitably enter the analysis of the choice to be made.''[124]

Allocation of the common costs of market information is not an exception to this widely-recognized problem. The Commission is not aware of a purely economic method of allocating the SROs' costs of market operation and market regulation among the SROs' transaction, listing, and market information services. The problem of allocation is exacerbated even further by the fact that an individual SRO often trades many different securities that are not all included in the same Network. Thus, not only must the costs of market information for each SRO be identified and allocated among the SRO's different services, the market information costs of the individual SROs also must be allocated among the different Networks.

In sum, any attempt to calculate the precise cost of market information presents severe practical difficulties. The Commission believes, however, that it may be possible to develop a more flexible, cost-based approach that avoids these practical difficulties, yet also maintains a reasonable connection between the cost of market information and the total amount of revenues derived from market information fees. Comment is requested on an outline of such an approach in section V.A below.

[121] Only a percentage of market operation and market regulation costs should be allocated to the cost of market information because, as discussed below, these costs also are associated with listing and transaction services. The costs therefore are common costs and must be allocated among the three services—listing, transaction, and market information.

[122] National securities exchanges are subject to the Commission's authority under section 11A(a)(3)(B) to require SROs to act jointly in furtherance of a national market system for securities.

[123] *See, e.g.,* ATS Release, note 4 above, Section IX.A *Costs and Benefits of the Rules and Amendments Regarding Alternative Trading Systems.*

[124] *MCI Telecommunications Corp* v. *FCC,* 675 F.2d 408, 415–416 (D.C. Cir. 1982). *See also* Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 225 (1993) (''Accounting regulation offers little guidance in developing cost allocation methods, since common or joint costs cannot generally be identified with any customer class, specific service or jurisdiction . . . As Justice Douglas has put it: . . . 'Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.' Stated another way, any cost allocation method involves elements of arbitrariness.'').

V. Requests for Comment

As noted in the Introduction, the Commission is considering whether the arrangements for disseminating market information should be modified in several respects. Its review thus far particularly has indicated the importance of adapting market information fees to the increasing retail investor demand for real-time information and to the changing structure of the securities industry. Prior to taking rulemaking or other action, the Commission believes it will be helpful to provide the public with a full opportunity to comment on issues relating to market information fees and revenues. This section first requests comment on the concept of a flexible, cost-based approach to evaluating the fairness and reasonableness of such fees and revenues. Comment then is requested on a conceptual approach to distributing the Networks' revenues to the individual SROs that could reflect more fully the Exchange Act's national market system objectives. Finally, comment is requested on a variety of issues relating to SRO and Plan disclosures and Plan governance, administration, and oversight. These include whether the Plans and SROs should provide greater public disclosure concerning their fees, revenues, and costs, and whether participation in the process of setting and administering fees should be broadened to include vendors, broker-dealers, and users of market information.

In formulating comments, the public is encouraged to consider the four principal objectives relating to market information set forth in section 11A of the Exchange Act—availability of information, neutrality of fees, quality of information, and fair competition/equal regulation.[125] The role of fees in funding SRO functions also should be considered. In addition, the Commission encourages commenters to consider the extent to which proposals are capable of being implemented in an objective and reasonably efficient manner, particularly given the other uses to which the Commission's resources could be devoted. In the ratemaking context, courts have recognized that ''[i]mplementation is as critical to a policy's success as theoretical design,'' and that it is justifiable for an agency to consider its limited resources in formulating a policy.[126] The Commission's preferred choice for resolving market information issues will be to rely whenever possible on consensus among the SROs, the securities industry, and information users, but to enhance the potential for such a consensus by establishing more objective standards for setting fees and distributing revenues, by providing greater public disclosure of relevant information, and by broadening participation in the fee-setting process.

A. Flexible, Cost-Based Approach to Market Information Fees and Revenues

The Commission is considering the concept of a flexible, cost-based approach for evaluating market information fees and revenues. Rather than require a strict mathematical calculation of costs in every case, this approach would rely, when possible,[127] on more flexible determinations of costs to determine whether fees are fair and reasonable. Costs are relevant to an assessment of fees and revenues in two different contexts. First, the total costs incurred to provide market information are relevant in assessing whether the total revenues derived from market information fees are fair and reasonable. Determining a total amount of revenues for each Network that is fair and reasonable is the issue addressed in section V.A.1 below. Second, costs are relevant in determining whether individual fees are fair and reasonable or unreasonably discriminatory when compared to other fees. Issues relating to specific fees, particularly the fees applicable to professional subscribers and retail investors, are discussed in section V.A.2 below.

1. Cost-Based Limit on Market Information Revenues

Since the enactment of the 1975 Amendments, the Commission has relied primarily on consensus among the SROs and the securities industry to resolve issues concerning market information fees and revenues. The Commission believes, however, that recent changes in the securities markets may require a revised approach that provides greater guidance to the SROs and the rest of the securities industry. Particularly with the potential for a significant number of SROs that are for-profit entities, it appears that closer monitoring of the SROs' funding and internal allocation of resources will be necessary. The principal financial objective of membership organizations has been to recover their operating costs, while their members act as for-profit entities. The advent of for-profit SROs, who will have the financial objective of generating profits for their owners, potentially could result in increased pressure to raise fees and revenues and to cut back on costs not directly associated with a source of revenues. This is not to say that for-profit SROs are inherently unable to meet their Exchange Act responsibilities, but rather that their fees and financial structures may warrant increased oversight by the Commission.

Accordingly, the Commission is considering whether a cost-based limit should be established for the total market information revenues of each Network. In establishing their fee structures, the Networks would be required to adjust the particular fees charged to different categories of vendors and subscribers so that they did not generate a total amount of revenues that would exceed the limit. To implement this type of conceptual approach, the Networks would, at a minimum, need to provide sufficient periodic financial disclosures to demonstrate their compliance with relevant requirements. In section V.C below, comment is requested on issues relating to financial disclosure. In addition, the SROs would be required to file a proposed fee change with the Commission when necessary to maintain compliance with the limit. Comment is requested on whether there should be specific requirements relating to the frequency and timing of proposed fee changes. Finally, the Commission itself could initiate direct action if necessary to assure that the Networks comply with all relevant requirements.

The Commission requests comment on the following broad outline of a conceptual approach for setting a cost-based limit on a Network's total market information revenues. It would involve four steps. First, each SRO would calculate the amount of its direct market information costs. These would include, for example, the Plan costs incurred by processors and administrators of the Networks in performing their Plan responsibilities and any other costs incurred only and entirely for providing market information services.

Second, each SRO would calculate a gross common cost pool made up of the total amount of its costs that are appropriately classified as contributing substantially to the value of market information. The principles guiding such a classification are discussed in section IV.C above. Appropriate categories of costs would include the costs of market operation and market

[125] *See* section III.B above.

[126] *MCI Telecommunications Corp.,* 675 F.2d at 414.

[127] As indicated by the Instinet Order (discussed in section III.C above), there may be some circumstances in which a strict, mathematical calculation of costs will be necessary to assure the fairness and reasonableness of a fee. The subsequent history of the Instinet proceedings also indicates, however, the practical difficulties inherent in such an approach.

regulation, but would not include the costs of member regulation or other direct costs of services other than market information. Comment is requested on whether these categories are sufficiently distinct to provide the basis for a workable internal cost allocation. Comment also is requested on specific types of costs that should, and should not, be classified as substantially contributing to the value of market information.[128]

Third, each SRO would apply a standard allocation percentage to its gross common cost pool to determine its net common cost pool. A percentage allocation is necessary to reflect the fact that these costs are incurred by the SROs not only to provide market information services, but also to provide listing and transaction services. The percentage would be the same for all SROs.[129] It could be derived from the historical experience of the SROs (on average, the SROs appear to fund between 30% and 40% of their market operation and market regulation costs through market information revenues)[130] or based on any other rationale that furthers the national market system objectives of the Exchange Act. Comment is requested on what would be an appropriate standard allocation percentage.

Finally, in the fourth step, it would be necessary for each SRO to allocate its total cost of market information (direct costs plus the net common cost pool) to the various Networks whose securities it trades. This allocation could be done directly (for those costs that can be associated with a particular Network), with the remainder allocated based on the proportion of the SRO's total trading volume represented by a Network's securities. The total amount of the costs allocated to each Network from the individual SROs would represent a limit on the amount of revenues that could be generated by each Network's fees. It bears emphasis here that, under this conceptual approach, separate rules would govern the *distribution* of Network revenues, and therefore an individual SRO would not necessarily recover the amount of its total cost of market information in distributions from the Networks.[131]

The Commission requests comment on all aspects of the concept of setting a cost-based limit on market information revenues. It appears that the conceptual approach outlined above could have three principal benefits. First, it could provide a much closer and more objective link between SRO costs and market information revenues than has been required in the past. Second, it potentially could be implemented in a more efficient manner than a strict, cost-of-service approach that required each SRO to establish a basis for allocating its common costs down to the last dollar. Third, the conceptual approach outlined above could put all the Networks on a more equal footing in terms of the proportion of relevant costs funded by market information revenues, thereby possibly furthering the Exchange Act objective of fair competition. Comment is requested on the advisability and practicality of this approach, including whether a single approach is appropriate for each of the different Networks and for different types of securities. The Commission also would be interested in suggestions for any alternative approaches to setting a fair and reasonable limit on market information revenues.

2. Fairness and Reasonableness of Specific Fees

A Network's fees cannot unreasonably discriminate among markets, vendors, broker-dealers, and users. To achieve this goal, the Commission believes that any disparities in fees should be justified by such legitimate factors as differences in relevant costs or degree of use. In this regard, it is important to recognize that the basic information stream (all of the transaction reports and quotations in a Network's securities) will be the same, and have the same production costs, no matter how many vendors and subscribers receive the information. Although there may be differences in a Network's costs of disseminating information to different categories of vendors and subscribers (such as the costs of administering a fee structure), it is vendors and broker-dealers who, for the most part, bear the costs of receiving the data stream from a Network processor and redisseminating it to individual subscribers. These redissemination costs incurred by parties other than the Networks are not appropriately incorporated into a Network's fee structure.

In addition, individual fees must be evaluated in terms of the national market system objective to assure the wide availability of market information. Accordingly, a Network's fees should not be set at levels that effectively restrict the availability of real-time information. As a theoretical matter, of course, lower prices always will result in greater marginal demand for a product. As a practical matter, however, the relevant Exchange Act question is whether the fees for particular classes of subscribers, given their economic circumstances and their need for and use of real-time information, are at a sufficiently high level that a significant number of users are deterred from obtaining the information or that the quality of their information services is reduced.

The various fee structures established by the Networks are described in section II above, and the amount of revenues derived from the various fees are set forth in Tables 5–8 in the Appendix. Comment is requested on the fairness and reasonableness of all of these fees, which include fees for vendor access and a variety of other services.[132] This subsection will discuss the fees that apply to users of market information and generate 94% of total market information revenues—the monthly fees applicable to professional subscribers and the fees applicable to retail investors (which include both monthly nonprofessional subscriber fees and per-

[128] For example, public utilities generally are entitled to earn a ''fair rate of return'' in addition to their allowable operating costs. *See, e.g.,* Instinet Order, note 89 above, at n. 68 (''Although utility ratemaking proceedings also involve the calculation of a rate of return for the utility's shareholders and bond-holders, such a calculation is unnecessary in this proceeding. The NASD has stated that it 'does not build in any rate of return in its fees' as '(t)here are no shareholders, save the NASD, and no dividends have ever been paid or are contemplated.' '') (citation omitted). Comment is requested on whether the cost of market information should include an allowance to provide a fair rate of return and, if so, how a fair rate of return should be determined.

[129] If different allocation percentages applied to different SROs, it might result in some Networks being entitled to charge higher fees in relation to costs than other Networks. SROs that primarily traded the securities of the favored Network could receive a higher proportion of their funding from market information fees than other SROs. Comment is requested on whether this situation would be consistent with the Exchange Act objective of fair competition or whether there are appropriate reasons for allocation percentages to vary from SRO to SRO.

[130] For example, as noted in section IV.B.2 above, the costs associated with Nasdaq's market operation, market regulation, and listing functions in 1998 were funded 30% by transaction services revenues, 32% by listing revenues, 35% by market information revenues, and 3% by other revenues. The SROs have not, however, provided detailed disclosures concerning their internal cost structures. It therefore has not been possible to make precise calculations of how they have funded their market operation and market regulation costs. The 30–40% figures given in the text necessarily represent a rough estimate.

[131] Currently, for example, revenues are distributed in accordance with an SRO's proportion of trading volume in a Network's securities. Comment is requested in section V.B below on whether the rules for the distribution of Network revenues should be revised to further more directly national market system objectives.

[132] A full description of Network fee structures, including fees applicable only to vendors, is provided in the Anderson Report, note 34 above.

query fees). These fees are set forth in Tables 1–4 in the Appendix.

a. Professional Subscriber Fees

Fees for professional subscribers generally range from $18.50 to $50 per month.[133] These fees produced revenues of $351.1 million in 1998, compared to $231.1 million in 1994, for an increase of 52%. The revenues generated by professional subscriber fees represented approximately 85% of the total amount of the Networks' revenues in 1998. The fees themselves have remained essentially the same over the last five years.[134] It is an increase in the number of professional subscribers that has produced the increase in revenues. For example, there were 338,010 Level 1 subscribers and 57,535 NQDS subscribers to Nasdaq System information in 1998, compared with only 260,500 Level 1 subscribers and 17,000 NQDS subscribers in 1994.[135] Similarly, there were 384,661 devices displaying Network A market information in 1998, compared with only 266,718 in 1994.[136] Moreover, the expansion in trading volume in recent years has produced an explosion in the volume of information disseminated by the Networks. As noted in section II.C above, for example, SIAC processed 634 million transaction reports and quotations in 1998 for Networks A and B, compared with only 188 million in 1994. Thus, monthly fees for professionals have remained steady despite a substantial increase in the amount of information provided.

Comment is requested on the fairness and reasonableness of professional subscriber fees. In this regard, it is important to consider whether they further the Exchange Act objective of making market information widely available. Based on an average of 21 trading days per month and monthly fees ranging from $18.50 to $50, a professional subscriber generally is charged from approximately $0.90 to $2.40 per trading day for market information. Given the importance of this information to the livelihood of a professional subscriber, comment is requested on whether these fees, in practice, limit the availability of market information.

b. Retail Investor Fees

The revenues from fees applicable to retail investors (which include monthly fees for nonprofessional subscribers and per-query fees) have grown exponentially in recent years. In 1994, such revenues amounted to $3.7 million. In 1998, they amounted to 38.9 million, for an increase of 951%. Most of this increase is attributable to increased demand by investors and not to fee increases by the SROs.[137] In addition, the nonprofessional subscriber fees for Nasdaq, Network A, and Network B securities have been substantially reduced in 1999. The Commission remains concerned, however, that the Networks' fee structures have not kept pace with advancing technology and increased demand.

The fees currently applicable to retail investors range from $0.50 to $2.50 per month for unlimited access to a particular Network's information, and the per-query fees range from $0.0025 to $0.02. The Commission requests comment on whether these fees now are low enough and structured in such a way that they do not significantly limit the availability of real-time information to retail investors, both in terms of the number of subscribers and the quality of information services. For example, does a monthly fee of $0.50 or $1 per Network deter a significant number of retail investors from using real-time market information or preclude broker-dealers from providing enhanced information services to their retail customers? Thus far, per-query fees have generated much greater revenues than the monthly fees that allow unlimited use of information. The fees allowing unlimited use, however, would appear to provide a greater opportunity for broker-dealers to provide retail investors with a much improved quality of service, including potentially the opportunity to obtain dynamically-updated displays of quotations and transaction reports in a security. Compared to receiving information based on a single query at a time, a real-time stream of dynamically-updated information could offer retail investors a greater ability to control their securities transactions, including possibly the ability to execute transactions in the market of their choice (for example, by directing a limit order to a specific market) or monitoring the quality of execution by their broker-dealers. Comment is requested on whether the current fee schedules could inappropriately restrict the information services that broker-dealers provide to their retail customers.

In addition, comment is requested on whether the fees applicable to retail investors are unreasonably discriminatory compared to those for professional subscribers. The monthly fees for nonprofessional subscribers are significantly less than the monthly fees for professional subscribers, yet it also appears that retail investors are unlikely to use real-time market information nearly as much as professional investors. With the monthly rates, for example, each class of subscribers theoretically receives the same service—an unlimited amount of real-time information for a Network's securities. Professional investors, however, are likely to monitor the stream of real-time market information for a substantial portion of each trading day during a month. Assuming an average of 21 trading days in a month and 6½ hours per trading day, professional investors may monitor real-time information for as many as 136 hours in a month. It does not appear that retail investors are likely to monitor real-time information for anywhere near as many hours during a month. Comment is requested on whether the difference in rates between professional and nonprofessional subscribers adequately reflects this difference in use.[138]

A petition to the Commission for rulemaking has asserted, among other things, that any fee applicable to retail investors for on-line access to market information constitutes unreasonable discrimination against on-line investors and their broker-dealers.[139] The petition argues that, by comparison, traditional broker-dealers pay the monthly professional fee and provide market information to their customers by

[133] Network A, Network B, and OPRA provide a variety of discounts in these fees depending on the size of the subscriber or the SRO membership status of the subscriber. These discounts are addressed in section V.A.2.c below.

[134] Nasdaq fees for professional subscribers increased $1 per month in the period from 1994 to 1998. OPRA professional subscriber fees generally increased from $3 to $4 per month. Network A and Network B professional subscriber fees were unchanged.

[135] The numbers of Nasdaq System subscribers are set forth in Exhibit Q to the annual amendments to Form SIP filed by Nasdaq for the years 1994 and 1998.

[136] NYSE, *1998 Fact Book* 103.

[137] For example, the NASD's per-query fee for Nasdaq System securities has remained at one cent since 1995. Revenues attributable to this fee grew from $2.6 million in 1997 to $13.5 million in 1998.

[138] For example, dividing a monthly professional fee of $20 by 136 hours produces a per-minute rate of approximately ¼ cent. At this rate, a nonprofessional subscriber fee of $2 per month would cover 800 minutes, or 13⅓ hours. Comment is requested on the number of hours in a month that retail investors, on average, could be expected to monitor real-time information.

[139] Letter submitted on behalf of Charles Schwab & Co., Inc., by Sam Scott Miller, Orrick, Herrington & Sutcliffe, LLP, to Jonathan G. Katz, Secretary, SEC, dated June 29, 1999. The petition requests rulemaking on a broad range of issues relating to market information fees and revenues, including fair and reasonable fees, non-discriminatory fees, and oversight of CTA practices. A copy of the petition is available for inspection and copying in the Commission's Public Reference Room, File No. 4–425.

personal telephone call without incurring additional fees. The Commission requests comment on this issue, as well as on any other issue relating to the effect of market information fee structures on broker-dealers conducting different types of business. In this regard, it appears that the degree of use and the quality of the service provided to customers of an on-line broker-dealer (particularly under a monthly fee structure providing instant access to unlimited information) may be superior to the service provided to customers of a traditional broker-dealer (who must initiate a separate telephone call and speak personally with an employee of their broker-dealer each time they want to update their information). Comment is requested on whether fees for on-line access to market information by retail investors are warranted by the degree of use and the quality of service provided.

c. Fee Discounts

The fee structures for Network A, Network B, and the OPRA System include various discounts that are based on the size of the subscribing firm or on whether the firm is a member of an SRO that is participant in the particular Network. They include (1) a Network A ''enterprise arrangement'' that caps the aggregate amount a registered broker-dealer must pay for most of the information services provided to its employees and customers at $500,000 per month,[140] (2) Network A monthly professional subscriber fees that range from $18.75 per device for subscribers with more than 10,000 devices to $127.25 for subscribers with a single device, (3) OPRA monthly professional subscriber fees that are $6-$10 less per device for members of an SRO that is a participant in OPRA than for non-members, (4) Network A nonprofessional subscriber fees that are $1 per month for the first 250,000 subscribers per vendor, and 50¢ per month for subscribers above 250,000, and (5) Network A, Network B, and OPRA per-query fees that are reduced based on the number of quotes distributed by a vendor during a month.

The Commission requests comment on whether these discounts are consistent with the Exchange Act objective that exclusive processors of information should remain neutral in their treatment of firms and customers. As noted above, the Commission believes that disparities in fees should be justified by such legitimate factors as differences in relevant costs, degree of use, or quality of service. In the past, the Networks have justified these fee discounts as reflecting differences in the administrative costs associated with different categories of subscribers.[141] The Commission has not, however, required the Networks to demonstrate that the size of the discounts corresponds with the size of the relative difference in administrative costs. Comment is requested on whether the size of these discounts should be strictly limited to differences in administrative costs.

B. Distribution of Network Revenues and SRO Funding

The current rules for distributing Network revenues to the SROs are described in section II.E above. In general, each of the Networks first distributes revenues directly to their respective administrators and processors to cover expenses incurred in performing their Plan functions. After these Plan costs are funded, the remaining revenues then are distributed to the SRO participants in a Network in accordance with a formula based on each SRO's percentage of trading volume in the Network's securities. For ease of reference, the initial distribution to cover specific costs will be referred to as the ''Direct Distribution,'' while the subsequent distribution of a Network's remaining revenues will be referred to as the ''Proportional Distribution.''

The Commission is considering a conceptual approach to distributing Network revenues that could reflect more fully and directly the objectives of the Exchange Act. Specifically, comment is requested on (1) whether certain individual SRO costs that most directly enhance the integrity of market information (principally, the cost of market regulation) should be funded as part of the Direct Distribution in addition to Plan costs, and (2) whether the formula for making the Proportional Distribution should be revised to compensate the SROs more in accordance with the value of the information they contribute to the stream of consolidated information. Finally, comment is requested on whether the SROs should be permitted to rebate market information revenues to their members.

1. Direct Funding of Market Regulation Costs

The Commission requests comment on whether a portion of market information revenues should be earmarked in the Direct Distribution to fund, in addition to Plan costs, SRO costs that directly enhance the integrity and reliability of market information. These could include primarily the costs incurred by the SROs in performing their *market* regulation function (as opposed to member regulation). Market regulation by the SROs helps assure that the information on which investors rely is not tainted by fraud or manipulation and that market participants comply with trading rules designed to enhance the efficiency and fairness of the SROs' markets. Although the benefits of market regulation extend directly to all those who use an SRO's information, the function does not appear to be as directly associated with a specific source of revenues as are other SRO functions. The Commission is concerned that competitive pressures among markets could lead to cutbacks in the substantial expenditures necessary to maintain full funding for this critically important Exchange Act responsibility.

Comment is requested on whether allocating market information revenues directly to fund specified market oversight and information integrity and reliability costs would further Exchange Act objectives.[142] The potential benefits of such an allocation appear to be two-fold. First, it could help ensure that this vital SRO function is fully funded, thereby helping to prevent the publication of fraudulent, deceptive, or manipulative market information, section 11A(c)(1)(A), and to assure the prompt, accurate, reliable, and fair publication of market information, section 11A(c)(1)(B). Second, the funding would be shared among all users of market information, rather than

[140] The terms and conditions of the Network A enterprise arrangement are described in Securities Exchange Act Release No. 41977 (October 5, 1999), 64 FR 55503.

[141] *See, e.g.,* Securities Exchange Act Release No. 26689 (April 3, 1989), 54 FR 14306 (discounts for subscribers that are members of OPRA participants explained on the basis of higher administrative costs for non-member subscribers); Securities Exchange Act Release No. 24130 (February 20, 1987), 52 FR 6413 (Network A fee structure requiring subscribers with a single device to pay a monthly device fee that is 6½ times higher than the fee for large subscribers ''reflect[s] the fact that total CTA and CQ Plan administrative costs for any subscriber on an average per terminal basis decrease as the average number of terminals increases'').

[142] Comment also is requested on whether any other categories of SRO costs that directly enhance the integrity and reliability of market information should be funded in the Direct Distribution. For example, technology systems with sufficient capacity and reliability to handle the highest-volume trading days help assure that the stream of consolidated information is not subject to unexpected interruptions. Comment is requested on whether some portion of technology costs that directly relate to the integrity and reliability of information (such as costs incurred to comply with the policies set forth in the Commission's ARP Releases) should be funded in the Direct Distribution.

falling on the particular SRO that incurs the particular costs. To the extent that market regulation costs benefit the market for a security as a whole, the objectives of fair competition, equal regulation, and an equitable allocation of SRO costs might be furthered.

Comment is requested on the advisability and practicality of pursuing this type of approach. In particular, would identification of the cost of market regulation be a reasonably objective task that could be accomplished without excessive accounting and auditing costs? Are there pragmatic methods that could simplify this task while still achieving the goal of adequately funding appropriate costs? Finally, comment is requested on whether direct funding would create an inappropriate incentive for the SROs to increase these costs beyond reasonable levels.

2. Compensating SROs in Accordance with the Value of Their Market Information

Comment also is requested on whether the formula for making the Proportional Distribution should be revised to reflect more directly the value that each SRO's information contributes to the stream of consolidated information made available to the public. In particular, does the current practice of allocating revenues based solely on an SRO's proportion of transaction volume adequately further the Exchange Act objectives of maintaining the quality of market information and encouraging fair competition?

As discussed in section III.A above, one of the fundamental policy decisions made by Congress and the Commission in the mid-1970's was to require all the SROs to make their market information, particularly their quotations, available to the public. It is important to recognize that the basis for this policy determination was not to prevent the SROs from charging reasonable fees for their information. Rather, Congress and the Commission determined that the information was too important to investors and too affected with the public interest to allow the SROs to restrict its availability. Although the SROs are no longer allowed to act individually in setting fees or otherwise capitalizing on the value of their information, the Commission believes that they should be encouraged to generate high-quality market information that enhances the value of the stream of consolidated information made available to the public. Comment is requested on whether the formula for the Proportional Distribution should be revised to reflect this objective.

Under current practice, for example, the Proportional Distribution is based solely on transaction volume. It therefore does not attempt to reward markets for the value of their quotations, except insofar as an SRO's percentage of transaction volume is a surrogate for the value of its quotations. Comment is requested on whether, in fact, transaction volume accurately reflects the value of an SRO's quotations, or whether some other basis should be found for distributing a portion of Network revenues based directly on the value of quotations. For example, is it possible to devise a pragmatic formula or algorithm (or a combination of different formulas or algorithms) that would reward markets that provide ''price discovery'' to which other market participants look to set their own prices? Similarly, is there a way to reward markets that are the first to publish quotations at the best prices and in the largest sizes? Finally, assuming a formula could be found to assess the value of quotations in an individual security, how should the results be aggregated for all of the securities that are included in a Network? For example, should there be an adjustment to account for differences in trading volume or is it more appropriate for each security to be given equal weight regardless of trading volume?

It bears emphasis that a formula or algorithm that merely produced appropriate results retrospectively based on historical data would not be satisfactory. Instead, it must be capable of producing appropriate results prospectively when market participants will have the opportunity to adjust their behavior in response to the formula. In other words, a value-oriented distribution would need to be resistant to being ''gamed'' and to avoid awarding markets a share of market information revenues when they have not in fact enhanced the value of the stream of consolidated information.

3. SRO Rebates to Members

Some of the SROs have established programs that in effect award rebates of market information revenues to their members.[143] In general, these rebates are given to the members responsible for effecting the transactions that resulted in a Network's revenues being distributed to the SRO. The Commission requests comment on whether such rebates are consistent with the Exchange Act objective of fair competition. In addition, do rebate programs constitute an equitable allocation of an SRO's charges among its members when only selected members receive a rebate based on their transaction volume in a particular type of security? At least thus far, the rebate programs have been established solely for securities in which the SRO granting the rebate does not operate the primary market. Comment is requested on whether changing the rules for distribution of Network revenues as discussed above (to fund information integrity and reliability costs directly and to reward the SROs that provide the highest quality market information) would address the extent to which rebates could constitute unfair competition. Moreover, do rebate programs indicate that market information revenues exceed self-regulatory funding requirements?

C. Plan and SRO Disclosure

Each of the Plans requires that audited financial statements be prepared for a Network's operations, primarily to allow its participants to verify that the financial provisions of the Plans have been satisfied. Currently, the Plans are not required to file publicly-available financial statements with the Commission.[144] In this regard, the Commission proposed Rule 11Ab2–2 in 1975, which would have required registered SIPs to file an annual amendment to their Form SIP that included financial statements. The rule was never adopted. The Commission requests comment on whether the Plans should be required to make annual filings for the Networks that would be available to the public. These filings could include (1) a complete listing of all their fees, and (2) the number of users participating in each of their different fee programs, and (3) audited financial statements setting forth their revenues (including an itemized listing of revenues attributable to their different fees), expenses, and distributions.

[143] *See, e.g.*, Securities Exchange Act Release No. 41238 (Mar. 31, 1999), 64 FR 17204 (CSE grants members a 50% pro rata transaction credit of Network B revenues); Securities Exchange Act Release No. 41174 (Mar. 16, 1999), 64 FR 14034 (NASD establishes pilot program to provide a transaction credit to members that trade listed securities in the over-the-counter market); Securities Exchange Act Release No. 40591 (Oct. 22, 1998), 63 FR 58078 (BSE establishes revenue-sharing program for members that is based, in part, on Network A and Network B revenues); Securities Exchange Act Release No. 38237 (Feb. 4, 1997), 62 FR 6592 (CHX establishes transaction credit for specialists based on a percentage of Network A and Network B revenues).

[144] The Plans regularly have provided financial statements to the Commission's staff. The financial statements have shown total revenues, expenses, and distributions, but have not itemized the amount of revenues attributable to different fees.

In contrast with the Plans, the SROs currently are required to file publicly-available financial statements with the Commission as part of the annual amendments to Form 1 for the national securities exchanges (Rule 6a–2(b)(1)), or to Form X–15AJ–2 for the national securities association (Rule 15Aj–1(c)(2)). These financial statements, however, provide little information concerning the SROs' internal cost structures. Comment is requested on whether the SROs should be required to provide greater disclosure of their financial condition, including disclosure of the costs associated with the performance of their various SRO functions. The Commission notes that, at the very least, the SROs will need to provide financial disclosures that are sufficient to support whatever approaches ultimately are adopted for the evaluation of fees and distribution of revenues.

D. Plan Governance, Administration, and Oversight

Each of the Plans has adopted essentially the same governance structure. All important operational decisions are to be made by a committee composed of one representative of each of the Plan's participants (''Operating Committee''). In addition, each Plan has designated one of its participants to administer its day-to-day affairs. Some of the Plans also have established committees to address particular aspects of their operations (for example, a technical committee to address technology issues).

None of the Plans provides for broader securities industry or public participation in the governance of its operations. The Commission is concerned that the Plans should be responsive (in a timely manner) to the concerns of vendors, broker-dealers, and investors in disseminating consolidated market information to the public. It also recognizes that the Plans operate substantial enterprises and must have governance structures that permit them to operate these enterprises effectively. Comment is requested on whether these governance structures should be broadened to include such parties as vendors, broker-dealers, and investors. If participation in the governance of the Plans were broadened, a variety of issues would need to be addressed. Should non-SRO parties be included on the Operating Committee? Should additional committees with broad participation be established to address the particular issues of most direct concern to parties that are not SROs (for example, a committee for establishing or reviewing fee structures)? What should be the mechanism for selecting non-SRO representatives to a committee? In what capacity should such representatives be allowed to participate (for example, voting or non-voting)? If given the power to vote, what should be the relative proportion of voting weight between the SRO and non-SRO representatives? Finally, comment is requested on whether, as an alternative to formal participation in Plan governance, the creation of an industry advisory committee on market information arrangements would constitute a more efficient and flexible vehicle to convey a broad range of views to the Plans and to the Commission.

With respect to the administration of fee structures, there appears to be considerable potential for making this process more efficient by standardizing and streamlining the agreements, policies, and reporting requirements that apply to vendors, broker-dealers, and subscribers.[145] Many of these operational issues require detailed attention and are perhaps best addressed in the context of improved Plan governance rather than by direct Commission action. Nevertheless, the existence of four Networks, each with its own fee structures and requirements, inherently limits the extent to which any Network, acting alone, could substantially reduce the cumulative administrative costs incurred by vendors, broker-dealers, and subscribers. Comment is requested on whether the Plans should establish industry-wide standards for administering their fee structures and, if so, the most appropriate means for the Plans to act jointly in developing such standards.

Finally, the Commission is concerned that the Plans have used their ''pilot program'' provisions to implement fee structures for periods of time beyond that which the provisions originally were intended to cover.[146] Comment is requested on the advisability and usefulness of pilot programs. Should they be eliminated entirely or should the Plans have some flexibility to experiment with innovative services and fee structures without first going through the process of a Commission filing and public comment? If pilot programs should continue in some form, comment is requested on whether they should be limited to a specified time period (for example, one year), after which the program could not be continued unless it was filed with the Commission. Finally, comment is requested on whether the terms and conditions of all pilot programs should be made available to the public in some fashion prior to initiation of the program.

VI. Conclusion

The Commission invites public comment on all of the foregoing matters, as well as on any other matters relating to the arrangements for disseminating market information that commenters believe the Commission should consider in concluding its review and formulating proposals.

By the Commission.

Dated: December 9, 1999.

Jonathan G. Katz,

Secretary.

Appendix—Tables 1–4: Subscriber Fees

Tables 1 through 4 set forth the Plans' principal fees for subscribers to market information services as they currently exist and as they existed at the end of 1998 and 1994. In addition to these subscriber fees, the Plans have a variety of other fees that apply to information vendors and others.

TABLE 1.—NETWORK A SUBSCRIBER FEES

	Current	1998	1994
Professional (monthly per device):			
No. of devices:			
1	$127.25	Unchanged	Unchanged.
2	79.50		

[145] The burdens and costs currently associated with administering the Networks' fee structures are described at length in the Andersen Report, note 34 above.

[146] The pilot program provisions are set forth in section II.F above.

TABLE 1.—NETWORK A SUBSCRIBER FEES—Continued

	Current	1998	1994
3	58.25		
4	53.00		
5	47.75		
6 to 9	39.75		
10 to 19	31.75		
20 to 29	30.25		
30 to 99	27.50		
100 to 249	26.50		
250 to 749	23.75		
750 to 4999	20.75		
5000 to 9999	19.75		
10,000 and up	18.75		
Nonprofessional (monthly per subscriber)		$5.25	$4.25.
1 to 250,000 subscribers per vendor	1.00	n/a	n/a.
250,001 subscribers and up	.50	n/a	n/a.
Per Query (processed by vendor per month)		.01	.005.
1 to 20,000,000	.0075	n/a	n/a.
20,000,001 to 40,000,000	.005	n/a	n/a.
40,000,001 and up	.0025	n/a	n/a.

TABLE 2.—NASDAQ SYSTEM SUBSCRIBER FEES

	Current	1998	1994
Level 1/Last Sale (monthly per device)	$20.00	$20.00	$19.00.
NQDS (monthly per device)	50.00	Unchanged	Unchanged.
Nonprofessional (monthly per person)	2.00	4.00	4.00.
Per Query	.005	.01	.015.

TABLE 3.—NETWORK B SUBSCRIBER FEES

	Current	1998	1994
Professional (monthly per device)			
Members:			
Last Sale	$13.60	Unchanged	Unchanged.
Bid-Ask	13.65	Unchanged	Unchanged.
Non-Members:			
Last Sale	14.60	Unchanged	Unchanged.
Bid-Ask	15.60	Unchanged	Unchanged.
Nonprofessional (monthly per person)	1.00	3.25	3.25.
Per Query (processed by vendor per month):			
1 to 20,000,000	.0075	n/a	n/a.
20,000,001 to 40,000,000	.005	n/a	n/a.
40,000,001 and up	.0025	n/a	n/a.
Per Query (per user, per month):			
1 to 50 Quotes	n/a	.50	n/a.
51 to 250 Quotes	n/a	3.25	n/a.
More than 251 Quotes	n/a	35.00	n/a.

TABLE 4.—OPRA SYSTEM SUBSCRIBER FEES*

	Current		1998		1994	
	Member	Non-Member	Member	Non-Member	Member	Non-Member
Professional (monthly per device):						
No. of devices:						
1 to 9	$16.00	$26.00	$15.00	$24.00	$21.00–55.00	$22.00–55.00
10 to 29	16.00	22.00	15.00	20.00	12.00	13.00
30 to 99	13.00	22.00	12.00	20.00	9.00	10.00
100 to 749	13.00	15.50	12.00	14.50	9.00	10.00
750 or more	10.00	15.50	9.40	14.50	7.00	8.00
Nonprofessional (monthly per person)	2.50		2.00		2.00	

TABLE 4.—OPRA SYSTEM SUBSCRIBER FEES*—Continued

	Current		1998		1994	
	Member	Non-Member	Member	Non-Member	Member	Non-Member
Per Query (tiered by volume)	.02 to .01		.02 to .01		.02	

*The fees are applicable to the OPRA System's basic service (equity options and index options). It charges separately for information on foreign currency options.

Tables 5–8: Network Revenues, Expenses, and Distributions

Tables 5 through 8 set forth the Networks' revenues, expenses, and distributions to their participant SROs in 1998 and 1994. As discussed in section II above, the four Networks are responsible for receiving market information from the their SRO participants, consolidating the information, and distributing it to vendors, broker-dealers, and other subscribers. The Networks' administrators and processors perform most of these functions, and their costs are defined in the Plans as ''operating expenses'' that may be deducted from Network revenues prior to any distribution to participants. The following costs are not included in the Networks' operating expenses: (1) the costs incurred by the SROs in collecting their market information and reporting it to the Network processors, and (2) the costs associated with the SROs' market surveillance function.

TABLE 5.—NETWORK A REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Professional Subscribers	$112,444,000	$79,519,000
Nonprofessional Subscribers	6,040,000	825,000
Per Query	8,236,000	276,000
Cable TV	1,917,000	0
Access Fees	9,682,000	4,133,000
Program Application Fees	2,634,000	1,608,000
Ticker Communications Fees	2,776,000	2,231,000
Other	0	369,000
Total Revenues	143,729,000	88,961,000
Expenses:		
Data Processing	5,997,000	5,457,000
Ticker Network	2,444,000	1,709,000
NYSE Allocated Support Costs	8,697,000	5,304,000
Other	1,360,000	326,000
Total Operating Expenses	18,498,000	12,796,000
Income before Taxes	125,231,000	76,165,000
Provision for Taxes	(36,000)	(863,000)
Net Income Available for Distribution	125,195,000	75,302,000
Distributions:		
NYSE	93,223,000	54,594,000
NASD	13,209,000	6,902,000
CHX	6,898,000	4,153,000
PCX	4,531,000	3,788,000
BSE	3,390,000	1,748,000
CSE	2,279,000	2,311,000
Phlx	1,664,000	1,806,000
CBOE	1,000	0

TABLE 6.—NASDAQ SYSTEM REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Level 1/Last Sale (Professional)	$86,713,000	$52,953,000
NQDS	21,155,000	6,611,000
Nonprofessional Subscriber	4,445,000	770,000
Per Query	13,473,000	517,000
Voice Response	1,956,000	592,000
Cable TV	241,000	0
Other	517,000	603,000
Total Revenues	128,500,000	62,046,000

TABLE 6.—NASDAQ SYSTEM REVENUES, EXPENSES, AND DISTRIBUTIONS—Continued

For the years ended December 31	1998	1994
Distributions:		
NASD Retention	128,088,000	61,946,000
CHX	412,000	100,000

TABLE 7.—NETWORK B REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Professional Subscriber	$91,576,000	$68,677,000
Nonprofessional Subscriber	1,625,000	416,000
Pilots (including per query)	2,316,000	279,000
Tickers	2,009,000	2,154,000
Computer Program Charges	746,000	557,000
Indirect Access Charges	853,000	116,000
Other	123,000	152,000
Total Revenues	99,248,000	72,351,000
Expenses:		
Data Processing Services	579,000	895,000
Ticker Network Expenses	663,000	433,000
Amex Allocated Support Costs	3,771,000	2,852,000
Total Expenses	5,013,000	4,180,000
Net Income Available for Distribution	94,235,000	68,171,000
Distributions:		
Amex	67,090,000	56,460,000
CHX	12,722,000	4,507,000
NASD	9,020,000	2,783,000
PCX	2,855,000	2,164,000
BSE	782,000	1,264,000
Phlx	528,000	881,000
CSE	236,000	112,000
CBOE	85,000	0
DIAMONDS	917,000	0

TABLE 8.—OPRA SYSTEM REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Professional Subscriber	$39,251,000	$23,333,000
Nonprofessional Subscriber	774,000	219,000
Vendor Fees	1,452,000	1,655,000
Other (including per-query)	2,031,000	360,000
Interest	148,000	56,000
Total Revenues	43,656,000	25,623,000
Expenses:		
Administrative and Operating Expenses	1,557,000	1,044,000
Processing Costs	3,324,000	1,772,000
Total Expenses	4,881,000	2,816,000
Net Income Available for Distribution	38,775,000	22,807,000
Distributions:		
CBOE	18,582,000	12,818,000
Amex	9,889,000	4,960,000
Phlx	4,939,000	2,448,000
PCX	5,365,000	2,392,000
NYSE	0	189,000

Tables 9–17: SRO Revenues and Expenses

Tables 9 through 17 set forth for 1998 and 1994 the SROs' revenues (including their distributions from the Networks), expenses, and an analysis of their sources of revenues (each source of revenues is represented as a percentage of

total revenues). The figures are derived primarily from the SROs' audited financial statements and their accompanying notes, which should be referred to for a complete and fair presentation of their financial condition. The following tables are provided for convenience of comparison.

TABLE 9.—NYSE CONSOLIDATED REVENUES AND EXPENSES

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A:		
Distribution	$93,223,000	$54,594,000
Allocated Support Costs	8,697,000	5,304,000
OPRA System Distribution	0	189,000
Others.		
Other	9,573,000	7,976,000
Total Market Information Revenues	111,493,000	68,063,000
Listing Fees	296,022,000	180,561,000
Trading Fees	123,795,000	92,080,000
Regulatory Fees	93,116,000	50,512,000
Facility and Equipment Fees	41,865,000	33,643,000
Membership Fees	7,361,000	6,125,000
Investment and Other Income	55,022,000	21,295,000
Total Revenues	728,674,000	452,279,000
Expenses:		
Compensation	204,711,000	152,194,000
Systems and Related Support	201,913,000	140,049,000
General and Administrative	51,703,000	22,613,000
Depreciation and Amortization	37,947,000	21,732,000
Professional Services	29,607,000	13,473,000
Occupancy	24,071,000	22,079,000
Total Expenses	549,952,000	372,140,000
Income before Taxes	178,722,000	80,139,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	15.3	15.0
Listing Fees	40.6	39.9
Trading Fees	17.0	20.4
Regulatory Fees	12.8	11.2
Facility and Equipment Fees	5.7	7.4
Membership Fees	1.0	1.4
Investment and Other Income	7.6	4.7

TABLE 10.—NASD CONSOLIDATED REVENUES AND EXPENSES (EXCLUDING AMEX SUBSIDIARY)

For years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Nasdaq System Retention	$128,088,000	$61,946,000
Network A Distribution	13,209,000	6,902,000
Network B Distribution	9,020,000	2,783,000
Other	1,937,000	2,798,000
Total Market Information Revenues	152,254,000	74,429,000
Issuer Services	137,344,000	79,219,000
Transaction Services	126,913,000	60,653,000
Member Assessments	91,313,000	44,152,000
Registration and Qualification Fees	78,662,000	45,761,000
Regulatory Fees and Fines	47,880,000	18,406,000
Interest and Other	27,871,000	25,988,000
Arbitration Fees	21,427,000	7,592,000
Corporate Finance Fees	16,143,000	15,787,000
Total Revenues	699,807,000	371,987,000

TABLE 10.—NASD CONSOLIDATED REVENUES AND EXPENSES (EXCLUDING AMEX SUBSIDIARY)—Continued

For years ended December 31	1998	1994
Expenses:		
Compensation	271,608,000	132,444,000
Professional and Contract Services	154,311,000	67,142,000
Computer Operation and Data Communications	65,101,000	31,355,000
Depreciation and Amortization	60,573,000	20,380,000
Occupancy	24,092,000	19,840,000
Publications, Supplies, and Postage	23,352,000	10,996,000
Travel, Meetings, and Training	22,907,000	16,121,000
Other	22,586,000	13,598,000
Systems Technology Migration	0	29,053,000
Intercompany (Amex)	(20,632,000)	0
Total Expenses	623,898,000	340,929,000
Income before Provision for Income Taxes	75,909,000	31,058,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	21.8	20.0
Issuer Services	19.6	21.3
Transaction Services	18.1	16.3
Member Assessments	13.0	11.9
Registration and Qualification Fees	11.2	12.3
Regulatory Fees and Fines	6.8	4.9
Interest and Other	4.0	7.0
Arbitration Fees	3.1	2.0
Corporate Finance Fees	2.3	4.2

TABLE 11.—AMEX CONSOLIDATED REVENUES AND EXPENSES

(Includes two-month period after acquisition by NASD on October 30, 1998)

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network B:		
Distribution	$67,090,000	$56,460,000
Allocated Support Costs	3,771,000	2,852,000
OPRA System Distribution	9,889,000	4,960,000
Other	2,160,000	1,993,000
Total Market Information Revenues	82,910,000	66,265,000
Trading Fees	91,937,000	45,107,000
Members' Dues and Regulatory Fines and Fees	17,679,000	2,875,000
Listing Fees	16,265,000	15,151,000
Investment and other income	15,257,000	14,157,000
Total Revenues	224,048,000	143,555,000
Expenses:		
Compensation and benefits	65,484,000	57,708,000
Systems and Related Support Costs	45,638,000	29,231,000
Professional Services	23,636,000	4,498,000
Facilities Costs	11,186,000	9,648,000
Depreciation and amortization	9,225,000	9,205,000
General Administrative and Other Expenses	26,003,000	18,833,000
Intercompany (after NASD acquisition)	20,632,000	0
Total Expenses	201,804,000	129,123,000
Income before Income Taxes	22,244,000	14,432,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	37.0	46.2
Trading Fees	41.0	31.4
Members' Dues and Regulatory Fines and Fees	7.9	2.0
Listing Fees	7.3	10.6

TABLE 11.—AMEX CONSOLIDATED REVENUES AND EXPENSES—Continued

(Includes two-month period after acquisition by NASD on October 30, 1998)

For the years ended December 31	1998	1994
Investment and other income	6.8	9.7

TABLE 12.—CBOE CONSOLIDATED REVENUES AND EXPENSES

For the years ended June 30	1998	1994
Revenues:		
Total Market Information Revenues*	$17,538,000	$11,052,000
Transaction Fees	84,639,000	68,205,000
Other Member Fees	19,703,000	14,272,000
Interest	1,133,000	1,059,000
Equity in Income of CSE	515,000	1,078,000
Other	3,012,000	1,997,000
Total Revenues	126,540,000	97,663,000
Expenses:		
Employee Costs	57,395,000	41,974,000
Outside Services	14,948,000	7,173,000
Facilities Cost	3,887,000	3,663,000
Communications	726,000	830,000
Data Processing	8,400,000	6,028,000
Travel and Promotional Expenses	15,585,000	5,071,000
Depreciation and Amortization	16,571,000	6,997,000
Other	8,733,000	4,360,000
Total Expenses	126,245,000	76,096,000
Income before Income Taxes	295,000	21,567,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	13.9	11.3
Transaction Fees	66.9	69.8
Other Member Fees	15.6	14.6
Interest	0.9	1.1
Equity in Income of CSE	0.4	1.1
Other	2.4	2.0

*The CBOE's reporting period ends on June 30. This reporting period renders inapplicable the CBOE distributions listed on Tables 5, 7, and 8 for the years ended December 31, 1998 and 1994.

TABLE 13.—PCX CONSOLIDATED REVENUES AND EXPENSES

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution	$4,531,000	$3,788,000
Network B Distribution	2,855,000	2,164,000
OPRA System Distribution	5,365,000	2,392,000
Other	191,000	78,000
Total Market Information Revenues	12,942,000	8,422,000
Transaction and Service Charges	53,782,000	30,450,000
Peripheral Equipment and Market Data Fees	1,900,000	1,919,000
Listing Fees	1,986,000	2,014,000
Member and Participant Dues	1,659,000	1,825,000
Interest Income	1,580,000	681,000
Regulatory and Registration Fees	1,294,000	687,000
Other	1,840,000	801,000
Total Revenues	76,983,000	46,799,000
Expenses:		
Compensation and Other Employee Costs	33,878,000	19,662,000
Facilities	8,959,000	6,776,000
Equipment	8,497,000	6,433,000

TABLE 13.—PCX CONSOLIDATED REVENUES AND EXPENSES—Continued

For the years ended December 31	1998	1994
Communications	5,604,000	3,453,000
Professional Services	5,764,000	730,000
Travel Expenses	1,854,000	0
Outside Data Processing Services	951,000	1,073,000
Expenditures Relating to New Facilities Project	4,150,000	0
Financing Costs	0	453,000
General and Administrative Expenses	6,328,000	3,409,000
Total Expenses	75,985,000	41,989,000
Income before Income Taxes	998,000	4,810,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	16.8	18.0
Transaction and Service Charges	70.0	65.1
Peripheral Equipment and Market Data Fees	2.5	4.1
Listing Fees	2.6	4.3
Member and Participant Dues	2.2	3.9
Interest Income	2.1	1.5
Regulatory and Registration Fees	1.7	1.5
Other	2.4	1.7

TABLE 14.—CHX CONSOLIDATED REVENUES AND EXPENSES

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution	$6,898,000	$4,153,000
Network B Distribution	12,722,000	4,507,000
Nasdaq System Distribution	412,000	100,000
Total Market Information Revenues	20,032,000	8,760,000
Operations	24,709,000	20,204,000
Interest	1,111,000	689,000
Total Revenues	45,852,000	29,653,000
Expenses:		
Employee Compensation and Benefits	15,022,000	13,693,000
Systems and Related Support	4,444,000	3,494,000
Rent, Maintenance and Utilities	4,166,000	4,226,000
Professional and Other	7,365,000	2,031,000
General and Administrative	3,859,000	2,374,000
Depreciation and Amortization	3,887,000	3,758,000
Other	0	701,000
Total Expenses	38,743,000	30,277,000
Income before Income Taxes	7,109,000	(624,000)
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	43.7	29.5
Operations	53.9	68.1
Interest	2.4	2.3

TABLE 15.—PHLX CONSOLIDATED REVENUES AND EXPENSES

For years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution	$1,664,000	$1,806,000
Network B Distribution	528,000	881,000

TABLE 15.—PHLX CONSOLIDATED REVENUES AND EXPENSES—Continued

For years ended December 31	1998	1994
OPRA System Distribution	4,939,000	2,448,000
Total Market Information Revenues	7,131,000	5,135,000
Transaction Fees	22,556,000	14,426,000
Depository	0	10,613,000
Clearing and Settlement	5,950,000	4,165,000
Floor Charges	1,595,000	1,732,000
Dividend and Interest Income	1,287,000	1,700,000
Other	5,159,000	2,865,000
Total Revenues	43,678,000	40,636,000
Expenses:		
Staffing Costs	22,114,000	23,213,000
Data Processing and Communication Costs	4,041,000	4,540,000
Occupancy Costs	2,817,000	3,337,000
Professional Services	2,783,000	494,000
Other	7,427,000	9,975,000
Total Expenses	39,182,000	41,559,000
Income from Continuing Operations before Income Taxes	4,496,000	(923,000)
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	16.3	12.6
Transaction Fees	51.6	35.5
Depository	0.0	26.1
Clearing and Settlement	13.6	10.2
Floor Charges	3.7	4.3
Dividend and Interest Income	2.9	4.2
Other	11.8	7.1

TABLE 16.—BSE CONSOLIDATED REVENUES AND EXPENSES

For years ended September 30	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution*	$3,029,000	$1,712,000
Network B Distribution*	783,000	1,301,000
Total Market Information Revenues	3,812,000	3,013,000
Transaction Charges	10,438,000	7,588,000
Members' Dues and Fees	2,451,000	2,418,000
Listing Fees	825,000	1,187,000
Interest	743,000	390,000
Other	97,000	305,000
Total Revenues	18,366,000	14,901,000
Expenses:		
Employee Costs	7,799,000	6,387,000
Data Processing	1,098,000	1,049,000
Occupancy Costs	1,524,000	1,530,000
Telecommunications	1,411,000	1,132,000
Clearing Fees and Related Costs	465,000	327,000
Professional Services	2,001,000	678,000
Depreciation and Amortization	941,000	900,000
Office and Other Related Expenses	548,000	489,000
Interest	63,000	82,000
Maintenance and Repairs	624,000	553,000
Other	1,129,000	728,000
Total Expenses	17,603,000	13,855,000

TABLE 16.—BSE CONSOLIDATED REVENUES AND EXPENSES—Continued

For years ended September 30	1998	1994
Income before Taxes	763,000	1,046,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	20.8	20.2
Transaction Charges	56.8	50.9
Members' Dues and Fees	13.3	16.2
Listing Fees	4.5	8.0
Interest	4.0	2.6
Other	0.5	2.0

*The BSE's reporting period ends on September 30. This reporting period renders inapplicable the BSE distributions listed on Tables 5 and 7 for the years ended December 31, 1998 and 1994.

TABLE 17.—CSE REVENUES AND EXPENSES.

For the year ended June 30	1998	1994*
Revenues:		
Market Information Revenues:		
Network A Distribution*	$2,450,000	$970,000
Network B Distribution*	173,000	20,000
Total Market Information Revenues	2,623,000	990,000
Transaction Fees	2,607,000	2,072,000
Members' Dues and Fees	451,000	92,000
Service Fees	136,000	428,000
Total Operating Revenues	5,817,000	3,582,000
Expenses:		
Computer and Other Costs of Services	2,605,000	997,000
Salaries, Wages and Employee Benefits	1,766,000	675,000
Professional Services	116,000	165,000
Communications	140,000	110,000
Occupancy	351,000	76,000
Travel and Promotional	146,000	0
Other	323,000	152,000
Total Operating Expenses	5,447,000	2,175,000
Operating Income	370,000	1,407,000
Non-Operating Income—Net	694,000	20,000
Income before Provision for Income Taxes	1,064,000	1,427,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	45.1	27.6
Transaction Fees	44.8	57.8
Members' Dues and Fees	7.8	2.6
Service Fees	2.3	11.9

*Due to a change in reporting period, 1994 information is for the six-month period ending June 30, 1994. In addition, the June 30 reporting period renders inapplicable the CSE distributions listed on Tables 5 and 7 for the years ended December 31, 1998 and 1994.

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BILLING CODE 8010–01–U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–129–FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: OSM is announcing the receipt of a proposed amendment to the Pennsylvania regulatory program (Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, as amended. Pennsylvania has submitted this proposed amendment to reflect changes made to regulations in the Pennsylvania program through the Department's Regulatory Basics Initiative (RBI). Under this initiative, regulations were revised because they were considered to be unclear, unnecessary or more stringent than the corresponding Federal regulation. The RBI resulted in the rulemaking in Coal Mining Permitting and Performance Standards, Pennsylvania Bulletin, Vol. 28, No. 19, May 9, 1998. The proposed amendment revises certain portions of 25 Pennsylvania Code Chapter 86, Surface and Underground Mining: General; Chapter 87, Surface Mining of Coal; Chapter 88, Anthracite Coal; Chapter 89, Underground Mining of Coal and Coal Preparation Facilities; and Chapter 90, Coal Refuse Disposal. The amendments are intended to revise the Pennsylvania program to be consistent with the corresponding Federal regulations.

DATES: Written comments must be received on or before 4:00 p.m. on January 18, 2000. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. on January 11, 2000. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m. on January 3, 2000.

ADDRESSES: Written comments and requests to testify at the hearing should be mailed or hand-delivered to Mr. Robert J. Biggi, Director, Harrisburg Field Office at the first address listed below. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking [or administrative] record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking [or administrative] record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Copies of the Pennsylvania program, the proposed amendment, a listing of any scheduled public meetings or hearing, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays:

Office of Surface Mining Reclamation and Enforcement, Harrisburg Field Office, Third Floor, Suite 3C, Harrisburg Transportation Center (Amtrack), 415 Market Street, Harrisburg, Pennsylvania 17101. Telephone: (717) 782–4036.

Pennsylvania Department of Environmental Protection, Bureau of Abandoned Mine Reclamation, 400 Market Street, P.O. Box 8476, Harrisburg, Pennsylvania 17101. Telephone: (717) 783–2267.

Each requester may receive, free of charge, one copy of the proposed amendment by contacting the OSM Harrisburg Field Office.

FOR FURTHER INFORMATION CONTACT: Mr. Robert J. Biggi, Director, Harrisburg Field Office, Telephone: (717) 782–4036.

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program

On July 30, 1982, the Secretary of the Interior conditionally approved the Pennsylvania program. Background on the Pennsylvania program, including the Secretary's findings and the disposition of comments can be found in the July 30, 1982 **Federal Register** (47 FR 33079). Subsequent actions concerning the regulatory program amendments are identified at 30 CFR 938.15.

II. Discussion of the Proposed Amendment

By letter dated November 30, 1999 (Administrative Record No. PA–849.02), the Pennsylvania Department of Environmental Protection (PADEP) submitted a proposed amendment to its program because of the department's Regulatory Basics Initiative (RBI). Under the RBI, regulations were revised because they were considered unclear, unnecessary or were more stringent than the corresponding federal regulations.

PADEP proposes to amend certain provisions of 25 Pennsylvania Code, Chapters 86 through 90, as follows:

Chapter 86, Surface and Underground Coal Mining: General

Section 86.2 Scope

PADEP proposes to correct a grammatical error by changing the word ''specify'' to ''specifies'' in the opening paragraph.

Section 86.37. Criteria for Permit Approval or Denial

PADEP proposes to modify subsection (4) to assure activities proposed under the application have been designed to prevent material damage to the hydrologic balance outside the proposed permit area by adding the word ''material'' before damage and eliminating the words ''within and'' before the word ''outside''.

PADEP proposes to modify subsection (6) regarding the effects of proposed coal mining activities on properties listed on or eligible for listing on the National Register of Historic Places by deleting the phrase ''or eligible for inclusion on'' from the second sentence and re-ordering the sentences. The first two sentences of subsection (6) now read as: ''The proposed activities will not adversely affect any publicly owned parks or places included on the National Register of Historic Places, except as provided for in Subchapter D. The effect of the proposed coal mining activities on properties listed on or eligible for listing on the National Register of Historic Places has been taken into account by the Department''.

Section 86.40 Permit Terms

PADEP proposes to modify subsection (b) by adding criteria under which the Department may grant an extension of time for commencement of mining activities by adding the phrase ''or if there are conditions beyond the control and without the fault or negligence of the permittee''.

Section 86.64 Right of Entry

PADEP proposes to modify this section by adding additional criteria for documenting right of entry by adding the following sentence to subsection (a) ''The description shall identify the documents by type and date of execution, identify the specific lands to which the document pertains and explain the legal rights claimed by the applicant''. Existing subsection (b)(1) and (2) are eliminated and new subsections (b)(1) through (3) are added specifying the documents required. New subsection (c) is added as ''This section shall not be construed to provide the Department with the authority to adjudicate property rights disputes''. Existing subsection (c) is re-lettered as (d), new subsection (d)(3) is added to specify that the requirements of the subsection are in addition to the requirements required by subsections (a) and (b), and existing subsections (2)(d) and (2)(e) are re-lettered as(3)(e) and (3)(f), respectively, which specify that all information required in the subsection shall be made part of the permit application.

Section 86.70 Proof of Publication

PADEP proposes to modify this subsection to require that an application to the Department shall contain an intent to publish, and a copy of the language to appear in the public notice as well as a copy of the advertisements or the original notarized proof of publication.

Section 86.132 Definitions

Substantially disturb. PADEP proposes to modify this definition by adding the word ''significant'' before ''impact''. The relevant portion of the definition now reads ''For purposes of coal exploration, including, but not limited to, to have a significant impact upon land, air or water resources * * *''

Section 86.133 General Requirements

PADEP proposes to modify subsection (e) to include parameters for metric tons, and to change the word ''less than'' to ''or less'' and to change the words ''or more'' to ''more than''. The relevant portion of the requirement now reads ''if 250 tons(226 metric tons) or less is removed'', and ''The removal of more than 250 tons (226 metric tons) of coal * * *''

Section 86.134 Coal Exploration Performance and Design Standards

PADEP proposes to modify subsection (l) by eliminating existing subsections (2) and (3) that required the person conducting coal exploration to measure environmental characteristics during the operations and to limit vehicular traffic and adding new subsection (2) that states ''Roads used for coal exploration shall comply with the following''. Existing subsections (4) and (5) are re-numbered as (3) and (4), existing subsection (6) is eliminated and new subsection (5) is added as follows: ''All areas disturbed by coal exploration activities shall be vegetated in a manner that encourages prompt revegetation and recovery of a diverse, effective and permanent vegetative cover''. Additionally, existing subsections (7) through (12) are re-numbered as (6) through (11) respectively.

Section 86.174 Standards for Release of Bonds

PADEP proposes to modify subsection (b)(1) to clarify the standards for Stage 2 bond release by requiring that topsoil and revegetation be successfully completed in accordance with the reclamation plan. The phrase ''and the standards for the success of revegetation are met'' is eliminated. PADEP also proposes to make a grammatical change to Subsection (b)(2) by changing the word ''their'' to ''the'' prior to ''requirements of the acts pertaining to contribution of suspended solids to stream flow''.

Chapter 87, Surface Mining of Coal

Section 87.1 Definitions

PADEP proposes to add subsection (x) ''unmanaged natural habitat'', which is defined as idle land which does not require a specific management plan after the reclamation and revegetation have been accomplished.

Section 87.77 Protection of Public Parks and Historic Places

PADEP proposes to modify subsection (a) by specifying that the rules pertain to publicly owned parks or historic places that are listed on the National Register of Historic Places.

Section 87.93 Casing and Sealing of Drilled Holes

PADEP proposes to modify subsection (a)(2) by substituting the word ''minimize'' for the phrase ''prevent to the maximum extent possible'' and adding a metric measurement of 38.1 meters to subsection (e) pertaining to the radius of the barrier of undisturbed earth around all oil and gas wells.

PADEP proposes to modify subsection (2)(iii) pertaining to when the Department may approve lesser distances by deleting the existing language and adding the following: ''The measures included in the permit to minimize damage, destruction or disruption of services pursuant to § 87.173(b) are implemented.

Section 87.97 Topsoil: Removal

PADEP proposes to modify subsection (c) by including metric measurements of 30.48 centimeters with the 12-inch measurement and to modify subsection (f) by substituting the word ''topsoil'' for ''subsoil.''

Section 87.101 Hydrologic Balance: General Requirements

PADEP proposes to modify subsection (a) by substituting the word ''minimize'' for the phrase ''prevent to the maximum extent possible'' and by adding a requirement that surface mining activities shall be planned and conducted to prevent material damage to the hydrologic balance outside the permit area. PADEP further proposes to add that the Department may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented.

Section 87.106 Hydrologic Balance: Sediment Control Measures

PADEP proposes to modify subsection (l) pertaining to prevention of contributions of sediment to streamflow or runoff by eliminating the word ''maximum'' prior to the words ''extent possible''.

PADEP also proposes to modify subsection (3) by changing the language of the requirement from ''Prevent erosion to the maximum extent possible'' to ''Minimize erosion to the extent possible.''

Section 87.126 Use of Explosives: Public Notice of Blasting Schedule

PADEP proposes to modify subsection (a) by allowing publication of the blasting schedule in a newspaper of general circulation up to 30 days before beginning a blasting program instead of the existing 20 day period.

Section 87.127 Use of Explosives: Surface Blasting Requirements

PADEP proposes to modify subsection (f)(5) by changing the limit for casting-off flyrock from the ''line of property owned or leased by the permittee'' to the ''permit boundary''.

Section 87.138 Protection of Fish, Wildlife and Related Environmental Values

PADEP proposes to modify subsection (a) by adding the phrase ''to the extent possible'' prior to the phrase ''using the best technology currently available''. PADEP also proposes to modify

subsections (a)(1) through (a)(3) by eliminating the word ''prevent'' and substituting the words ''minimize'', ''avoid or minimize'' and ''avoid'' respectively, as they pertain to disturbances.

PADEP also proposes to modify subsection (b) by changing the name of the Fish Commission to the Fish and Boat Commission.

Section 87.144 Backfilling and Grading: Final Slopes

PADEP proposes to modify subsection (c) by deleting subsections (1) through (4) enumerating requirements for terraces. PADEP also proposes to modify subsection (f) by eliminating specific grading, preparation of overburden, and placement of topsoil requirements pertaining to placement in a direction other than parallel when parallel placement creates hazards to equipment operators.

Section 87.146 Regarding or Stabilizing Rills and Gullies

PADEP proposes to eliminate the existing subsection and substitute the following new subsections:

(a) Exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies, which form in areas that have been regraded and topsoiled and which do one of the following shall be filled, regraded and otherwise stabilized:

(1) Disrupt the approved postmining land use or the reestablishment of the vegetative cover.

(2) Cause or contribute to a violation of water quality standards for receiving streams.

(c) For the areas listed in subsection (b), the topsoil shall be replaced and the areas shall be reseeded or replanted.

Section 87.159 Postmining Land Use

PADEP proposes to modify subsection (b) by eliminating subsections (3) and (4) pertaining to land that has received improper management or was changed within 5 years of the beginning of mining.

PADEP also proposes to add new subsection (3) as follows: ''The proposed postmining land use is reasonably likely to be achieved which may be demonstrated by one or more of the following or other similar criteria'': Criteria currently identified in subsections (3), (4), and (5) are re-lettered as (i), (ii) and (iii) respectively, under new subsection (3).

PADEP also proposes to eliminate subsection (6) pertaining to certification of plans for postmining land use by a registered professional engineer. Existing subsections (7), (8) and (9) are re-numbered as (4), (5) and (6), respectively.

Section 87.160 Haul Roads and Access Roads

PADEP proposes to modify subsection (a) by eliminating the phrase ''prevent, to the maximum extent possible'', and substituting the words ''control or prevent'' prior to ''erosion and contributions of sediment to streams or runoff * * *''.

Section 87.166 Haul Roads and Access Roads: Restoration

PADEP proposes to modify this subsection by substituting the phrase ''as soon as practicable'' for the word ''immediately''.

PADEP also proposes to modify subsection (4) by eliminating the requirement that roadbeds be plowed. The subsection now reads ''Roadbeds shall be ripped or scarified''.

Section 87.173 Support Facilities and Utility Installations

PADEP proposes to modify subsection (a) by eliminating criteria from the opening paragraph and deleting subsections (1) and (2). The criteria to locate, maintain and use buildings is now included in new subsections (1), (2), (2)(i) and (2)(ii) as follows:

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property.

(2) To the extent possible using the best technology currently available:

(i) Minimizes damage to fish, wildlife and related environmental values.

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. These contributions may not be in excess of limitations of State or Federal law.

Section 87.174 Steep Slope Operations

PADEP proposes to eliminate subsection (g) pertaining to Departmental approval of unprotected drainage channels on backfilled areas.

Section 87.176 Auger Mining

PADEP proposes to delete subsection (d) pertaining to augering to the rise. Existing subsection (e) is re-lettered as (d) and further modified to outline situations where the Department may allow auger mining in subsections (d)(1) through (d)(4).

Section 87.209 Criteria and Schedule for Release of Bonds on Pollution Abatement Areas

PADEP proposes to modify subsection (a) by raising the amount of bond to release from 50% to 60%. PADEP also proposes to modify subsection (a)(4) to specify that the operator has not caused degradation of baseline pollution at any time during a period of 6 months prior to request for bond release. PADEP further proposes to modify subsection (b) by deleting the phrase that allows release of additional bond up to 35% of the amount of the bond for the authorized pollution abatement area and substituting the phrase that additional funds can be released, but that the Department will retain an amount sufficient to cover the cost to the Department of reestablishing vegetation if completed by a third party.

PADEP also proposes to modify subsection (b)(3)(ii)(I) by deleting the phrase ''from the date of the initial bond release under subsection (a)'' and substituting the phrase ''prior to the date of application for bond release and until the bond release is approved under subsection (b) * * *'' as it pertains to the 12 month period of ground water monitoring that does not show degradation of baseline pollution load.

PADEP proposes to modify subsection (c)(4) pertaining to the release of the remaining portion of the bond by deleting the phrase ''which shall be measured from the date of release of bond under subsection (b).''

Chapter 88, Anthracite Coal

Section 88.1 Definitions

PADEP proposes to add subsection (x) ''unmanaged natural habitat'', which is defined as idle land which does not require a specific management plan after the reclamation and revegetation have been accomplished.

Section 88.56 Protection of Public Parks and Historic Places

PADEP proposes to modify subsection (a) by specifying that the rules pertain to publicly owned parks or historic places that are listed on the National Register of Historic Places.

Section 88.83 Sealing of Drilled Holes: General Requirements

PADEP proposes to modify subsection (a)(2) by substituting the word ''minimize'' for the phrase ''prevent to the maximum extent possible'' and adding a metric measurement of 38.1 meters to subsection (e) pertaining to the radius of the barrier of undisturbed earth around oil and gas wells.

PADEP proposes to modify subsection (2)(iii) pertaining to when the Department may approve lesser distances by deleting the existing language and adding the following: ''The measures included in the permit to minimize damage, destruction or

disruption of services are implemented.''

Section 88.91 Hydrologic Balance: General Requirements

PADEP proposes to modify subsection (a) by substituting the word ''minimize'' for the phrase ''prevent to the maximum extent possible'' and by adding a requirement that surface mining activities shall be planned and conducted to prevent material damage to the hydrologic balance outside the permit area. PADEP further proposes to add that the Department may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented.

Section 88.96 Hydrologic Balance: Sediment Control Measures

PADEP proposes to modify subsection (l) pertaining to prevention of contributions of sediment to streamflow or runoff by eliminating the word ''maximum'' prior to the words ''extent possible''.

PADEP also proposes to modify subsection (3) by changing the language of the requirement from ''Prevent erosion to the maximum extent possible'' to ''Minimize erosion to the extent possible.''

Section 88.118 Backfilling and Grading: Final Slopes

PADEP proposes to modify subsection (c) by deleting subsections (1) through (4) enumerating requirements for terraces. PADEP also proposes to modify subsection (f) by eliminating specific grading, preparation of overburden, and placement of topsoil requirements pertaining to placement in a direction other than parallel when parallel placement creates hazards to equipment operators.

Section 88.133 Postmining Land Use

PADEP proposes to modify subsection (a) by deleting the reference to Subchapter E (relating to coal exploration) and adding the reference to Subchapter F (relating to bonding and insurance requirements).

PADEP also proposes to modify subsection (b) by eliminating subsections (3) and (4) pertaining to land that has received improper management or was changed within 5 years of the beginning of mining.

PADEP also proposes to add new subsection (3) as follows: ''The proposed postmining land use is reasonably likely to be achieved which may be demonstrated by one or more of the following or other similar criteria': Criteria currently identified in subsections (3) and (4) are re-lettered as (i), (ii) respectively under new subsection (3).

PADEP also proposes to eliminate subsection (5) pertaining to certification of plans for postmining land use by a registered professional engineer. Existing subsections (6), (7) and (8) are re-numbered as (4), (5) and (6), respectively.

Section 88.138 Haul Roads and Access Roads: General

PADEP proposes to modify subsection (a) by eliminating the phrase ''prevent, to the maximum extent possible'', and substituting the words ''control or prevent'' prior to ''erosion and contributions of sediment to streams or runoff * * *''.

Section 88.144 Haul Roads and Access Roads: Restoration

PADEP proposes to modify this subsection by substituting the phrase ''as soon as practicable'' for the word ''immediately''.

Section 88.191 Hydrologic Balance: Sediment Control Measures

PADEP proposes to modify subsection (l) pertaining to prevention of contributions of sediment to streamflow or runoff by eliminating the word ''maximum'' prior to the words ''extent possible''.

PADEP also proposes to modify subsection (3) by changing the requirement from ''Prevent erosion to the maximum extent possible'' to ''Minimize erosion to the extent possible.''

Section 88.221 Postmining Land Use

PADEP proposes to modify subsection (b) by eliminating subsections (3) and (4) pertaining to land that has received improper management or was changed within 5 years of the beginning of mining. PADEP also proposes to add new subsection (3) as follows: ''The proposed postmining land use is reasonably likely to be achieved which may be demonstrated by one or more of the following or other similar criteria'': Criteria currently identified in subsections (3) and (4) are re-lettered as (i) and (ii) respectively under new subsection (3).

PADEP also proposes to eliminate subsection (5) pertaining to certification of plans for postmining land use by a registered professional engineer. Existing subsections (6), (7) and (8) are renumbered as (4), (5) and (6), respectively.

Section 88.231 Haul Roads and Access Roads: General

PADEP proposes to modify subsection (a) by eliminating the phrase ''prevent, to the maximum extent possible'', and substituting the words ''control or prevent'' prior to ''erosion and contributions of sediment to streams or runoff . . .''.

Section 88.237 Haul Roads and Access Roads: Restoration

PADEP proposes to modify this subsection by substituting the phrase ''as soon as practicable'' for the word ''immediately''.

Section 88.283 Sealing of Drilled Holes: General Requirements

PADEP proposes to modify subsection (e) by adding a metric measurement of 38.1 meters pertaining to the radius of the barrier of undisturbed earth around all oil and gas wells.

PADEP also proposes to modify subsection (2)(iii) pertaining to approval of lesser distances by deleting the existing language and adding the following: ''The measures included in the permit to minimize damage, destruction or disruption of services are implemented.''

Section 88.291 Hydrologic Balance: General Requirements

PADEP proposes to modify subsection (a) by substituting the word ''minimize'' for the phrase ''prevent to the maximum extent possible'' and by adding a requirement that surface mining activities shall be planned and conducted to prevent material damage to the hydrologic balance outside the permit area. PADEP further proposes to add that the Department may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented.

Section 88.296 Hydrologic Balance: Sediment Control Measures

PADEP proposes to modify subsection (l) pertaining to prevention of contributions of sediment to streamflow or runoff by eliminating the word ''maximum'' prior to the words ''extent possible''.

Section 88.334 Postdisposal Land Use

PADEP proposes to modify subsection (a) by changing the reference from ''this section (bonds)'' to ''Chapter 86, Subchapter F, (relating to bonding and insurance requirements)''.

PADEP also proposes to modify subsection (b) by eliminating subsections (3) and (4) pertaining to

land that has received improper management or was changed within 5 years of the beginning of mining.

PADEP also proposes to modify subsection (c)(1) by deleting the reference to ''surface mining'' and substituting ''coal refuse disposal''.

PADEP also proposes to add new subsection (3) as follows: ''The proposed postmining land use is reasonably likely to be achieved which may be demonstrated by one or more of the following or other similar criteria': Criteria currently identified in subsections (3) and (4) are re-lettered as (i) and (ii) respectively, under new subsection (3), and (i) is further changed by deleting the reference to ''surface mining'' and substituting ''coal refuse disposal''.

PADEP also proposes to eliminate subsection (5) pertaining to certification of plans for postdisposal land use by a registered professional engineer. Existing subsections (6), (7), and (8) are re-numbered as (4), (5) and (6), respectively.

Section 88.335 Haul Roads and Access Roads: General

PADEP proposes to modify subsection (a) by eliminating the phrase ''prevent, to the maximum extent possible'', and substituting the words ''control or prevent'' prior to ''erosion and contributions of sediment to streams or runoff . . .''.

Section 88.341 Haul Roads and Access Roads: Restoration

PADEP proposes to modify this subsection by substituting the phrase ''as soon as practicable'' for the word ''immediately''.

Section 88.492 Minimum Requirements for Reclamation and Operation Plan

PADEP proposes to modify subsection (f)(1) by specifying that the rules pertain to publicly owned parks or historic places that are listed on the National Register of Historic Places.

Section 88.509 Criteria and Schedule For Release of Bonds on Pollution Abatement Areas.

PADEP proposes to modify subsection (a) by raising the amount of bond to release from 50% to 60%. PADEP also proposes to modify subsection (a)(4) to specify that the operator has not caused degradation of baseline pollution at any time during a period of 6 months prior to request for bond release. PADEP further proposes to modify subsection (b) by deleting the phrase that allows release of additional bond up to 35% of the amount of the bond for the authorized pollution abatement area and substituting the phrase that additional funds can be released, but that the Department will retain an amount sufficient to cover the cost to the Department of reestablishing vegetation if completed by a third party.

PADEP also proposes to modify subsection (b)(3)(ii)(I) by deleting the phrase ''from the date of the initial bond release under subsection (a)'' and substituting the phrase ''prior to the date of application for bond release and until the bond release is approved under subsection (b)'' as it pertains to the 12 month period of ground water monitoring that does not show degradation of baseline pollution load.

PADEP proposes to modify subsection (c)(4) pertaining to the release of the remaining portion of the bond by deleting the phrase ''which shall be measured from the date of release of bond under subsection (b).''

Chapter 89, Underground Mining of Coal and Coal Preparation Facilities

Section 89.38 Archaeological and Historical Resources and Public Parks

PADEP proposes to re-title this section as Archaeological and historical resources, public parks and publicly owned parks.

PADEP proposes to modify subsection (b) by specifying that the rules pertain to publicly owned parks or historic places that are listed on the National Register of Historic Places.

Section 89.65 Protection of Fish, Wildlife and Related Environmental Values

PADEP proposes to modify subsection (a) by adding the phrase ''to the extent possible'' prior to the phrase ''using the best technology currently available'' and by changing the word ''prevent'' to ''minimize'' prior to the word ''disturbances.''

PADEP also proposes to modify subsections (d)(1) and (d)(2) by eliminating the word ''prevent'' and substituting the words ''avoid or minimize'' and ''avoid'' respectively, as they pertain to disturbances. Subsection (d)(2) is further modified by requiring an operator to avoid disturbances to enhance or restore habitats of unusually high value for fish and wildlife.

Section 89.67 Support Facilities

PADEP proposes to modify subsection (a) by eliminating criteria from the opening paragraph and deleting subsections (1) and (2). The criteria to locate, maintain and use buildings is now included in new subsections (1), (2), (2)(i) and (2)(ii) as follows:

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property.

(2) To the extent possible using the best technology currently available:

(i) Minimizes damage to fish, wildlife and related environmental values.

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. These contributions may not be in excess of limitations of State or Federal law.

Section 89.82 Protection of Fish, Wildlife and Related Environmental Values

PADEP proposes to modify subsections (a) and (c) by adding the phrase ''to the extent possible'' prior to the phrase ''using the best technology currently available'' and by deleting the phrase ''of the reclamation activities'' in subsection (a).

PADEP also proposes to modify subsections (b) and (e) by changing the name of the Fish Commission to the Fish and Boat Commission.

Section 89.87 Regrading or Stabilizing Rills and Gullies

PADEP proposes to eliminate the existing subsections and substitute the following new subsections:

(a) Exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies, which form in areas that have been regraded and topsoiled and which do one of the following shall be filled, regraded and otherwise stabilized:

(1) Disrupt the approved postmining land use or the reestablishment of the vegetative cover.

(2) Cause or contribute to a violation of water quality standards for receiving streams.

(c) For the areas listed in subsection (b), the topsoil shall be replaced and the areas shall be reseeded or replanted.

Section 89.88 Postmining Land Use

PADEP proposes to modify subsection (b) by eliminating subsections (2) and (3) pertaining to land that has received improper management or was changed within 5 years of the beginning of mining.

PADEP also proposes to add new subsection (2) as follows: The proposed postmining land use is reasonably likely to be achieved which may be demonstrated by one or more of the following or other similar criteria: Criteria currently identified in subsection (2) is now included in subsection (i).

PADEP also proposes to eliminate subsection (3) pertaining to certification of plans for postmining land use by a registered professional engineer. Existing subsections (4), (5), (6) and (7) are renumbered as (3), (4), (5) and (6), respectively.

Section 89.90 Restoration of Roads

PADEP proposes to modify subsection (a) by substituting the phrase ''as soon as practicable'' for the word ''immediately''.

PADEP also proposes to modify subsection (4) by eliminating the requirement that roadbeds be plowed. The subsection now reads ''Roadbeds shall be ripped or scarified''.

Chapter 90, Coal Refuse Disposal

Section 90.1 Definitions

PADEP proposes to add subsection (x) ''unmanaged natural habitat'', which is defined as idle land which does not require a specific management plan after the reclamation and revegetation have been accomplished.

Section 90.40 Protection of Public Parks and Historic Places

PADEP proposes to modify subsection (a) by specifying that the rules pertain to publicly owned parks or historic places that are listed on the National Register of Historic Places.

PADEP also proposes to modify subsections (a)(1) and (a)(2) by deleting the word ''to'' before ''prevent'' and ''minimize'' respectively.

Section 90.93 Casing and Sealing of Drilled Holes and Underground Workings

PADEP proposes to modify subsection (d) by deleting the reference to the requirements of the Gas Operations, Well-Drilling, Petroleum and Coal Mining Act (52 P.S. § 2101–2602) and adding a reference to the Oil and Gas Act (58 P.S. §§ 601.101–601.605).

PADEP also proposes to add a metric measurement of 38.1 meters to subsection (e) pertaining to the radius of the barrier of undisturbed earth around all oil and gas wells.

PADEP further proposes to modify subsection (2)(iii) pertaining to when the Department may approve lesser distances by deleting the existing language and adding the following: ''The measures included in the permit to minimize damage, destruction or disruption of services pursuant to § 90.147(b) are implemented.

Section 90.97 Topsoil: Removal

PADEP proposes to modify subsection (c) by including metric measurements of 30.48 centimeters with the 12-inch measurement and to modify subsection (f) by substituting the word ''topsoil'' for ''subsoil.''

Section 90.101 Hydrologic Balance: General Requirements

PADEP proposes to modify subsection (a) by substituting the words ''minimize disturbances'' for the phrase ''prevent to the maximum extent possible, changes'' and by adding a requirement that surface mining activities shall be planned and conducted to prevent material damage to the hydrologic balance outside the permit area. PADEP further proposes to add that the Department may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented.

Section 90.106 Hydrologic Balance: Erosion and Sedimentation Control

PADEP proposes to modify subsection (a)(l) pertaining to prevention of contributions of sediment to streamflow or runoff by eliminating the word ''maximum'' prior to the words ''extent possible''.

PADEP also proposes to modify subsection (a)(3) by changing the requirement from ''Prevent erosion to the maximum extent possible'' to ''Minimize erosion to the extent possible.''

Section 90.134 Haul Roads and Access Roads: General

PADEP proposes to modify subsection (a) by eliminating the phrase ''minimize erosion and to prevent'', and substituting the words ''control or prevent:'' prior to ''contributions of sediment to streams or runoff . . .''.

Section 90.140 Haul Roads and Access Roads: Restoration

PADEP proposes to modify this subsection by substituting the phrase ''as soon as practicable'' for the word ''immediately''.

PADEP also proposes to modify subsection (4) by eliminating the requirement that roadbeds be plowed. The subsection now reads ''Roadbeds shall be ripped or scarificed''.

Section 90.147 Support Facilities and Utility Installations

PADEP proposes to modify subsection (a) by eliminating criteria from the opening paragraph and deleting subsections (1) and (2). The criteria to locate, maintain and use buildings is now included in new subsections (1), (2), (2)(i) and (2)(ii) as follows:

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property.

(2) To the extent possible using the best technology currently available:

(i) Minimizes damage to fish, wildlife and related environmental values.

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. These contributions may not be in excess of limitations of State or Federal law.

Section 90.150 Protection of Fish, Wildlife and Related Environmental Values

PADEP proposes to modify subsection (a) by adding the phrase ''to the extent possible'' prior to the phrase ''using the best technology currently available''.

PADEP also proposes to modify subsections (a)(1) through (a)(3) by eliminating the word ''prevent'' at the beginning of each and substituting the words ''minimize'', ''Locate and operate haul and access roads to avoid or minimize'' and ''avoid'' respectively, as they pertain to disturbances in each subsection. Subsection (a)(3) is further modified by requiring an operator to avoid disturbances to enhance or restore habitats of unusually high value for fish and wildlife.

PADEP proposes to modify subsections (b) and (d) by changing the name of the Fish Commission to the Fish and Boat Commission.

Section 90.166 Postdisposal Land Use

PADEP proposes to modify subsection (a) by changing the reference from ''Subchapter E (relating to coal exploration)'' to ''Subchapter F (relating to bonding and insurance requirements)''.

PADEP also proposes to modify subsection (b) by eliminating subsections (3) and (4) pertaining to land that has received improper management or was changed within 5 years of the beginning of mining.

PADEP also proposes to add new subsection (3) as follows: ''The proposed postmining land use is reasonably likely to be achieved which may be demonstrated by one or more of the following or other similar criteria'': Criteria currently identified in subsections (3), (4) and (5) are re-lettered as (i), (ii) and (iii) respectively under new subsection (3).

PADEP also proposes to eliminate subsection (6) pertaining to certification of plans for postdisposal land use by a registered professional engineer. Existing subsections (7), (8), and (9) are re-numbered as (4), (5) and (6), respectively.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Pennsylvania program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under **DATES** or at locations other than the Harrisburg Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** by close of business on January 3, 2000. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

If a public hearing is held, it will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and who wish to do so will be heard following those scheduled. The hearing will end after all persons who desire to comment have been heard. Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendments may request a meeting at the Harrisburg Field Office by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, notices of the meetings will be posted in advance at the locations listed above under **ADDRESSES**. A summary of meeting will be included in the Administrative Record.

IV. Procedural Determinations

Executive Order 12866

This proposed rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions in the analyses for the corresponding Federal regulations.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Tim L. Dieringer,

Acting Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 99–32740 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 100 and 165

[CGD07–99–087]

RIN 2115—AA97

OPSAIL 2000, Port of Miami, FL

AGENCY: Coast Guard, DOT.

ACTION: Advanced notice of proposed rulemaking; request for comments.

SUMMARY: The Coast Guard requests public comment on the temporary establishment of several exclusion areas for OPSAIL 2000 in the Port of Miami, Florida, from June 6 through June 10, 2000. The Coast Guard anticipates a rulemaking to establish temporary Limited Access Areas and/or Special Local Regulations to control vessel traffic within the Port of Miami on the last two days of the event, June 9 and 10, 2000. These temporary regulations will be necessary to ensure the safety of persons and property in the vicinity of a fireworks display scheduled for June 9, 2000, in the vicinity of the west turning basin, and in the movement of numerous large sail vessels (Tall Ships) during the parade of sail out of the Port of Miami scheduled for June 10, 2000.

DATES: Comments must be received on or before January 31, 2000.

ADDRESSES: Comments may be mailed to the Port Management and Response Department, Coast Guard Marine Safety Office Miami, 100 MacArthur Causeway, Miami Beach, Florida 33139, or delivered to the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The Port Management and Response Department of Marine Safety Office Miami maintains the public docket for this rulemaking. Documents indicated in this preamble as being available in

the docket, are part of docket [CGD07–99–087] and are available for inspection or copying at the Coast Guard Marine Safety Office Miami, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Joseph Boudrow, Port Management and Response Department, Coast Guard Marine Safety Office Miami, (305) 535–8705, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in the early stages of this rulemaking by submitting written data, views, or arguments. Please explain your reasons for each comment so that we can carefully weigh the consequences and impacts of any future requirements we may propose. Persons submitting comments should include their name and address, identify this rulemaking (CGD07–99–087) and the specific section of this document to which each comment applies. Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelop. The Coast Guard will consider all comments received during the comment period.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Port Management and Response Department at the address under **ADDRESSES**. The request should include the reasons why a hearing would be beneficial. If the Coast Guard determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

OPSAIL 2000 is sponsoring a fireworks display and parade of Tall Ships in the Port of Miami and on the waters of Government Cut, on June 9 and 10, 2000 respectively. The Coast Guard expects many spectator craft for this millennium event. The anticipated rulemaking will provide specific guidance on vessel movement controls, and limited access areas that will be in effect at various times in those waters during the period June 9 through 10, 2000. The Coast Guard may seek to establish additional regulated areas, anchorage grounds, and safety or security zones once confirmation of the exact number of Tall Ships and dignitaries that will be participating in OPSAIL 2000 is available.

Schedule of Events

Current planned marine related events include:

1. Starting June 6, 2000: Tall Ships arrive on individual schedules and moor at Dodge Island.
2. June 9, 2000: Fireworks display scheduled to take place in the west turning basin, which is bounded by the western end of Dodge Island, Watson Island, and Miami's Bicentennial Park.
3. June 10, 2000: Outbound Parade of Sail and departure of the participating Tall Ships through the Port of Miami.

Discussion

The Coast Guard anticipates large numbers of spectator craft and numerous commercial vessels (passenger vessels and charter boats) in the area during June 9 through 10, 2000, to view OPSAIL events. The safety of parade participants and spectators will require that these craft be kept at a safe distance from the parade route. The greatest traffic restrictions will be in place during the outbound Parade of Sail, which will begin the morning of June 10 and end that afternoon. The Parade of Sail restrictions will affect all vessels and will include a limited access area for the vessel parade to provide for maximum safety of the event. The sponsor will designate and appropriately mark the recommended spectator viewing areas. The only other anticipated restriction for marine traffic will be during the fireworks display on the evening of June 9, 2000.

Regulatory Evaluation

At this early stage in what is still just a potential rulemaking, the Coast Guard has not determined whether any future rulemaking may be considered a significant regulatory action under section 3(f) of Executive Order 12866 or the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979).

The Coast Guard expects the economic impact of any future rulemaking to be minimal. Although the Coast Guard anticipates prohibiting all non-parade traffic from Government Cut and Outer Bar Cut during the Outbound Parade of Sail on Saturday, June 10, 2000, the effect of any future rulemaking will be minimized because of the limited duration of the event and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners, facsimile, the Internet, marine information broadcasts, maritime association meetings, and Miami area newspapers. Mariners and commercial vessels can adjust their plans accordingly. The Coast Guard anticipates that the majority of the maritime industrial activity in the Port of Miami will continue, relatively unaffected by any future rulemaking.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), the Coast Guard must consider whether this potential rulemaking will have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard does not anticipate that its potential rulemaking will have anything but a minimal impact upon small entities, but expects that comments received on this advance notice will help it determine the number of potentially affected small entities and in weighing the impacts of the various regulatory alternatives for the purpose of drafting any rules.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we will assist small entities in understanding this advance notice and how it affects them. Small entities may call the person identified in **FOR FURTHER INFORMATION CONTACT**. The Coast Guard is particularly interested in how any future rulemaking will affect small entities. If you are a small entity and believe that you may be affected by such a rulemaking, please tell how, and what flexibility or compliance alternatives the Coast Guard should consider to minimize the burden on small entities while promoting port safety.

Collection of Information

The Coast Guard anticipates that any future rulemaking will not require any new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

The Coast Guard analyzed this advance notice under Executive Order 13132. From the information currently available, we cannot determine whether this potential rulemaking will have

significant federalism implications under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. The Coast Guard does not anticipate that any future rulemaking will result in an unfunded mandate.

Taking of Private Property

The Coast Guard anticipates that any potential rulemaking will not effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

The Coast Guard anticipates that any potential rulemaking will meet applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

The Coast Guard anticipates that any potential rulemaking will not be economically significant and will not present an environmental risk to health or risk to safety that may disproportionately affect children under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks.

Environment

The Coast Guard anticipates that any potential rulemaking will require an Environmental Assessment due to the advertised size of the event and its proximity to sensitive environmental areas. Further, any potential rulemaking will be designed to minimize the likelihood of maritime accidents and attendant environmental consequences and to enhance the safety of event participants, spectators and other maritime traffic. The Coast Guard invites comments addressing possible effects that any such rulemaking may have on the human environment, or addressing possible inconsistencies with any Federal, State, or local law or administrative determination relating to the environment. The Coast Guard will reach a final determination once it has received a detailed parade of sail plan and environmental analysis from the sponsor organization.

Dated: December 8, 1999.

L.J. Bowling,

Captain, U.S. Coast Guard, Captain of the Port, Miami Zone.

[FR Doc. 99–32784 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–15–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA074–4094b; FRL–6501–3]

Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Oxygenated Gasoline Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The revision makes the oxygenated gasoline program a contingency measure for the five-county Philadelphia area, which means that the oxygenated gasoline program would only be required to be implemented in the five-county Philadelphia area if there is a violation of the carbon monoxide (CO) national ambient air quality standard (NAAQS). The revision also makes technical amendments to the oxygenated gasoline regulation. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the **ADDRESSES** section of this document. If EPA receives no adverse comments, EPA will not take further action. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. 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.

DATES: Comments must be received in writing by January 18, 2000.

ADDRESSES: Written comments should be addressed to David L. Arnold, Chief, Ozone and Mobile Sources Branch, Mailcode 3AP21, US Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, US Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Pennsylvania Department of Environmental Resources Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Mrs. Kelly L. Bunker, (215) 814–2177, at the EPA Region III address above, or by e-mail at bunker.kelly@epa.gov.

SUPPLEMENTARY INFORMATION:

For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: November 18, 1999.

A.R. Morris,

Acting Regional Administrator, Region III.

[FR Doc. 99–32374 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 172–0205; FRL–6511–5]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is withdrawing its proposed approval of a revision to the California State Implementation Plan (SIP) and proposing to disapprove the revision. This revision concerns the federal recognition of variances from certain rule requirements. Based on comments received on its proposal to approve this revision, EPA now believes the revision does not meet applicable Clean Air Act requirements and is therefore proposing to disapprove the revision.

DATES: Comments on this proposed action must be received in writing on or before January 3, 2000.

ADDRESSES: Comments may be mailed to: Ginger Vagenas, Permits Office (AIR–3), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Copies of the rule and EPA's responses to comments received on its proposed approval of the rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule are also available for inspection at the following locations:

Environmental Protection Agency, Air Docket (6102), 401 ''M'' Street, S.W., Washington, D.C. 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 ''L'' Street, Sacramento, CA 95812.

South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765.

FOR FURTHER INFORMATION CONTACT: Ginger Vagenas, Permits Office (AIR–3), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1252.

SUPPLEMENTARY INFORMATION:

I. Applicability

The rule being proposed for disapproval is South Coast Air Quality Management District (SCAQMD) Rule 518.2—Federal Alternative Operating Conditions. Rule 518.2 was adopted on January 12, 1996 and was submitted to EPA by the California Air Resources Board (CARB) on May 10, 1996. This rule was found to be complete on July 19, 1996, pursuant to EPA's completeness criteria that are set forth in 40 CFR Part 51 Appendix V.[1]

II. Background

This document addresses EPA's proposed disapproval for SCAQMD Rule—Rule 518.2—Federal Alternative Operating Conditions. The rule would allow the SCAQMD to temporarily modify certain applicable requirements through the title V permitting process rather than through a SIP revision. These modifications are accomplished by establishing a mechanism for the creation of alternative operating conditions (AOCs), a means by which to offset any emissions in excess of the otherwise applicable requirements that would result, and provisions for EPA and public review and EPA veto of the proposed AOCs.

On September 25, 1998 (63 FR 51325) EPA proposed approval of Rule 518.2. At that time, EPA believed that the rule was consistent with the CAA, EPA regulations, and EPA policy. However, upon further review, EPA has reconsidered its position and now believes that certain demonstrations and rule revisions would be required for the rule to be proposed for approval. For additional background on EPA's original analysis, including a detailed discussion of the CAA requirements governing approval of Rule 518.2, please refer to the **Federal Register** notice cited above.

III. EPA Evaluation and Proposed Action

In determining the approvability of Rule 518.2, EPA must evaluate the rule for consistency with the requirements of the Clean Air Act (CAA) and EPA regulations, including those found in sections 110, 172, 173, 182, and 193 of the CAA and 40 CFR part 51 (Requirements for Preparation, Adoption and Submittal of Implementation Plans). EPA's interpretation of these requirements, which forms the basis for this action, appears in EPA policy guidance documents. In general, relevant and applicable guidance documents have been set forth to ensure that submitted rules meet Federal requirements, are fully enforceable, and strengthen or maintain the SIP.

A. Compliance with Section 110(l) of the Clean Air Act

EPA received comments that Rule 518.2 does not comply with section 110(l) of the Act and cannot be approved for this reason. These commenters oppose approval of Rule 518.2 because it will allow sources to violate the new source review lowest achievable emission rate (''LAER'') and offsets requirements of the Act as well as the requirements of Title V, and therefore does not comply with section 110(l).

LAER and Offset Requirements

Section 110(l) provides that the Administrator shall not approve a SIP revision ''if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of (the Act).'' LAER is a technology-based emission control requirement which is implemented through the nonattainment area new source review (''NSR'') permitting program mandated by sections 172(b)(5) and 173. LAER is defined in section 171(3), in pertinent part, as that rate of emission which reflects:

> (A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or
>
> (B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent * * *.

In general, we agree with the commenters that, because Rule 518.2 would permit a source to exceed a LAER emissions limit contained in its NSR permit, it would violate LAER requirements and would not comply with section 110(l).

However, because LAER is a technology-based standard, there is a limited subset of circumstances in which an AOC could apply to a LAER limit in compliance with the requirements of the Act. In *Marathon Oil* v. *EPA*, 564 F.2d 1253, 1272–73 (9th Cir. 1977), the Ninth Circuit held, in the context of a Clean Water Act case, that EPA must provide an upset defense for technology-based effluent limits to take into account the fact that even properly maintained technology can unexpectedly fail. Other cases adopted this reasoning, and they formed the basis for EPA's decision to include a malfunction provision in part 70. *See* 60 FR 45558–45561 and 40 CFR 70.6(g). This provision applies across the board, even to emission limits that derive from LAER. Accordingly, we believe that Rule 518.2 could be redrafted to allow an AOC for LAER-based limits only in the narrow instance where the source could demonstrate that an unavoidable malfunction caused the violation.

The commenters' second argument that Rule 518.2 does not comply with section 110(l) focuses on the offset requirements under section 173. As part of the NSR permitting requirements of section 173, new sources or modifications of existing sources located in nonattainment areas must obtain:

> sufficient offsetting emissions reductions * * * such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources * * * so as to represent * * * reasonable further progress. Section 173(a)(1)(A).

Further, section 173(c) requires that, ''a new or modified major stationary source may comply with any offset requirement in effect under this part for increased

[1] EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area.''

Section 182 of the CAA requires that offsets must be obtained in a ratio determined either by the severity of the air quality in the nonattainment area. The offset ratio required in the South Coast is 1.2 to 1. Thus, when a new or modified source applies for an NSR permit, it must obtain offsetting emissions in an amount greater than the emissions it will add to the air. Therefore, not only are the new emissions not reflected in the attainment demonstration, but they should result in a decrease in the inventory due to the offset ratio. While the offset requirement is an entirely independent one, the offset ratio is the link to the reasonable further progress requirement—allowing growth to occur at the same time that air quality improves.

Based upon the above, if a source that was initially required under section 173 to offset its emissions applies for an AOC, that source must be required to offset the excess emissions in the same manner or it will violate section 173(c). Because Rule 518.2 does not require such offsets, we agree that it would violate section 173. Therefore, the current version of Rule 518.2 cannot be approved because it would not comply with section 110(l).

We believe that the District could address this approvability issue by ensuring that sufficient offsets are set aside to cover any excess emissions associated with an AOC granted to sources subject to NSR.

Title V

Finally, the commenters believe that 110(l) prohibits EPA from approving Rule 518.2 because the rule violates title V of the Act. The commenters make two arguments in this regard. First, they argue that section 502(a) prohibits sources from violating terms of their title V permits and that the AOCs contemplated by Rule 518.2 would allow sources to do so. We disagree with the commenters on this point. We believe that the combination of an approvable version of Rule 518.2 and the process for approving AOCs under the title V program provides a means by which an applicable requirement and the title V permit may be temporarily modified and thus does not violate or circumvent the requirements of section 502(a). This approach may, however, conflict with the provisions of 40 CFR 70.6(a)(1)(iii), which provides for the creation of alternatives to SIP emission limits via the title V permit revision process. This section appears to limit the opportunities for such flexibility to situations in which the applicable implementation plan allows for it and in which the alternative limit is equivalent to that contained in the plan. EPA solicits comment on this issue. See also ''White Paper Number 2 for Improved Implementation of the part 70 Operating Permits Program, Attachment B,'' March 5, 1996.

Second, the commenters argue that because section 502(a) provides EPA with discretion to exempt certain nonmajor sources from the title V program entirely, but prohibits EPA from doing so for major sources, EPA is prohibited from approving the AOC process for major sources. However, Rule 518.2 does not in any way exempt major sources from the title V program. Rather, it provides a process for temporarily revising an applicable requirement and the related title V permit conditions. The source remains subject to title V and must comply with the conditions of the AOC and all remaining conditions of the Title V permit.

B. Compliance With Section 193 of the Act

In its 1998 FR document proposing to approve Rule 518.2, EPA solicited comment on whether allowing relaxations to pre-1990 rules [2] would violate the requirements of section 193 of the CAA, which prohibits the modification of any control requirement in effect before November 15, 1990 in an area which is a nonattainment area for any air pollutant, unless the modification ensures equivalent or greater emission reductions of such air pollutants. EPA noted that offsetting excess emissions from variances with the Rule 518.2 bank does not ensure equivalent emission reductions because the bank is ''funded'' with excess emissions included in the inventory rather than from real reductions.

Under the *de minimis* rule established by the D.C. Circuit in Alabama Power, unless Congress has been extraordinarily rigid, EPA may provide exemptions when the burdens of regulations yield a gain of trivial or no value. In its 518.2 proposal EPA noted that the language of section 193 and the legislative history associated with section 193 appear to be quite rigid and expressed concern that application of the *de minimis* exemption under Alabama Power might not be appropriate. EPA has considered the comments submitted and has concluded that the *de minimis* rule does not apply in this situation.

Does the *de minimis* Rule Apply to Section 193?

One commenter wrote that section 193 is clear on its face and that no backsliding from pre-1990 requirements is allowable. The commenter noted that the language in section 193 is very straightforward and rigid, and that any attempt to discount variances from pre-1990 requirements as *''de minimis''* is contrary to the Act and to case law interpreting it. The commenter concluded that Rule 518.2 does not comply with section 193.

After further consideration of this issue, EPA believes that the language of 193 is in fact ''extraordinarily rigid'' in its requirement to provide equivalent or greater emission reductions to offset relaxations to pre-1990 rules. The *de minimis* rationale for approving relaxations to pre-1990 rules is therefore unavailable.

Two commenters wrote in support of interpreting section 193 as not being ''extraordinarily rigid'' and therefore allowing a *de minimis* exemption to pre-1990 requirements. One of these commenters went on to state that section 193 is an ambiguous statute and that EPA could easily support an interpretation that allows a *de minimis* exemption from the emissions at issue under rule 518.2.

EPA believes that section 193 unambiguously requires any relaxations to control requirements or plans in effect prior to enactment of the CAA amendments of 1990 to be offset by equivalent or greater emission reductions. The clarity of the statutory language supported by the legislative history [3] evidences intent by Congress that relaxations to pre-1990 requirements should occur only where compensating strengthenings will result in no increase in emissions.

Does Rule 518.2 Relax pre-1990 Standards?

In the **Federal Register** document proposing approval of Rule 518.2, EPA

[2] By ''pre-1990 rules'' we mean rules in effect before November 15, 1990, the date of the enactment of the Clean Air Act Amendments of 1990.

[3] The Report on the House Energy and Commerce Committee on the 1990 Clean Air Act Amendments noted that the ''anti-backsliding'' language in section 193 ''prohibits the relaxation of control requirements currently in effect or required to be adopted. * * * Although many nonattainment areas are allotted additional years before they must attain ambient air quality standards under these amendments, all areas must continue to use pollution control measures already put in place, as well as those additional measures required under this Act, in order to assure attainment as expeditiously as practical.''

stated that it believes ''inclusion of pre-1990 rules in Rule 518.2 is justified because the variance bank is so small that any excused emissions would essentially be insignificant such that, in effect, no relaxation has occurred.'' Four commenters concurred with that statement, but others asserted that the statement was tantamount to saying those emissions increases are *de minimis.* EPA has reconsidered this issue and has concluded that it is not possible to draw a meaningful distinction between *de minimis* and insignificant in the context of this rule. EPA disagrees with the premise that Rule 518.2 will not relax rules. Alternative operating conditions issued under 518.2 do in fact modify the underlying requirement. The issuance of a variance, or in the case of 518.2, an AOC, temporarily allows a source to operate under a different set of requirements. For that particular source, the control requirement has been modified, regardless of the size of the emissions change allowed by the AOC.

Does the Emissions Bank in 518.2 Prevent Backsliding?

Three commenters argued that the inclusion of an excess emissions credit bank would ensure that any temporary emissions increases allowed under 518.2 would be offset, and that therefore, the anti-backsliding provisions of section 193 would not be violated. Because of the nature of the bank, EPA must disagree with this comment. Offsetting excess emissions from variances with the Rule 518.2 bank does not ensure equivalent emission reductions because that bank is ''funded'' with excess emissions included in the inventory rather than from real reductions.

Does 518.2 Modify or Relax Underlying Requirements?

Two commenters stated that Rule 518.2 would not delete any control measures that were already in place or scheduled to be put in place at the time of the 1990 CAA amendments. They argued that although Rule 518.2 provides federal recognition of temporary AOCs, the underlying control measures would stay in place and no modification or relaxation of those measures would occur.

EPA notes that the deletion of control measures is not at issue here: section 193 addresses the relaxation of pre-1990 control measures. The premise of Rule 518.2 is that it temporarily modifies a requirement with which a source is out of compliance by creating an alternative, less stringent set of conditions with which the source will comply. This will result in an increase of emissions beyond those allowed under the applicable requirement. Further, for the duration of the AOC, the underlying requirement is not enforceable against the source. This amounts to a relaxation.

Can EPA Provide *de minimis* Exemptions to pre-1990 Control Requirements?

Two commenters said that the EPA had authority before and after November 15, 1990 to recognize *de minimis* exceptions to pre-1990 requirements and that this authority was and is an integral part of each control requirement in effect on November 15, 1990. EPA disagrees with the premise that its authority to provide *de minimis* exemptions was or is an integral part of state or district adopted control requirements. Under Alabama Power, EPA may, under certain circumstances, approve control requirements that provide *de minimis* exemptions. EPA does not, however, agree that noncompliance with adopted control requirements can be overlooked because the violation resulted in relatively low excess emissions.

Can EPA Approve Variances From Control Requirements on a Case-by-Case-Basis?

Two commenters noted that EPA could approve a variance from a control requirement as a SIP revision on a case-by-case basis before 1990, and still can. One of those commenters also said that CAA section 193 does not prevent the recognition by EPA of variances from pre-1990 requirements.

EPA believes that if the appropriate procedural and substantive requirements [4] are met, including a demonstration that relaxations to pre-1990 rules will be offset by equivalent or greater emissions reductions, it can approve such variances. As discussed in this notice, Rule 518.2 does not fully meet these requirements. EPA is therefore proposing to disapprove it.

Are Variances an Integral Part of the Pre-1990 Rules?

Several commenters noted that SCAQMD's variance rules were in the SIP in 1990. Two of those commenters said that variances were an integral part of the pre-1990 SIP rules relating to the SCAQMD.

EPA acknowledges that variance rules were approved into the SIP in error. EPA has corrected this error by removing them. The fact that these rules were in the SIP is irrelevant and would not be recognized under section 193. Under *Train,* a variance would have to be submitted to EPA as an individual SIP revision to be effective. *See Train* v. *NRDC,* 421 U.S. 60 (1975).

Does the Anti-Backsliding Language of Section 193 Apply to Short-Term Variances?

EPA received comment from one party that the ''anti-backsliding'' language of section 193 was not intended to prevent short-term, carefully controlled issuance of alternative operating requirement, such as those contemplated by rule 518.2.

EPA believes the language of section 193 is very clear and that it does not allow for relaxations to pre-1990 rules without equivalent or greater emission reductions. There is no evidence that Congress intended to exempt alternative operating conditions from this statutory provision. Any AOCs that would relax pre-1990 rules are subject to section 193.

Would the Failure To Allow a *de minimis* Exemption Be Contrary to the Primary Legislative Goal of Section 193?

One commenter stated that the literal meaning of section 193 need not be followed where failure to allow a *de minimis* exemption is contrary to the primary legislative goal. The commenter said that the purpose of section 193 is to prevent backsliding in a manner that will interfere with attainment or rate of progress in reducing emissions and that the carefully circumscribed provisions of rule 518.2 will not have any negative air quality impact.

EPA does not believe that the literal meaning of section 193 is contrary to its primary legislative goal. The purpose of section 193 is to prevent backsliding and it sets out the means to do so: By requiring relaxations to pre-1990 control measures to be offset by equivalent or greater emission reductions.

Has EPA Previously Approved *de minimis* Exemptions of Much Greater Impact?

EPA received one comment that case law and U.S. EPA policy indicate that the magnitude of excess emission previously excused by the *de minimis* exemption is much greater than the variance emissions allowed under Rule 518.2. This commenter went on to say that U.S. EPA itself has utilized the *de minimis* exemption to allow ''nonmajor'' sources to avoid substantial CAA requirements such as conformity and new source review requirements.

[4] For a complete discussion of the procedural and substantive requirements that apply to EPA approval of relaxations to the SIP, see EPA's proposed approval of Rule 518.2. (63 FR 51325, September 25, 1998).

As noted previously, because section 193 is rigid, the *de minimis* rule under Alabama Power cannot be applied to this situation; therefore, other cases where EPA has applied the *de minimis* rule are not relevant.

Do the Reductions Required Under Section 193 Need To Come From Sources Regulated by the Same Rule From Which the AOC Is Being Sought?

EPA received comment from one party regarding the source of emission reductions used to offset any increases allowed under Rule 518.2. This commenter noted that, while some of the emission reductions will likely come from different sources than would occur (sic) under the rules under which the alternative operating condition is sought, this is also true of market trading programs. The commenter said that EPA has already approved market trading programs, such as RECLAIM, without insisting that emissions at each facility remain below levels authorized in 1990 and urged EPA to interpret section 193 similarly in this case.

EPA finds this comment unclear. We have interpreted the comment to address the requirement under section 193 that any modification that would relax a pre-1990 control requirement, settlement agreement, or plan must provide for equivalent emission reductions. Specifically, it appears that the commenter is arguing that the offsetting reductions need not come from a strengthening of the same control requirement that the AOC will modify. The comment also seems to imply that the emission bank established in Rule 518.2 is funded with real reductions, however, this is not the case.

EPA believes that the correct interpretation of section 193 is that, overall, the SIP must be strengthened so that increased emissions that result from any relaxations to pre-1990 requirements will be offset by decreases from modifications to other parts of the SIP. Because the statute prohibits modifications to pre-1990 requirements unless the modification ensures equivalent emissions reductions, the compensating reductions must be contemporaneous with the relaxation. If the district still wants rules enacted prior to 1990 to be a part of this program, we believe that the rule could be amended to cure this problem by funding the emissions bank with real emission reductions. EPA solicits comment on this proposal.

C. Criteria for Granting AOCs

EPA received comments opposing approval of the California Health and Safety Code standards for granting variances as the basis for approving AOCs under Rule 518.2. These standards, which are incorporated into Rule 518.2(e)(2), are as follows:

- The petitioner is or will be in violation of any applicable requirement(s) listed in paragraph (c)(1) of this rule;
- Due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either (1) an arbitrary or unreasonable taking of property or (2) the practical closing and elimination of a lawful business. In making those findings pursuant to paragraph (4) where the petitioner is a public agency, the Hearing Board shall consider whether or not requiring immediate compliance would impose an unreasonable burden upon an essential public service. For purposes of this subparagraph, ''essential public service'' means a prison, detention facility, police or fire-fighting facility, school, health care facility, landfill gas control or processing facility, sewage treatment works, or water delivery operation, if owned and operated by a public agency;
- The closing or taking would be without a corresponding benefit in reducing air contaminants;
- The petitioner for the Alternative Operating Condition has given consideration to curtailing operations of the source in lieu of obtaining an Alternative Operating Condition;
- During the period the Alternative Operating Condition is in effect, the petitioner will reduce excess emissions to the maximum extent feasible;
- During the period the Alternative Operating Condition is in effect, the petitioner will monitor or otherwise quantify emission levels from the source, and report these emission levels to the District pursuant to a schedule established by the District;
- The Alternative Operating Condition will not result in noncompliance with the requirements of any NSPS, NESHAP;
- Or other standard promulgated by the U.S. EPA under sections 111 or 112 of the Clean Air Act, or any standard or requirement promulgated by the U.S. EPA under Titles IV or VI of the Clean Air Act, or any requirement contained in a permit issued by the U.S. EPA, or other requirement contained in paragraph (c)(2); and
- Any emissions (calculated pursuant to subparagraph (h)(3)(B) of this rule) resulting from the Alternative Operating Condition will not, in conjunction with emissions (calculated pursuant to subparagraph (h)(3)(B)) resulting from all other Alternative Operating Conditions established by the Hearing Board and in effect at the time, cause an exceedance of the monthly or annual SIP Allowance established pursuant to subdivision (i) of this rule.

The commenters argue that these criteria are too vague, grant unfettered discretion to the district hearing board, and inappropriately focus on economic considerations. In addition, they argue, in practice these standards have failed to protect public health and to limit emissions growth.

We believe that these comments are well-taken. Section 110(a)(1) of the Act requires SIPs to provide for attainment and maintenance of the national ambient air quality standards (NAAQS). Because the NAAQS are health and welfare-based standards, Congress intended that they must be met continuously, not just intermittently. Accordingly, section 110(a)(2) of the Act requires SIPs to contain enforceable emission limitations, and section 302(k) of the Act defines ''emission limitations'' as a requirement ''which limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous basis*'' (emphasis added).

EPA explained its interpretation of the term ''continuous compliance'' in a June 21, 1982 memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, to the Regional Air Division Directors. That guidance states that ''continuous compliance is essentially the avoidance of preventable excess emissions over time as a result of the proper design, operation, and maintenance of an air pollution source.'' The guidance also emphasizes that excess emissions resulting from malfunctions or other emergency situations must be minimized and terminated quickly.

On September 28, 1982, February 15, 1983, and September 20, 1999, EPA issued policy statements regarding the treatment of excess emissions arising during startup, shutdown, and malfunction. These memoranda are based on EPA's interpretation of the Act's requirements for continuous compliance and attainment and maintenance of the NAAQS.[5] These

[5] See September 28, 1982 and February 15, 1983 memorandums, both entitled ''Policy on Excess Emissions During Startup, Shutdown, and Malfunctions,'' from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, to the Regional Administrators and September 20, 1999 memorandum entitled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' from Steven A. Herman, Assistant Administrator for Enforcement and Compliance and Robert Perciasepe, Assistant Administrator for Air and Radiation, to the Regional Administrators.

policies indicate that all excess emissions must be considered violations, although they clarify that SIPs may contain affirmative defenses that may excuse, under certain limited, unavoidable circumstances, the payment of civil penalties.

These policy statements are consistent with EPA's view that SIP limits must be met continuously because they are intended to protect the NAAQS; any exceptions should be narrowly drawn and clearly place the burden on the source to demonstrate that an exceedance was unavoidable. In responding to petitioner's comments, we have reevaluated the AOC criteria and have concluded that they are inconsistent with the requirements for SIPs in section 110 of the Act regarding enforceability and continuous compliance. For this reason, we agree that the criteria for granting AOCs in section 518.2(e)(2) must be revised before the rule can be approved.

Currently, the criteria in section 518.2(e)(2) provide that if, for reasons beyond the control of the petitioner, it would cause ''an arbitrary or unreasonable taking of property'' for the source to come into compliance, then the source should be able to obtain a variance. The criteria do not focus on the cause of the noncompliance. The lack of focus on the cause of noncompliance is a critical flaw because, given the words of the criteria, a variance can be granted even if the petitioner could have avoided the noncompliance in the first place.

This lack of focus in the criteria on the cause of the violation is problematic because variances are, by their very nature, allowed periods of noncompliance, or in other words, exceptions to the continuous compliance requirement imposed by the statute on emission limitations. EPA has recognized that it is appropriate to interpret this requirement to allow sources not to be penalized when periods of noncompliance are caused by unavoidable circumstances, but beyond that, exceptions to the continuous compliance requirement are not allowed. Therefore, in order for Rule 518.2 to comport with the continuous compliance requirement, it must ensure that AOC's are only granted when the underlying cause of the violation is unavoidable. EPA's September 20, 1999 policy on excess emissions provides helpful guidance on the precise provisions that should be added to Rule 518.2 to make it approvable.

The changes suggested above will correct what EPA sees as a flaw in the South Coast's variance program. Under the variance program, the District can excuse a violation based on the adverse consequences that a source might suffer it had to come into compliance. Given the statute's mandate that emission limitations provide for continuous compliance, EPA addresses this issue of economic inability to comply in other ways.

EPA has stated many times in several of its enforcement policy documents that it believes in enforcement responses that are commensurate with the seriousness of violations. In short, punishment should fit the crime. Minor violations might be addressed with a Notice of Violation, while more serious violations might be subject to civil or even criminal enforcement. Second, the focus of EPA's enforcement policies over the years has been returning sources to compliance as expeditiously as practicable, not shutting down companies.[6]

At the same time, EPA does not let companies in violation of environmental laws completely off the hook just because immediate compliance might cause a financial hardship. Rather, when EPA has taken action against financially troubled companies, it has required them to come into compliance in accordance with a set schedule laid out in a consent decree and required them to pay a penalty they can afford, if appropriate.

D. Compliance and Enforcement

EPA received comments expressing concerns that Rule 518.2 would have adverse effects on enforcement, both by government entities and citizens, and that the rule might act as a disincentive to voluntary compliance. We believe these concerns would be addressed by the changes necessary for approval outlined elsewhere in this document.

E. Title III

One commenter pointed out that, on its face, Rule 518.2(c)(2) does not prohibit the issuance of AOCs from title III requirements in situations where EPA has deemed a state or local rule to be equivalent to the federal requirements. While we believe that the intent of the rule is to include these requirements in the list of exemptions from applicability, we agree that the language is unclear and must be revised.

[6] *See* Price, Courtney M., Assistant Administrator for Enforcement and Compliance Monitoring, Memorandum (Subject: Clean Air Act Enforcement Policy Respecting Sources Complying By Shutdown) Nov. 27, 1985) (''EPA has consistently interpreted the Act as requiring compliance as expeditiously as practicable.'').

F. Environmental Justice

One commenter opposes approval of Rule 518.2 on the basis that it would violate Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.'' The commenter argues that communities of color and low income communities in the South Coast are disproportionately impacted by existing sources of air pollution, and by allowing existing sources to emit air pollutants in excess of their permitted levels, Rule 518.2 will have disproportionate impacts on these communities.

In the context of a workgroup drafting a version of Rule 518.2 to apply statewide, CARB has suggested addressing this issue by incorporating language based California Health and Safety Code section 41700. This language would provide that no AOC shall be granted if:

> operation under the AOC will result in the source discharging such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health, or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to business or property.

We believe that this language, incorporated into Rule 518.2, would address the commenter's concerns.

In conclusion, rules submitted to EPA for approval as revisions to the SIP must conform with the CAA and EPA policy in order to be approved by EPA. As described above, SCAQMD Rule 518.2 is deficient because it is inconsistent with sections 110(a)(2), 110(l), 302(k), and 193 of the CAA. Because of the identified deficiencies, EPA cannot grant approval of SCAQMD Rule 518.2 under section 110(k)(3) and part D. Therefore, in order to maintain the SIP, EPA is proposing a disapproval of this rule.

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

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory

action from Executive Order 12866, Regulatory Planning and Review.

B. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, Federalism and 12875, Enhancing the Intergovernmental Partnership. Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it does not affect state enforceability, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to Executive Order 13045 because it is does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 governmental jurisdictions. This proposed rule will not have a significant impact on a substantial number of small entities because EPA's disapproval of the state request under section 110 and subchapter I, part D of the Clean Air Act does not affect any existing requirements applicable to small entities. Any pre-existing federal requirements remain in place after this disapproval. Federal disapproval of the state submittal does not affect state-enforceability. Moreover, EPA's disapproval of the submittal does not impose any new Federal requirements. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions 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).

F. 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 annual 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 disapproval action being proposed does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This proposed disapproval would not change existing requirements under State or local law, and would include no Federal mandate. If EPA were to disapprove the State SIP submittal, pre-existing requirements would remain in place and State enforceability of the submittal would be unaffected. The action would impose no new 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, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: December 10, 1999.

David P. Howekamp,

Acting Regional Administrator, Region IX.

[FR Doc. 99–32762 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. NJ41–206, FRL–6509–5]

Approval and Promulgation of Implementation Plans; New Jersey; Motor Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to find that the State of New Jersey will have implemented the enhanced inspection and maintenance (I/M) program when mandatory testing begins on December 13, 1999 and to reinstate the interim approval granted under section 348 of the National Highway Systems Designation Act (NHSDA). Due to New Jersey's delays in starting the enhanced I/M program, EPA notified New Jersey by a December 12, 1997 letter that the sanctions clock was started for failure to implement the enhanced I/M program. The offset sanction began in New Jersey on June 14, 1999. The highway sanction would begin six months thereafter if New Jersey did not implement the program. This action is proposing to reinstate the interim approval and to stop the sanctions clock and lift any sanctions applied in New Jersey.

DATES: Comments must be received on or before January 18, 2000, and will be considered before taking final action.

ADDRESSES: All comments should be addressed to Raymond Werner, Acting Branch Chief, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations: Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866 and New Jersey Department of Environmental Protection, Bureau of Air Quality Planning, 401 East State Street, CN418, Trenton, New Jersey 08625.

FOR FURTHER INFORMATION CONTACT: Judy-Ann Mitchell, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4249.

SUPPLEMENTARY INFORMATION:

I. Background

New Jersey submitted changes to the existing I/M program on March 27, 1996 to satisfy the applicable requirements of both the Clean Air Act (CAA) and the National Highway System Designation Act (NHSDA). On October 31, 1996 (61 FR 56172), EPA published a notice of proposed conditional interim approval of New Jersey's enhanced I/M program. On May 14, 1997 (62 FR 26401), EPA published a final conditional interim approval of New Jersey's enhanced I/M program which began the 18-month interim period under section 348 of the NHSDA.

Due to New Jersey's delays in starting the enhanced I/M program, EPA notified New Jersey by a December 12, 1997 letter that the sanctions clock was started for failure to implement the enhanced I/M program, in accordance with section 179(a)(4) of the Act. The offset sanction began in New Jersey on June 14, 1999. The highway sanction would begin six months thereafter.

Additionally, on November 4, 1998, EPA informed New Jersey that the December 12, 1997 letter tolled the interim approval period for the State. Since approximately six months of the interim period had passed, the State will have the remaining 12 months of the interim approval period to demonstrate their I/M program's effectiveness.

II. Proposed Action

EPA is proposing to find that the State of New Jersey implemented the enhanced I/M program when mandatory testing begins on December 13, 1999 and to reinstate the interim approval granted under section 348 of the NHSDA. Elsewhere in this **Federal Register**, EPA is announcing an interim final determination that the sanctions have been stayed and deferred because the State will have more likely than not started up the approved I/M program. Implementing the program on a mandatory basis cures the deficiency cited in the December 12, 1997 letter. EPA is now proposing to find that the deficiency was corrected and proposing to make a finding that the State is implementing the I/M SIP and EPA is reinstating the interim approval granted under section 348 of the NHSDA. This will result in stopping the sanctions that were announced on December 12, 1997.

On November 19, 1999, New Jersey notified EPA by letter that the mandatory enhanced I/M program will be implemented on December 13, 1999. EPA has been working closely with the State during the phase-in period of the enhanced I/M program and agrees that the State will have the program implemented on December 13, 1999. If comments are received which cause EPA to conclude that the enhanced I/M program has not been implemented, EPA will not proceed with the final rulemaking and will withdraw the interim final rule finding that the state has more likely than not implemented the program. In such event, the sanctions will be immediately reinstated via a letter and a **Federal Register** notice.

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism

implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation. This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation.

In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 governmental jurisdictions.

This proposed rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions 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).

F. 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 annual 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 proposed does not include a Federal mandate that may result in estimated annual 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.

G. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Ozone, Volatile organic compounds.

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

Dated: December 7, 1999.

Jeanne M. Fox,

Regional Administrator, Region 2.

[FR Doc. 99–32516 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[AZ 072–0085; FRL–6511–2]

Approval and Promulgation of Maintenance Plan and Designation of Area For Air Quality Planning Purposes for Carbon Monoxide; State of Arizona

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is reproposing to redesignate the Tucson Air Planning Area (TAPA) to attainment for the carbon monoxide (CO) National Ambient Air Quality Standard (NAAQS) and to approve a maintenance plan that will insure that the area remains in attainment.

EPA originally proposed to redesignate the TAPA to attainment for CO on July 22, 1998 (see 63 FR 39258) and is reproposing to provide the public with an opportunity to comment on additional information submitted by the Pima Association of Governments (PAG) in support of the redesignation and on several other new issues that were raised subsequent to publication of the original proposal.

DATES: Written comments on this proposal must be postmarked on or before January 18, 2000.

ADDRESSES: Send comments to Eleanor Kaplan, Air Planning Office, (Air–2), United States Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

The technical support document and copies of other documents relevant to this action can be found in the docket for this proposal. The docket can be reviewed or copied during normal business hours at the following locations between 8 a.m. and 4:30 p.m. on weekdays. You may need to pay a fee for copying. US Environmental Protection Agency, Region 9, Air Division, Air Planning Office, (AIR–2), 75 Hawthorne Street, San Francisco, California 94105–3901, (415) 744–1159, Pima County Department of Environmental Quality, 130 West Congress, Tucson, Arizona 85701, (520) 740–3340.

Electronic Availability: This document is also available as an electronic file on EPA's Region 9 Web Page at http://www.epa.gov/region09/air.

FOR FURTHER INFORMATION CONTACT: Eleanor Kaplan, Air Planning Office (AIR–2), Air Division, US Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901, (415) 744–1159, email: kaplan.eleanor@epa.gov

SUPPLEMENTARY INFORMATION:

I. Background

On October 6, 1997 Arizona submitted a request to redesignate the CO Tucson Air Planning Area (TAPA) nonattainment area to attainment for the NAAQS and for approval of a maintenance plan. EPA proposed approval of the request and maintenance plan on July 22, 1998 (see 63 FR 39258) and provided for a 30-day public comment period.

In its original proposal, EPA found that the TAPA met all the redesignation requirements specified in section 107(d)(3)(E) of the Clean Air Act (CAA), namely

- The area must have attained the applicable NAAQS,
- The area had met all relevant requirements under section 110 and part D of the Act,
- The air quality improvement was due to permanent and enforceable emission reductions, and
- The area had a fully approved maintenance plan pursuant to section 175A of the Act.

With regard to the requirement for a fully approved maintenance plan, since the TAPA had elected to take advantage of the Limited Maintenance Plan (LMP) option provided for in EPA guidance,[1] EPA reviewed the TAPA LMP and found that the TAPA was eligible to use that option and that the plan met the requirements specified in the EPA LMP guidance. For a full discussion of EPA's evaluation of the TAPA redesignation request and the maintenance plan, the reader is referred to the original EPA proposal and to the Technical Support Document (TSD) accompanying that proposal notice which may be found in the docket.

EPA received one set of comments during the 30-day comment period provided under the original proposal. Those comments came from the Arizona Center for Law in the Public Interest (ACLPI) in a letter dated August 21, 1998. EPA considered all of the comments from ACLPI and, when it takes final action, will reply in detail to each of them and to any public comments that may be received in response to the additional issues contained in this reproposal.

However, EPA believed that additional information was required to respond to one of ACLPI's comments which questioned the eligibility of the TAPA for the LMP option. The LMP option rests on the assumption that areas qualifying for the option will not experience so much growth in the maintenance period that a violation of the CO NAAQs would result. ACLPI questioned whether the projected growth in the TAPA rendered it ineligible to use the LMP option. EPA therefore requested additional information from the PAG relating to CO emissions projections for the area for a 10-year maintenance period extending through 2010. EPA received that information in a letter from PAG dated June 18, 1999. The supplementary information contained in that letter is being presented for public comment in section II of today's document along with additional issues that have arisen since the original proposal.

PAG provided growth projections for CO mobile source emissions, population, and Vehicle Miles Traveled (VMT). EPA considered the growth and CO emissions projections provided by the PAG and the summary of the area's design values over the past few years and believes that the data, in conjunction with the pre-violation action triggers and the contingency measures provided for in the TAPA maintenance plan, provide reasonable assurance that the area will not violate the NAAQS during the maintenance period. EPA is therefore reproposing the redesignation of the TAPA to attainment for the CO NAAQS and for approval of the maintenance plan on the grounds that the area meets the requirements for redesignation specified under the Clean Air Act and that it is qualified to utilize the LMP option.

II. New Issues For Public Comment

The issues described below are being presented for public comment in this reproposal. EPA is not re-opening the comment period for any other issues relating to the TAPA redesignation request.

A. Additional Information Received From PAG

A summary of the additional information provided by PAG is contained in Tables I and II below. The full text of the PAG letter is contained in the TSD accompanying this document.

[1] Memorandum entitled ''Limited Maintenance Plan Option for Nonclassifiable CO Nonattainment Areas,'' from Joseph W. Paisie, Group Leader, Integrated Policy and Strategies Group, Office of Air Quality Planning and Standards, US EPA, Research Triangle Park, North Carolina, October 6, 1995.

TABLE 1.—PAG PROJECTIONS FOR CO MOBILE EMISSIONS AND VMT

Year (population)	CO mobile emissions (tpd) tons per day	VMT	Population
1990	444.8	15,491,995	666,880
1995	.....	17,915,850	766,172
1999 (2000)	325.8	20,243,419	854,329
2003 (2005)	325.1	22,873,378	943,795
2010	367.2	27,286,950	1,031,623
2020	428.7	32,760,981	1,206,244

TABLE 2.—AMBIENT AIR CONCENTRATIONS—1990–1998

Year	Ambient Air Concentration [2]
1990	6.5
1991	5.7
1992	5.8
1993	6.0
1994	5.5
1995	5.9
1996	5.1
1997	4.4
1998	4.0

[2] As described in 40 CFR 50.8, the national primary ambient air quality standard for carbon monoxide is 9 parts per million (10 milligrams per cubic meter) for an 8-hour average concentration not to be exceeded more than once per year.

The information in Table 1 indicates that despite projected increases in population and VMT for the years 1990 through 2010, CO emissions drop from 444.8 tons per day in 1990 to 367.2 in 2010 rising again to a projected 428.7 tons per day in 2020, but still below the 1990 figure. PAG also provided information, shown in Table 2, on ambient air CO concentrations for the years 1990 through 1998. The figure for ambient air CO concentrations, or design value, is the highest of the second highest eight-hour concentrations observed at any site in the area and is the value on which the determination of attainment or nonattainment is based. The data here indicates that the design value for the TAPA for 1993–1995 was 6.0 or 67% of the NAAQS standard for CO. The design value for the years 1996 through 1998 dropped to 5.1 or 57% of the NAAQS standard.

EPA attributes the downward trend of ambient CO levels in the TAPA in spite of the growth in VMT and population to several factors. Current control measures are having a positive effect that exceeds the negative effects of growth. Those control measures include the Federal Motor Vehicle Control program, the State's winter oxyfuels program and the State Vehicle Emissions inspection (VEIP) program. The downward trend of CO mobile source emissions despite growth in VMT and population that has been experienced in the TAPA is consistent with what EPA has been observing in other areas of the country. For example, the Colorado Springs, Colorado area, a moderate CO nonattainment area that was redesignated to attainment for CO in August 1999 (64 FR 46279), provided data showing a decrease in CO emissions from 264.20 tons per day in 1993 to a projected 173.22 tons per day in 2010, despite a projected increase in population in the same period from 434,324 to 481,013 and a projected increase in VMT from 8,813,543 to 13,076,951. Looking ahead, other factors that are likely to contribute to the downward trend of CO mobile source emissions in the future include the National Low Emitting Vehicle (LEV) program and the Tier 2 emissions standards for new cars.

EPA believes that the following comprise additional safeguards against the possibility of a violation of the CO NAAQS in the TAPA during the maintenance period:

- The pre-violation action triggers contained in the TAPA LMP which set in motion a process designed to forestall a future violation of the CO NAAQS.
- The design values for the TAPA listed in Table II which were at 57% of the CO NAAQS standard for the years 1996–1998, provide an ample margin of safety and time to take action in the event of a possible violation of the CO NAAQS in the future.

In summary, based on the information contained in the TAPA redesignation request and LMP and the additional information provided by PAG, EPA finds that the TAPA qualifies for the LMP option and meets the assumptions of that option: (1) that an area beginning the maintenance period at or below 85% of exceedance levels will continue to meet the standard for another ten years and (2) that it is unreasonable to expect that an area qualifying for the LMP option will experience so much growth in the maintenance period that a violation of the CO NAAQS would result.

B. Proposed Approval of SIP Revisions Submitted After Publication of the Original Proposal

Table III below provides a summary of the Arizona statutes that were amended after the publication of the original redesignation proposal.

TABLE 3

SIP revision date	Arizona statutes involved	Provisions
August 11, 1998	A.R.S. 49–401 and 49–406	Revised these statutes to expand the authority of the State and local certified metropolitan planning organizations to develop plans and to implement and enforce control measures for maintenance areas.
September 1, 1999	A.R.S. 41–796.01 41–2121, 49–401.01, 49–402, 49–404.	Clarifies the applicability of control measures to Area B (Tucson Air Planning Area) following EPA approval of the TAPA as a maintenance area.
September 1, 1999	A.R.S. 41–3009.01, 49–541.01, 49–542, 49–545, 49–557, 49–573, 41–803, 401.01.	Continues the State's vehicle emissions inspection program through December 31, 2008.

In the original redesignation proposal published July 22, 1998, EPA proposed to approve Arizona's request for redesignation to attainment for the TAPA if, prior to the final action, ADEQ submitted a SIP revision amending Arizona statutes 49–401 and 49.406. EPA believed these amendments were necessary in order to expand the authority of State and local certified metropolitan planning organizations to develop plans and to implement and enforce control measures in attainment as well as nonattainment areas. Prior to the amendments, the statutes referred only to nonattainment areas. Amendments to A.R.S. 49–401 and 49–406 were signed into law on June 2, 1998 and were received as SIP revisions on August 11, 1998.

Subsequent to the adoption of amendments to A.R.S. 49–401 and 49–406, other sections of Arizona statutes were found that needed to be revised to ensure continued implementation of committed SIP control measures following redesignation. A SIP revision received on September 9, 1999 contains amendments to various Arizona statutes (1) expanding the definition of Tucson from a CO ''non-attainment area'' to a CO ''nonattainment/maintenance'' area and (2) amending various statutes relating to the State's Vehicle Emissions Inspection Program (VEIP) extending the expiration date of that program from 2001 to 2008.

With regard to the VEIP sunset date of 2008, which is two years short of the requirement for a ten-year maintenance period, in a letter to EPA, dated August 23, 1998, ADEQ states that Arizona Revised Statutes 41–2955 limits to ten years the existence of an agency before it undergoes a sunset review and therefore the VEIP has been extended for the maximum time allowed under this statute, *i.e.*, ten years. The letter supplies a recent history of legislative changes to the VEIP, concluding that ''The VEIP has consistently received support for necessary program updates from the Legislature''. EPA therefore believes that, on the basis of this legislative history, it is reasonable to assume that the program will be extended when it expires in 2008. The full text of the letter from ADEQ is attached to the TSD accompanying this document which is available at the addresses noted above.

C. Proposed Removal of Existing SIP Disapprovals

EPA is proposing to remove the Agency's disapprovals (56 FR 5459, February 11, 1991) of the attainment demonstration and contingency measures that were contained in the 1988 Arizona CO SIP revision for Pima County. Those disapprovals were based on the finding of the Ninth Circuit Court of Appeals on March 1, 1990 in *Delaney* v. *EPA*, 898 F.2d 687 (9th Cir. 1990) that the Arizona plans for Maricopa and Pima Counties did not fully comply with the Clean Air Act as amended in 1977 and with EPA guidance issued pursuant to that law. *See* 4 FR 7182 (January 21, 1981).

EPA is proposing to remove the disapproval of the attainment demonstration contained in the 1988 Arizona CO SIP on the grounds that the maintenance demonstration provided by the TAPA in the LMP supplants that attainment demonstration. The maintenance demonstration in the LMP shows that there has been no exceedance of the CO NAAQS in the TAPA for the years 1993 through 1995. In addition, data from AIRS indicates that there has been no exceedance of the CO NAAQS from 1995 to the present. Although under the LMP option there is no requirement to project emissions over the maintenance period, the TAPA maintenance plan and the additional information provided by PAG show that the area has attained the CO NAAQS and will continue at or below the standard for the ten-year maintenance period.

EPA is also proposing to remove the disapproval of the contingency measures contained in the 1988 Arizona CO SIP revision on the grounds that the contingency provisions in the TAPA Limited Maintenance Plan supplant those measures. The contingency plan included in the TAPA maintenance plan identifies the measures which would be triggered by specified events and provides a schedule and procedure for adoption and implementation of the measures.

III. Summary of Proposed Actions

A. New Proposals

1. SIP Revisions: EPA is proposing to approve the following SIP revisions containing amendments to various Arizona statutes.

- SIP revision submitted August 11, 1998 containing amendments to A.R.S. 49–401 and 49–406: These statutory amendments expand authority of State and local certified metropolitan planning organizations to develop plans and to implement and enforce control measures for attainment as well as maintenance areas as required by Section 110(a)(2)(E) of the CAA.
- SIP revisions submitted to EPA on September 1, 1999 containing amendments to the following Arizona statutes: A.R.S. 41–796.01, 41–2121, 49–401.01, 49–402–402, 49–404, 49–454, and 49–541. These amendments, which were signed into law on May 18, 1999 insure continued implementation of the control measures contained in these statutes following redesignation to maintenance.
- SIP revision submitted to EPA on September 1, 1999 containing amendments to Arizona Statutes 41–3009.01, 49–541.01, 49–542, 49–545, 49–557, 49–573, 41–803, and 41–401.01 relating to the continued implementation of the State's Vehicle Emissions Inspection Program (VEIP) through December 31, 2008.

2. EPA is proposing to remove the Agency's disapprovals (56 FR 5459, February 11, 1991) of the attainment demonstration and contingency measures that were contained in the 1988 Arizona CO SIP revision for Pima County on the grounds that they have been supplanted by the maintenance demonstration and contingency plan

contained in the area's Limited Maintenance Plan.

B. Reproposals

1. EPA is reproposing to approve the TAPA CO maintenance plan because it meets the requirements set forth in section 175A of the CAA and the requirements of the LMP option contained in EPA guidance of October 6, 1995.

2. EPA is reproposing to approve the Emissions Inventory for the base year 1994 contained in the LMP as meeting the requirements of section 172(c)(3) of the CAA.

3. EPA is reproposing to approve the amendments to State Legislation A.R.S. 41–2083, 41–2122 and 41–2125 relating to the State's oxyfuels program in Area B, the Tucson area, including standards for liquid fuels (A.R.S. 41–2083, standards for oxygenated fuel, volatility exemptions (A.R.S. 41–2122) and oxygen content in the sale of gasoline (A.R.S. 41–2125) as control measures in the maintenance plan to be implemented in the event of probable or actual violation of the CO NAAQS in the TAPA. EPA is simultaneously reproposing to approve the amendments to A.R.S. 2083, 2122 and 2125, which were included as part of the LMP following a public hearing on August 20, 1997, as a revision to the Arizona SIP.

4. Finally, EPA is reproposing to approve Arizona's request for redesignation to attainment.

EPA is soliciting public comments on the additional issues described in section II, ''New Issues For Public Comment'' of this reproposal. Comments on these issues as well as the comments that were received on the original proposal, will be considered before taking final action. Interested parties may participate in the federal rule making procedure by submitting written comments to the person and address listed in the **ADDRESSES** section at the beginning of this document.

VI. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, Regulatory Planning and Review.

B. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, Federalism and 12875, Enhancing the Intergovernmental Partnership. Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) Concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children.

If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it is does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 governmental jurisdictions. This proposed rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act,

preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions 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).

F. 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 annual 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 annual 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.

List of Subject in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate Matter, Reporting and recordkeeping requirements, Sulfur Dioxide.

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

Dated: December 9, 1999.

David P. Howekamp,

Acting Regional Administrator, Region IX.

[FR Doc. 99–32761 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[IN 109–1b; FRL–6507–6]

Approval of Hospital/Medical/Infectious Waste Incinerator State Plan for Designated Facilities and Pollutants: Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve Indiana's State Plan for Hospital/Medical/Infectious Waste Incinerators (HMIWI), submitted on September 30, 1999. The State Plan adopts and implements our Emissions Guidelines (EG) applicable to existing HMIWIs. The approval means that EPA finds the State Plan meets Clean Air Act (Act) requirements. In the final rules section of this **Federal Register**, the EPA is approving the State's request as a direct final rule without prior proposal because EPA views this action as noncontroversial and anticipates no adverse comments. A detailed rationale for approving the State's request is set forth in the direct final rule. The direct final rule will become effective without further notice unless EPA receives relevant adverse written comment on this action. Should the EPA receive such comment, it will publish a final rule informing the public that the direct final rule will not take effect and such public comment received will be addressed in a subsequent final rule based on this proposed rule. If no adverse written comments are received, the direct final rule will take effect on the date stated in that document and no further activity will be taken on this proposed rule. EPA does not plan to institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received on or before January 18, 2000.

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

Copies of the State submittal are available for inspection at: Regulation Development Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Ryan Bahr, Environmental Engineer, Regulation Development Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–4366.

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

Dated: November 30, 1999.

Francis X. Lyons,

Regional Administrator, Region 5.

[FR Doc. 99–32177 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL–6511–4]

Control of Air Pollution From New Motor Vehicles; Compliance Programs for New Light-Duty Vehicles and Light-Duty Trucks

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; Extension of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is extending the public comment period on the Ethyl petition to reconsider the CAP 2000 rule. A **Federal Register** notice requesting comment was published on November 5, 1999 (64 FR 60401). The purpose of this notice is to extend the comment period from December 20, 1999 to January 14, 2000, to allow commenters additional time to submit comments.

DATES: EPA will accept comments until January 14, 2000.

ADDRESSES: Comments should be submitted in duplicate to the EPA Air & Radiation Docket # A–96–50, Room 1500–M (Mail Code 6102), 401 M Street SW., Washington, DC 20460. Copies of information relevant to this petition and CAP 2000 are available for inspection in public docket A–96–50 at the above address, between the hours of 8:00 a.m. to 5:30 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Linda Hormes, Certification and Compliance Division, U.S. Environmental Protection Agency, 2000 Traverwood, Ann Arbor, MI 48105, Phone (734) 214–4502, E-mail: hormes.linda@epa.gov.

Dated: December 13, 1999.

Margo T. Oge,

Director, Office of Mobile Sources.

[FR Doc. 99–32757 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 243

[FRL 6505–7]

RIN 2050–AE66

Revisions to Guidelines for the Storage and Collection of Residential, Commercial, and Institutional Solid Waste

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency is proposing to revise Guidelines for the Storage and Collection of Residential, Commercial, and Institutional Solid Waste through incorporation by reference of new voluntary consensus standards from the American National Standards Institute (ANSI). We are proposing this revision in response to a petition for rulemaking submitted by the Waste Equipment Technology Association requesting the Agency to update the references to ANSI standards. This proposed revision would assure that the Guidelines include references to the most current national safety standards.

In the final rules Section of today's **Federal Register**, we are promulgating this amendment as a final rule without a prior proposal because we view this as a noncontroversial action that encourages the use of voluntary consensus standards. Thus, we anticipate no adverse comments. A detailed rationale for the amendment is set forth in the preamble to the accompanying direct final rule. If no adverse comments are received in response to this action, we plan no further action regarding this proposed rule as the accompanying direct final rule will be effective. If we receive relevant adverse comments, we will withdraw the final rule and we will address public comments received a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action.

DATES: Comments on this proposed rule must be received on or before January 18, 2000. A relevant adverse comment will be considered to be any comment substantively criticizing the proposal on a basis not already provided to EPA in comment.

ADDRESSES: Commenters must send an original and two copies of their comments referencing docket number F–99–COLF–FFFFF to: (1) If using regular US Postal Service mail: RCRA Docket Information Center, Office of Solid Waste (5305G), U.S. Environmental Protection Agency Headquarters (EPA, HQ), 401 M Street, SW, Washington, DC 20460–0002, or (2) if using special delivery, such as overnight express service: RCRA Docket Information Center (RIC), Crystal Gateway One, 1235 Jefferson Davis Highway, First Floor, Arlington, VA 22202. Comments may also be submitted electronically through the Internet to: rcra-docket@epa.gov. Comments in electronic format should also be identified by the docket number F–99–COLF–FFFFF and must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

Commenters should not submit electronically any confidential business information (CBI). An original and two copies of CBI must be submitted under separate cover to: RCRA CBI Document Control Officer, Office of Solid Waste (5305W), U.S. EPA, 401 M Street, SW, Washington, DC 20460–0002.

Public comments and supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding federal holidays. To review docket materials, it is recommended that the public make an appointment by calling 703 603–9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page. The index and some supporting materials are available electronically. See the ''Supplementary Information'' section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at 800 424–9346 or TDD 800 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call 703 412–9810 or TDD 703 412–3323.

For more detailed information on specific aspects of this rulemaking, contact Dwight Hlustick, Office of Solid Waste 5306W, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460–0002, 703 308–8647, hlustick.dwight@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: The index for the supporting materials is available on the Internet at <http://www.epa.gov/epaoswer/non-hw/muncpl/equip/>.

The following supporting materials are available for viewing in the RCRA Information Center (RIC):

Petition for Rulemaking—Proposed Modification to the Requirements and Recommended Procedures for Solid Waste Collection Equipment (40 CFR Part 243), submitted to Robert Dellinger and Larry Starfield (US EPA), submitted from Waste Equipment Technology Association, March 24, 1997.

Mobile Refuse Collection and Compaction Equipment—Safety Requirements, 1992, American National Standards Institute, ANSI Z245.1–1992.

Stationary Compactors—Safety Requirements, 1997, American National Standards Institute, ANSI Z245.2–1997.

Waste Containers—Safety Requirements, 1994, American National Standards Institute, ANSI Z245.30–1994.

Waste Containers—Compatibility Dimensions, 1996, American National Standards Institute, ANSI Z245.60–1996.

You can find these materials at the official record for this action will be kept in paper form. Accordingly, EPA will transfer all comments received electronically into paper form and place them in the official record, which will also include all comments submitted directly in writing. The official record is the paper record maintained at the address in **ADDRESSES** at the beginning of this document.

EPA responses to comments, whether the comments are written or electronic, will be in a notice in the **Federal Register** or in a response to comments document placed in the official record for this rulemaking. EPA will not immediately reply to commenters electronically other than to seek clarification of electronic comments that may be garbled in transmission or during conversion to paper form, as discussed above.

Regulated Entities. Entities potentially affected by this action are public or private owners or operators of solid waste collection and transport equipment. Affected categories and entities include the following.

Category	Examples of affected entities
Federal government ..	Agencies procuring waste services.
Industry	Owners or operators of solid waste collection services.
Municipal and tribal governments.	Owners or operators of solid waste collection services.

This table is a guide for readers that describes which entities are likely to be affected by this action. It lists the types of entities EPA is now aware could potentially be impacted by today's action. It is possible that other types of entities not listed in the table could also be affected. To determine whether you would be impacted by this action, you should carefully examine the applicability criteria. If you have questions about whether this action applies to a particular facility, please consult Mr. Dwight Hlustick, U. S. Environmental Protection Agency, Office of Solid Waste (5306W), 401 M Street, SW, Washington, DC 20460, (703) 308–8647, HLUSTICK .DWIGHT@EPAMAIL.EPA.GOV

Preamble Outline

I. Under what authority is EPA proposing this rule?
II. What is the background for this proposed rule?
III. What will this proposed rule do?
IV. How does this proposed rule comply with applicable statutes and executive orders?
A. Executive Order 12866 (OMB Review):
B. Regulatory Flexibility Act
C. Unfunded Mandates Reform Act
D. Paperwork Reduction Act
E. Executive Order 12875: Enhancing the Intergovernmental Partnership
F. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Risks and Safety Risks
H. National Technology Transfer and Advancement Act of 1995
I. Executive Order 12898: Environmental Justice
J. Executive Order 12088 (Compliance of Federal Agencies with the Solid Waste Disposal Act):

I. Under What Authority Is EPA Proposing This Rule?

The Agency is proposing these guidelines under the authority of Sections 1008(a)(3), 2002(a)(1), and 4004(a) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6907(a)(3), 6912(a)(1), and 6944(a).

II. What Is the Background for This Proposed Rule?

EPA promulgated the Part 243—Guidelines for the Storage and Collection of Residential, Commercial, and Institutional Solid Waste in 1976. In 40 CFR 243.202–1(d), these guidelines referenced safety standards that had been established as consensus standards. The reference was to American National Standards Institute (ANSI) standard Z245.1—Safety Standards for Refuse Collection Equipment.

ANSI's current policy is to revise each standard every five years. This means that the safety standards referenced in 40 CFR 243.202–1(d) have been revised since 1976.

The original safety standard referenced in the 1976 guideline has been expanded in scope. In 1976, ANSI Z245.1 covered the following types of collection equipment;

(1) Rear-loading compaction equipment,
(2) Side-loading compaction equipment,
(3) Front-loading compaction equipment,
(4) Tilt-frame equipment,
(5) Hoist-type equipment,
(6) Satellite vehicles,
(7) Special collection compaction equipment, and
(8) Stationary compaction equipment.

Now Z245.1 has evolved into the following series of four separate standards.

(1) Z245.1—Mobile Refuse Collection and Compaction Equipment—Safety Requirements;
a. Front-loading equipment,
b. Rear-loading equipment,
c. Satellite vehicles
d. Side-loading equipment,
e. Tilt-frame and hoist-type equipment,
f. Mechanized container collecting vehicles,
g. Recycling vehicles, and
h. Transfer trailers;
(2) Z245.2—Stationary Compactors—Safety Requirements;
(3) Z245.3—Waste Containers—Safety Requirements; and
(4) Z245.6—Waste Containers—Compatibility Dimensions.

In this notice, EPA is proposing to revise the Part 243 guidelines to incorporate the above four standards. Each type of equipment covered in the original guideline would still be covered in these proposed revisions. In addition, EPA has proposed to add voluntary consensus standards for waste containers which did not exist at the time of the original rulemaking.

The waste container standards were added because waste containers are an integral part of most waste collection systems.

The petitioners also requested that balers be included in this regulation. Although they are an important part of some waste collection systems, they are not an integral part of many waste collection systems and they were not included in the original regulation. There may also be some question whether balers should be considered part of a waste collection system. Therefore, EPA is not including standards for balers in this proposed rule.

III. What Does This Proposed Rule Do?

Overview of This Proposed Rule

This proposed rule would change three sections; §§ 243.100, 243.200–1, and 243.202–1. The changes are to be made through incorporation by reference. All of the proposed changes are to be made in the ''Requirements'' sections of the guideline. ''Requirements'' are minimum levels of performance that solid waste collection operations are required to meet. These guidelines are mandatory for Federal agencies and recommended to State, interstate, regional, and local governments for their activities.

Specific Changes Proposed

The proposed rule would change § 243.100 paragraphs (c) and (g) update references to an Executive Order. The current regulations refer to Executive Order 11752. That Executive Order would be replaced by Executive Order 12088. Today's proposed rule would change the text to refer to the new Executive Order 12088.

The proposed changes to § 243.200–1 would add a new paragraph (e). The new paragraph (e) adds the Safety Requirements and Compatibility Dimensions to the Waste Containers requirement of the guidelines. These guidelines address requirements for waste containers used for storage of solid waste and for materials that have been separated for the purpose of recycling.

The proposed change to § 243.202–1 would update the safety requirements for both mobile equipment and stationary compactors. The safety requirements for mobile equipment are updated from the 1976 standards to new standards finalized in 1992. The safety requirements for stationary compactors are updated from the 1976 standards to new standards finalized in 1997. The safety requirements are applicable to many types of solid waste collection vehicles and to stationary compactors.

Why EPA Wants To Make These Proposed Changes

We are making these changes at the request of Waste Equipment Technology Association to modify the ANSI standards because we believe the newer standards have a number of improved safety provisions. For example, the updated standards require the use of grab handles, riding steps, and slip resistant surfaces on loading platforms. Therefore, we believe, that if the industry follows these new standards,

the accident rate for solid waste collection industry should be reduced. These features should reduce risks both to people who collect solid waste as well as to the general public.

IV. How Does This Proposed Rule Comply With Applicable Statutes and Executive Orders?

A. Executive Order 12866 (OMB Review)

Under Executive Order 12866, EPA must determine whether a regulatory action is significant and therefore subject to OMB review and the other provisions of the Executive Order. A significant regulatory action is defined by Executive Order 12866 as one 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 rights and obligations or 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 Executive Order 12866.

We have determined that this proposed rule would not be a significant regulatory action under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare, and make available for public comment, a regulatory flexibility analysis that describes the impact of a proposed or final rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant adverse impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains EPA's determination.

The effect of this proposed rule is to encourage purchasers of waste containers and solid waste collection vehicles to procure equipment that meets current industry voluntary consensus standards for safety. This proposed rule contains recommendations, not requirements, to State and local governments; therefore, it would not impose new burdens on small entities. Additionally, it is the Agency's understanding that all new solid waste collection equipment meets the current ANSI standards. As a result, this proposed rule would not impose new burdens on small entities. Therefore, pursuant to 5 U.S.C. 605b, I hereby certify that this proposed rule will not have a significant adverse impact on a substantial number of small entities. Hence, this proposal does not require a regulatory flexibility analysis.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of regulatory actions on State, local, and Tribal governments, and the private sector. Under Section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, Section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of alternatives and adopt the least costly, most cost effective or least burdensome alternative that achieves the objective of the rule. The provisions of Section 205 do not apply when they are inconsistent with applicable law. Moreover, Section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under Section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA's analysis of compliance with the Unfunded Mandates Reform Act of 1995 found that this proposed rule imposes no enforceable duty on any State, local or tribal governments or the private sector. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of UMRA. States are encouraged to participate in the development of voluntary consensus standards such as the ones referenced in this proposed rule.

D. Paperwork Reduction Act

Today's proposal is in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* We found that no information is being collected from the States, Federal Agencies, or industry for the existing rule and this proposal would not require the collection of any additional information. Therefore, we do not need to prepare an Information Collection Request (ICR).

E. Executive Order 13132 (Federalism)

Exeuctive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an acocuntable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''sustantial 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include

a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This is so because the incorporation of these revised ANSI standards into the Part 243 guidelines imposes no mandate on states or local governments. Instead, we provide the Part 243 guidelines only as recommendations for states, interstate, regional, and local governments. Part 243 sets forth requirements only for federal agencies. See 40 CFR section 431.100(c). Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's proposed rule change would not significantly or uniquely affect the communities of Indian tribal governments. The impact of these revisions on tribal governments would be minimal and no different from any other governmental entity affected. These revisions do not require any new mandates for the tribes, but merely update existing voluntary standards. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to E.O. 13045 because it is not an economically significant rule as defined by E.O. 12866, and because it would not affect decisions involving the environmental health or safety risks to children.

H. National Technology Transfer and Advancement Act of 1995

Under Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), EPA is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

This proposed rule would comply with the requirements of the NTTAA because it utilizes voluntary consensus standards developed by the American National Standards Institute (ANSI). The ANSI is a voluntary consensus standards-setting body under the NTTAA.

I. Executive Order 12898: Environmental Justice

Under Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' as well as through EPA's April 1995, ''Environmental Justice Strategy, OSWER Environmental Justice Task Force Action Agenda Report,'' and National Environmental Justice Advisory Council, EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities, and all people live in clean and sustainable communities.

The Agency believes that today's proposed rule change which would revise voluntary consensus standards into guidelines for waste containers and solid waste collection vehicles would not have an adverse environmental or economic impact on any minority or low-income group, or on any other type of affected community since these standards would not significantly affect the location of any solid waste collection facility. These are updated safety standards to assure minimal safety requirements for waste collection equipment.

J. Executive Order 12088

(Compliance of Federal Agencies with the Solid Waste Disposal Act)

Executive Order 12088 requires each head of a Federal Agency to comply with standards issued under several laws, including the Solid Waste Disposal Act. Executive Order 12088 revoked an older Executive Order 11752. Part 243 included two outdated references to Executive Order 11752 at § 243.100(c) and (g). Today's proposed rule would replace the old references to Executive Order 11752 with Executive Order 12088.

List of Subjects in 40 CFR Part 243

Environmental protection, Government property, Incorporation by reference, Waste treatment and disposal.

Dated: December 3, 1999.

Carol M. Browner,

Administrator.

[FR Doc. 99–32074 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA–2725, MM Docket No. 99–346, RM–9763]

Digital Television Broadcast Service; Evansville, IN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Tri-State Public Teleplex, Inc., licensee of station WNIN(TV), NTSC Channel 9, Evansville, Indiana, requesting the substitution of DTV Channel *12 for station WNIN(TV)'s assigned DTV Channel *54. DTV *12 can be allotted to Evansville, Indiana, in compliance with the principle community coverage requirements of Section 73.625(a) at coordinates 38–01–27 N. and 87–21–43 W. DTV Channel *12 can be allotted to Evansville with a power of 15.0 (kW) and a height above average terrain (HAAT) 177 meters.

DATES: Comments must be filed on or before January 31, 2000, and reply comments on or before February 15, 2000.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Todd D. Gray, Dow, Lohnes & Albertson, 1200 New Hampshire Avenue, NW, Suite 800, Washington, DC 20036 (Counsel for Tri-State Public Teleplex, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 99–346, adopted December 6, 1999, and released December 8, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

Digital Television Broadcasting.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 99–32595 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 99–2758, MM Docket No. 99–347, RM–9751, RM–9761]

Radio Broadcasting Services; Exmore and Cheriton, VA, Fruitland, MD

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on two inter-related petitions. Be-More Broadcasting, permittee of a new unconstructed FM station on Channel 291B1 at Exmore, VA, requests the reallotment of its channel to Cheriton, VA, as the community's first local aural service, and the modification of its construction permit (BPH–19951109MC) to specify Cheriton as its community of license. Great Scott Broadcasting, licensee of Station WKHI, Channel 298B, Exmore, VA, requests the substitution of Channel 298B1 for Channel 298B, the reallotment of the channel to Fruitland, MD, as the community's first local aural service, and the modification of the station's license to specify Fruitland as its community of license. Channel 291B1 can be allotted to Cheriton in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.7 kilometers (11.6 miles) northeast, at coordinates 37–26–25 NL; 75–52–51 WL, to accommodate Be-More's desired transmitter site. Channel 298B1 can be allotted to Fruitland with a site restriction of 16 kilometers (9.9 miles) southwest, at coordinates 38–11–32 NL; 75–41–58 WL, to avoid a short-spacing to Station WRXS, Channel 295A, Ocean City, MD, and Station WSNJ–FM, Channel 299B, Bridgeton, NJ. A grant of both of these proposals would result in Exmore having no local aural service.

DATES: Comments must be filed on or before January 31, 2000, and reply comments on or before February 15, 2000.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: A. Wray Fitch III, Gammon & Grange, P.C., 8280 Greensboro Drive, 7th Floor, McLean, VA 22102–3807 (Counsel to Be-More); Ross G. Greenberg, Leventhal, Senter & Lerman, P.L.L.C., Suite 600, 2000 K Street, NW, Washington, DC 20006–1809 (Counsel to Great Scott).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 99–347, adopted December 1, 1999, and released December 10, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 99–32701 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA No. 99–2711; MM Docket No. 97–252; RM–9206]

Radio Broadcasting Services; Columbia City, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; denial.

SUMMARY: This document denied a proposal filed by Max Media requesting the allotment of Channel 243A at Columbia City, Florida, as the community's first local FM broadcast service. *See* 63 FR 2354, January 15, 1998. Based on the information submitted by Max Media, we do not believe that Columbia City qualifies as a community for allotment purposes and therefore it would not serve the public interest to allot a channel to Columbia City.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 97–252, adopted November 24, 1999, and released December 7, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 1231 20th Street, NW., Washington, DC. 20036, (202) 857–3800, facsimile (202) 857–3805.

List of Subjects in 47 CFR Part 73

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 99–32702 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 99–2671; MM Docket No. 99–104; RM–9507]

Radio Broadcasting Services; Beulah, CO

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: This document dismisses a petition for rule making filed by Mountain West Broadcasting proposing the allotment of FM Channel 230C3 to Beulah, Colorado, as a first local aural transmission service, for failure to establish that locality is a *bona fide* community for allotment purposes. See 64 FR 17141, April 8, 1999. With this action, this proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 99–104, adopted November 24, 1999 , and released December 3, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center (Room CY–A257), 445 Twelfth Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 99–32704 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 99–2695, MM Docket No. 99–345, RM–9782]

Radio Broadcasting Services; Minerva, NY

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Bible Broadcasting Associates, seeking the allotment of Channel 264A to Minerva, NY, as the community's first local aural service. Channel 264A can be allotted to Minerva in compliance with the Commission's minimum distance separation requirements, with respect to domestic allotments, with a site restriction of 2.9 kilometers (1.8 miles) northwest, at coordinates 43–48–33 North Latitude and 74–00–41 West Longitude, to avoid a short-spacing to Station WKBE, Channel 262B1, Warrensburg, New York, and Station WWFY, Channel 265A, Middlebury, Vermont. The allotment would be short-spaced to Station CBF–FM, Channel 264C1, Montreal, Quebec, Canada. Since Minerva is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian Government in the allotment of Channel 264A at Minerva, as a specially-negotiated, short-spaced allotment, must be obtained.

DATES: Comments must be filed on or before January 24, 2000, and reply comments on or before February 8, 2000.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Jerrold Miller, Miller & Miller, P.C., P.O. Box 33003, Washington, DC 20033 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 99–345, adopted November 24, 1999, and released December 3, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 99–32705 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 99–2685, MM Docket No. 99–343, RM–9750]

Radio Broadcasting Services; Elberton, Lavonia and Pendergrass, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a mutually exclusive petition filed by Radio Elberton, Inc. to reallot Channel 221A from Elberton to Lavonia, GA, as the community's first local aural service, and the modification of Station WWRK–FM's license accordingly, and the application of Waves of Mercy Productions, Inc., for a construction permit for a new noncommercial educational station on Channel 220A at Pendergrass, GA, which would also be the community's first local aural service. Channel 221A can be allotted to Lavonia in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.5 kilometers (7.8 miles) west, at coordinates 34–27–26 NL; 83–14–27 WL, to accommodate Radio Elberton's desired site. The coordinates specified in the Waves of Mercy Productions application (BPED–19990630MB) are 34–12–59 NL; 83–38–50.

DATES: Comments must be filed on or before January 24, 2000, and reply comments on or before February 8, 2000.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Room TW–325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: John M. Pelkey, Haley Bader & Potts P.L.C., 4350 North Fairfax Drive, Suite 900, Arlington, VA 22203–1633 (Counsel to Radio Elberton); Waves of Mercy Productions, Inc., 5319 Amherst Way, Flowery Branch, GA 30542 (Applicant for Pendergrass, GA).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 99–343, adopted November 24, 1999, and released December 3, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 99–32706 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA 99–5063; Notice 1]

RIN 2127–AH 83

Federal Motor Vehicle Safety Standards; Interior Trunk Releases

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: We are proposing to require that all new vehicles with trunks come equipped with a release latch inside the trunk compartment beginning January 1, 2001. During the summer of 1998, eleven children died when they inadvertently trapped themselves in the trunk of a car. This proposal is intended to give children and others who find themselves trapped inside a car trunk a chance to get out of the trunk alive.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than February 15, 2000.

ADDRESSES: You should mention the docket number of this document in your comments and submit your comments in writing to: Docket Management, Room PL–401, 400 Seventh Street, SW Washington, DC 20590. You may call Docket Management at 202–366–9324. You may visit the Docket from 10:00 am to 5:00 pm Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Stephen R. Kratzke, Director, Office of Crash Avoidance Standards, NHTSA, 400 Seventh Street, SW, Washington DC 20590. Mr. Kratzke's telephone number is (202) 366–4931 and his facsimile number is (202) 366–4329.

SUPPLEMENTARY INFORMATION:

Previous Agency Looks at Trunk Entrapment

The issue of motor vehicle trunk entrapment was initially raised in May of 1984 when NHTSA was petitioned by Mr. William Proehl to require that every new car be equipped with a trunk release lever that can be easily operated from inside a vehicle's trunk. The petitioner listed various possible circumstances of accidental and intentional entrapment in the trunk of a vehicle. The petitioner stated that persons such as alarm and stereo installers, mechanics, playful children, pranksters, and crime victims may be trapped in the trunk. The petitioner also believed that an elderly person might fall into the trunk and thereby become entrapped. Mr. Proehl asked NHTSA to require an inside trunk release on all new cars to facilitate the release of these victims.

After reviewing the petition and the available information in this area, NHTSA published a notice of denial for rulemaking which concluded that the likelihood of an internal trunk lever ever being used was remote (49 FR 47277; December 3, 1984). NHTSA stated in 1984 that it was not aware of any data indicating that there is much likelihood of occurrence of unintentional entrapment in a vehicle's trunk. NHTSA's rationale for its conclusion stated that trunk lids are spring-loaded in the open position and, therefore, not likely to close by themselves with someone inside. Because the lids are spring loaded, it is difficult to close the trunk from any position except standing behind the vehicle and pushing down on the outer surface of the trunk lid. From that position, a person has a full view of the trunk interior. The agency stated that it believed it would be extremely unlikely that a person would accidentally close the lid with someone inside. Concerning an elderly person falling into the trunk, the petitioner suggested that entrapment could occur if snow on the trunk closed

the lid when the person fell. It was unclear to NHTSA how the trunk would entrap the person in this circumstance, since it is unlikely that the individual would fall in such a way that more than his or her upper torso is inside the trunk. Again, in this situation, NHTSA stated its belief that an internal trunk release lever would not likely need to be used.

The 1984 notice stated that NHTSA was aware that victims of crime or pranks are, on occasion, purposely locked in the trunk of a vehicle. However, the petitioner did not provide any data supporting the benefits of an internal release mechanism in these circumstances. The agency did not and still does not know, for example, how often a victim of a crime or prank who is purposely locked in a vehicle's trunk might also be secured so that an internal release mechanism could not be operated.

Between May 1984 and July 1998, NHTSA received approximately two dozen letters expressing concern about trunk entrapments. In no case was data provided to the agency about the size of this safety problem.

Events of the Summer of 1998

In June 1998, the U.S. Congress directed NHTSA to conduct a study of the benefits to the public of a regulation to require the installation in a motor vehicle of an interior device to release the trunk lid. NHTSA was required to submit a report on the results of the study to Congress by December 1999. Additionally, during a three-week period between July and August of 1998, eleven children died in three separate incidents when they locked themselves in the trunk of an automobile. These events obliged NHTSA to take another look at the problem of trunk entrapments.

The Work of the Expert Panel on Trunk Entrapment

In September 1998, NHTSA began to gather all available information on the issue of trunk entrapments, which is not a well defined problem. In general, it appears that the victims of trunk entrapment include two distinct categories: people who are intentionally locked in a motor vehicle trunk by criminals and people, nearly always children, who inadvertently lock themselves in the trunk. The problem solution requires some understanding of criminal and child behavior, the human factors problem of designing a mechanism that children and others will be able to operate quickly when frightened and in the dark, and other issues including location and possible power requirements. Considering the broad array of issues, NHTSA decided that instead of having the government develop a solution on its own, a more effective way of addressing and understanding the issue would be to bring business, government and civic leaders, medical and engineering researchers and a broad coalition of concerned organizations together to work to prevent trunk entrapments. To accomplish this, NHTSA decided to convene an independent panel of experts.

In November 1998, NHTSA asked Ms. Heather Paul of the National Safe Kids Campaign to chair an Expert Panel for the purpose of developing recommendations and strategies by mid-1999 for addressing the issue of deaths and injuries resulting from motor vehicle trunk entrapment. The Expert Panel on Trunk Entrapment consisted of representatives from various industries, including vehicle manufacturers, law enforcement groups, experts in child psychology and behavior, child safety advocates, the medical community, other Federal government agencies, and other interested parties.

This Expert Panel met three times in Washington, DC, in January, March, and May 1999. At the first meeting, NHTSA presented an overview of the available data on the size of the safety problem. NHTSA's report is available in the public docket in both its original and revised form (Docket No. NHTSA 1999–5063–2 and 5063–3, respectively). The report concluded that existing Federal databases had very little information on the problem of trunk entrapment, and described our search through data collected by this agency, as well as the Consumer Product Safety Commission, the National Center for Health Statistics, and the Federal Bureau of Investigation. The available data indicated there have been 21 deaths in 11 incidents of inadvertent trunk entrapment from 1987 to 1999.

Also at the first meeting, Janette Fennell of Trunk Releases Urgently Needed Coalition (TRUNC), a non-profit group dedicated to improving trunk safety, made a presentation suggesting that trunk entrapments happen with greater regularity than is generally believed. Ms. Fennell said that, as of January 1999, she had gathered anecdotal evidence and media reports of more than 900 cases of trunk entrapment. Ms. Fennell's presentation was followed by a presentation by Lenore Terr, a child psychologist. Ms. Terr explained that evidence suggests that small children basically ''shut down'' and passively wait for rescue in situations like trunk entrapment. Hence, she recommended that any trunk release must be very simple or it will not help small children.

The next presentation at the first meeting was by Mr. Robert Lange of General Motors Corporation (GM). Mr. Lange presented GM's research and trunk safety retrofit solution. GM's interior release mechanism is a handle that is lighted for 30 minutes after the trunk is closed. GM's research found that most 3 to 6-year old children could successfully use this handle. The success rate increased dramatically as children got older. However, Mr. Lange emphasized that neither GM's handle nor any other approach will allow all 3 to 6-year old children to get out of a trunk alive. That is why, according to Mr. Lange, GM's retrofit switch requires a deliberate movement of a switch to latch the trunk closed. GM believes this will prevent a significant portion of inadvertent trunk entrapments.

The final presentation at the first meeting was by Wayne Lord, of the FBI's National Center for the Analysis of Violent Crime. Mr. Lord said we learn about criminals by studying their reactions to certain situations or stimuli. These reactions allow one to predict likely future behavior when confronted with those situations or stimuli. There are currently no studies of which Mr. Lord is aware that involve the behavior of criminals who knew there was a trunk release inside the trunk. Hence, there is no scientific basis for predictions about what criminals will do if there are inside trunk releases (either harm or immobilize victims or ignore or forget about the trunk release). Any prediction as to which of these two courses criminals will take is just a guess, and the FBI will not do that.

At the second meeting of the Expert Panel on March 9, 1999, the first presentation was by Dr. Jonathan Arden, a forensic pathologist and the Medical Examiner for the District of Columbia. Dr. Arden provided a detailed medical description of asphyxiation and hyperthermia, the diagnoses on the death certificates of the children who died in the trunks of cars. Dr. Arden suggested the preferred approach would be to get the children out of the trunk as quickly as possible. The other presentation at the second meeting was by Lois Fingerhut of the National Center for Health Statistics (NCHS), who gave information about the pilot program NHTSA and NCHS have undertaken to look at non-crash deaths in vehicles. Ms. Fingerhut gave out a copy of a standard death certificate and explained how and where the information on the cause of death is coded.

The Expert Panel spent a significant part of the second meeting discussing possible paths for getting inside trunk releases into vehicles. The options considered were:

1. *Rely on voluntary actions by manufacturers to install inside trunk releases.* The potential benefits identified with this path were that it allows maximum freedom to develop and install a variety of different solutions without imposing any unintended regulatory obstacles. The potential negative implications of this path were that not all manufacturers would necessarily install inside trunk releases on all their vehicles.

2. *NHTSA Establishes a Requirement for Vehicles to be Equipped with Inside Trunk Releases without any Performance Requirements.* The potential benefit of this path is that it allows manufacturers maximum freedom to experiment with different designs of inside trunk releases, while assuring that all vehicles with trunks will have an inside trunk release. The potential negative implications of this path were that, absent performance requirements, the goals of the requirement might not be fulfilled. Manufacturers might choose ineffective inside trunk releases that would fully comply with such a standard.

3. *NHTSA Establishes a Detailed Performance Requirement for Inside Trunk Releases.* The potential benefit of this path is that it establishes clear guidance as to what performance is expected from inside trunk releases. The potential negative of this path is the amount of time it would take to conduct research to determine what performance requirements should be established. In addition, detailed performance requirements can pose obstacles to new technologies not available at the time the performance requirements are established.

The Expert Panel did not decide on any one of these three options at its second meeting, but there was significant discussion of each of these courses of action. The Panel decided to wait to make any recommendation as to the approach it would recommend.

At the third meeting of the Expert Panel on May 3, 1999, Mr. Michael Stando of Ford Motor Company gave a presentation about the inside trunk release that will be original equipment on ALL of its model year 2000 cars. This decision by Ford affects 1.8 million cars and three latch suppliers. Mr. Stando said that Ford generated 22 different potential approaches. Ford consulted a psychologist specializing in child behavior. The psychologist said that the most natural response for children 18 months to 4 years old to an object that interests them is to grasp the object and pull it toward themselves, to put it in their mouth if they are younger and to visually examine it more closely if they are older. Mr. Stando stated that Ford human factors specialists then tested their symbol and symbol/handle recognition on 27 children between the ages of three and five. 18 of the 27 children achieved at least partial symbol/handle recognition. Ford's inside trunk release is cable-operated with a T-shaped handle. The handle is sized for a child's hand and made of polypropylene, like many food containers. Mr. Stando said that the handle has a phosphorescent ''glow-in-the-dark'' additive, so it needs no electrical power. The handle is quick-charging—it needs only 10 seconds of garage light to glow visibly inside the closed trunk. The glow was said to be very long-lasting (up to 8 hours when fully charged). The handle operates with a pull motion. It is low effort and requires only one inch of travel, factors designed to make the trunk release system child-friendly, according to Mr. Stando. In addition, this mechanism can be retrofitted on Ford cars from one to five model years back. Mr. Stando announced that Ford will make this release available as a retrofit option for these older vehicles.

As a result of the information and discussions at these three meetings, the Expert Panel announced a series of recommendations on June 8, 1999. One of these recommendations was that ''[a]ll automobile manufacturers should design and install trunk safety features, including internal trunk release mechanisms, into all new vehicles by January 1, 2001.'' Another recommendation was that NHTSA ''should issue a standard requiring vehicles to be equipped with internal trunk release mechanisms. The standard should hold the automobile industry accountable for taking action, yet allow manufacturers the freedom to determine optimal design solutions. Manufacturers are urged to pursue voluntary action rather than waiting for NHTSA's rulemaking.'' Interested people can read all of the Expert Panel's recommendations in the docket at NHTSA–99–5063–4. This proposal follows up on those recommendations.

NHTSA's Proposal for Original Equipment Inside Trunk Releases

Safety Need and Efficacy of Countermeasures

In the agency's previous look at inside trunk releases in 1984, we stated that we knew of no data about the size of the safety problem or the likely effectiveness of an internal trunk release at addressing that problem. We now have a report by the Centers for Disease Control in December 1998 that documented 19 cases of children ages 6 or younger that died in car trunks from 1987 to 1998. The cause of death in all cases was either hyperthermia (''heat stroke'') or hyperthermia plus asphyxiation.

We acknowledge that this problem is not the largest motor vehicle safety issue, not even for children ages 6 or younger. However, we do not believe that just because a problem is relatively small, NHTSA should do nothing to address it. The entire subject of preventing injury and death from motor vehicles in something other than on-road crashes is one that is often given short shrift because it is so hard to document the size of the problem. There are no reliable Federal data sources that track non-crash injuries. Nevertheless, NHTSA is specifically charged by law with protecting the public against unreasonable risks in non-crash situations, as well as crash situations. Since more than 40,000 people die each year from motor vehicle crashes, we as an agency have rightly focused our resources and efforts on crash-related situations. However, if the safety risks from a non-crash situation can be quantified, as this has been by the Centers for Disease Control report and the work of the Expert Panel, NHTSA must then consider whether those safety risks can be effectively addressed by a means whose costs are reasonably related to the expected benefits.

With respect to the likely efficacy of internal trunk releases, we now have data from General Motors and Ford that indicates many, but not all, children from ages three to six will be able to use those manufacturers' designs for internal trunk releases to escape from locked trunks. Ford is voluntarily equipping all of its model year 2000 vehicles that have trunks with these internal trunk releases. We interpret this as a conclusion by that company that the cost of its internal trunk release design is reasonable in relation to the safety problem.

Based on this information on the size of the problem and the efficacy of likely countermeasures, which has become available since we last considered mandating internal trunk releases, NHTSA now concludes that this safety problem appears to be one that it would be appropriate to address with a Federal motor vehicle safety standard. The next issue we must address is what requirements we should propose for this new standard.

Proposed Requirements

The Expert Panel spent quite a bit of time discussing how detailed the performance requirements for interior trunk releases should be. The agency has a variety of approaches for dealing with potential safety features. At one end of the spectrum, some safety features are installed voluntarily by manufacturers with no Federal motor vehicle safety standard requirement to do so. One current example of this is Antilock Brake Systems on passenger cars and light trucks. This voluntary approach allows manufacturers to choose whether to put the safety feature on their vehicles and the performance characteristics of the design of the safety feature they will install. One advantage of this approach is it gets the safety feature on vehicles more quickly, since there is no need to wait for action by NHTSA. However, a substantial disadvantage of this approach is that the safety feature is not usually installed on every vehicle.

At the other end of the spectrum is when NHTSA requires a safety feature by issuing a Federal motor vehicle safety standard that requires the equipment and specifies necessary performance levels for the equipment. One current example of this is frontal air bags in cars and light trucks. This approach assures that the safety feature will be installed on every new car and light truck and that the performance will achieve levels that are determined to be the minimum acceptable for protection of the public. However, this approach takes the most time to get implemented. It is especially difficult in an area like interior trunk releases, where there is little existing research. NHTSA would have to first conduct its own research in this area. This would likely take two years or more. We would then have to initiate the rulemaking process. Our rulemaking on average takes 18 to 24 months to produce a final rule. We would have to allow some leadtime for manufacturers to install internal trunk releases in their vehicles. Hence, a detailed performance standard would take four to five years to get internal trunk releases in vehicles.

The question then is whether we can find some middle ground between allowing manufacturers to decide if and when they will install interior trunk releases in their vehicles and waiting five years for a detailed performance standard. The Expert Panel believed it found such a middle ground and recommended that NHTSA adopt a general equipment requirement for interior trunk releases, without specifying detailed performance requirements. This approach ensures that every new car and light truck will be equipped with an interior trunk release, while allowing vehicle manufacturers substantial flexibility to determine the optimal solutions for their vehicles.

NHTSA has successfully used this approach in Federal Motor Vehicle Safety Standard No. 113, *Hood Latch System* (49 CFR § 571.113). That standard simply requires that a front opening hood must have a second latch position. No details of the latch's performance are specified. This simple standard obliged manufacturers to put a second latch position on the hoods of all their vehicles. If needed, the agency could have revisited this standard to add more detailed performance requirements. However, the safety problem of hoods flying open while the vehicle was in motion and obstructing the driver's vision was effectively addressed by this general equipment requirement.

We agree with the Expert Panel's recommendation. With respect to interior trunk releases, NHTSA wants to allow manufacturers the freedom to determine optimal design solutions for their vehicles, while assuring the public that all new vehicles with trunks will have an interior trunk release as soon as practicable. A general equipment standard achieves this.

However, this proposed standard includes an additional requirement for interior trunk releases. The internal trunk release must include a feature that allows it to be easily seen inside the closed trunk. It is very dark inside a closed trunk. One cannot expect victims of trunk entrapment, especially small children, to grope around in hopes of locating the internal trunk release. GM will address this issue by lighting its release handle, while Ford has chosen a phosphorescent release mechanism. Either of these approaches is acceptable, as are any other approaches that assure victims trapped inside a trunk will be able to quickly locate the release mechanism.

Although this proposed standard does not explicitly require it, NHTSA notes that the Expert Panel recommended that manufacturers should base their designs for internal trunk releases upon the cognitive and physical abilities of young children. In other words, the Expert Panel was advising other manufacturers to do what General Motors and Ford have done—take the time to understand the abilities of young children and tailor the designs to those abilities. The Expert Panel reasoned that an internal trunk release mechanism that is designed to be operated by small children will also work well for adults. The opposite would not necessarily be true—that is, an internal trunk release mechanism designed to be operated by adults might not work for small children.

Scope of Proposal

This proposal would apply to all new vehicles with ''trunk lids.'' NHTSA has long defined a ''trunk lid'' in Standard No. 206 as ''a movable body panel that provides access from outside the vehicle to a space wholly partitioned from the occupant compartment by a permanently attached partition or a fixed or fold-down seat back.'' We are now proposing that all vehicles with ''trunk lids'' must have a release inside the trunk compartment.

The effect of this definition is that the requirement for an internal release would not apply to vehicles that do not typically have trunk lids, like hatchback cars, station wagons, pickup trucks, sport utility vehicles, and vans. Although these vehicles sometimes have a package shelf behind the rear seat that covers a concealed cargo area, the package shelf is not fixed. If anyone were trapped in that area, they could readily lift the package shelf and escape.

Commenters are asked to specifically address the proposed definition for a trunk lid and state whether they believe it is acceptable for the purposes of this new standard. If the commenter believes the proposed definition is unclear in some cases, we ask the commenter to provide specific examples of vehicles where they are unsure whether there is a trunk lid.

Consideration of Exclusions for Small Trunks or Vehicles Made by Small Manufacturers

During the Expert Panel meetings, an issue was raised as to whether vehicles with small trunks should be excluded from the requirement for an interior trunk release. The reason suggested was that some trunks are so small it would be physically impossible for a person to fit inside them. NHTSA has decided not to propose such an exemption. While there certainly are vehicles, especially two-seaters and sports cars, with very small trunks, the agency is not aware of any trunk that is so small a 3-year-old child could not get inside. However, the agency specifically asks commenters to address this tentative conclusion. If there are vehicle trunks that are so small even a 3-year-old child could not fit inside, NHTSA asks the commenter to give the dimensions of the trunk compartment and a suggested method for measuring a trunk compartment to see if it is so small the commenter believes it should be excluded from the

internal trunk release requirement. In formulating the final rule on this subject, NHTSA will consider the information in the comments and elsewhere as we re-examine our tentative decision to make even small trunks subject to this internal release requirement.

A variant on this request was that vehicles made by small manufacturers, *i.e.,* a company that makes no more than a few thousand vehicles each year, be excluded from the requirement for an internal trunk release. NHTSA understands that these small manufacturers have much lesser resources than manufacturers like Ford or General Motors. In recognition of this, we have occasionally allowed small manufacturers more time to comply with requirements that require intensive engineering than is allowed for larger manufacturers. However, we do not believe it is necessary or appropriate to do that with respect to internal trunk releases. The agency does not believe that designing and installing an internal trunk release presents the same kind of engineering challenge that advanced occupant protection systems do. The approaches taken by Ford and General Motors for internal trunk releases are publicly available. Thus, we are not proposing to exclude low volume manufacturers from the internal trunk release standard.

Leadtime

Again, all vehicle manufacturers, not just low volume ones, can study the approaches Ford and General Motors have taken for internal trunk releases. Hence, no lengthy leadtime appears necessary before implementing a requirement for internal trunk releases.

The Expert Panel was considering a recommendation that all manufacturers should design and install trunk safety features, including internal trunk release mechanisms, into all new vehicles by September 1, 2000, which would coincide with the start of the 2001 model year. However, representatives of vehicle manufacturers stated that, while they could meet that date, a few more months would allow them to ensure their internal trunk release mechanisms were more effective. Those representatives asked that the date be postponed four months, to January 1, 2001, and the Expert Panel adopted the January 1, 2001 date in its final recommendations. We are proposing the same January 1, 2001 date in this notice.

Organization Within Federal Motor Vehicle Safety Standards

NHTSA has typically organized its safety standards so that the 100 series of standards represents the crash avoidance standards (those designed to reduce the likelihood of being in a crash), the 200 series of standards represents the crashworthiness standards (those designed to protect the occupant in the event of a crash), and the 300 series of standards represents the post-crash fire standards (those designed to minimize the likelihood of a fire after a crash). A standard for an internal trunk release doesn't fit into any of these categories because there is no crash associated with the problem of becoming trapped inside a locked trunk. Therefore, we are proposing a new series of standards, the 400 series, that will be dedicated to motor vehicle injury prevention in non-crash events. This standard for internal trunk releases is proposed to be Standard No. 401.

Rulemaking Analyses and Notices

a. Executive Order 12866 (Federal Regulation) and DOT Regulatory Policies and Procedures

NHTSA has examined the impact of this proposed rulemaking action and determined that it is not significant within the meaning of Executive Order 12866 and not significant within the meaning of the Department of Transportation's regulatory policies and procedures. Information indicates that an approach to internal trunk releases such as Ford has chosen can be accomplished for about $2.00 per vehicle. There are approximately 7 million new vehicles with trunks sold each year in the United States. Thus, if this proposal were adopted as a final rule, we would anticipate total costs of about $14 million, well under the $100 million level needed to classify a rule as major. Accordingly, the agency has not prepared a full preliminary regulatory evaluation for this proposal.

b. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Public Law 96–354), as amended, requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. The only parties affected by this proposal will be manufacturers of motor vehicles with trunks. To the extent that some of those parties qualify as small businesses, the costs associated with this proposal are so minor that no significant impacts on small businesses will result if this proposal were adopted as a final rule.

c. Executive Order 12612

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

d. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. This proposal would not have any such impacts on those parties. As noted above, the agency expects the costs associated with this proposal to be about $2.00 per car, or about $14 million in the aggregate.

e. National Technology Transfer and Advancement Act

This proposal is consistent with the National Technology Transfer and Advancement Act of 1995 (Public Law 104–113). Under the Act, ''all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.'' There are no such standards available at this time. However, one of the Expert Panel's recommendations was that the Society of Automotive Engineers (SAE) should begin work to develop a recommended practice for the design and performance of trunk safety features, including internal trunk release mechanisms. NHTSA will consider any such SAE recommended practice when it becomes available.

f. National Environmental Policy Act

NHTSA has analyzed this proposed rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that adoption of this proposal in a final rule of this action would not have any significant impact on the quality of the human environment.

g. Executive Order 12778 (Civil Justice Reform)

This proposal does not have any retroactive effect. Under section 49 U.S.C. 30103, whenever a Federal motor vehicle safety standard is in effect, a state may not adopt or maintain a safety

standard applicable to the same aspect of performance which is not identical to the Federal standard, except to the extent that the state requirement imposes a higher level of performance and applies only to vehicles procured for the State's use. 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

h. Paperwork Reduction Act

This proposal does not have any requirements that are considered to be information collection requirements as defined by the Office of Management and Budget (OMB) in 5 CFR Part 1320.

Submission of Comments

How Can I Influence NHTSA's Thinking on This Document?

In developing this document, we tried to address the concerns of all our stakeholders. Your comments will help us improve this rule. We invite you to provide different views on options we propose, new approaches we have not considered, new data, how this document may affect you, or other relevant information. We welcome your views on all aspects of this document. Your comments will be most effective if you follow the suggestions below:

Explain your views and reasoning as clearly as possible.

- Provide solid technical and cost data to support your views.
- If you estimate potential costs, explain how you arrived at the estimate.
- Tell us which parts of this document you support, as well as those with which you disagree.
- Provide specific examples to illustrate your concerns.
- Offer specific alternatives.
- Refer your comments to specific sections of this document, such as the units or page numbers of the preamble, or the regulatory sections.
- Be sure to include the name, date, and docket number with your comments.

How do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**.

Comments may also be submitted to the docket electronically by logging onto the Dockets Management System website at http://dms.dot.gov. Click on ''Help & Information'' or ''Help/Info'' to obtain instructions for filing the document electronically.

How can I be Sure That my Comments Were Received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR Part 512.)

Will the Agency Consider Late Comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider it in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I Read the Comments Submitted by Other People?

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location.

You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Docket Management System (DMS) Web page of the Department of Transportation (http://dms.dot.gov/).

(2) On that page, click on ''search.''

(3) On the next page (*http://dms.dot.gov/search/*), type in the four-digit docket number shown at the beginning of this document. Example: If the docket number were ''NHTSA–1998–1234,'' you would type ''1234.'' After typing the docket number, click on ''search.''

(4) On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments. Although the comments are imaged documents, instead of word processing documents, the ''pdf'' versions of the documents are word searchable.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

Plain Language

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this document.

List of Subjects in 49 CFR Part 571

Imports, Incorporation by reference, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

In consideration of the foregoing, NHTSA proposes to amends 49 CFR Chapter V as set forth below.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

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

Authority: 49 U.S.C. 322, 30111, 30115, 30166 and 30177; delegation of authority at 49 CFR 1.50.

2. A new section 571.401 would be added to Part 571, to read as follows:

§ 571.401 Standard No. 401; Internal trunk release.

S1. *Purpose and scope.* This standard establishes the requirement for providing a release mechanism inside the trunk compartment of a motor vehicle, so that people trapped inside the trunk will be able to unlatch the trunk.

S2. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, buses, and trucks that have a trunk lid.

S3. *Definitions.* Trunk lid means a movable body panel that provides access from outside the vehicle to a space wholly partitioned from the occupant compartment by a permanently attached partition or a fixed or fold-down seat back.

S4. *Requirements.* Each motor vehicle that has a trunk lid shall have a release mechanism inside the trunk compartment that unlatches the trunk lid. This internal trunk release must include a feature, like lighting or phosphorescence, that allows it to be easily seen inside the closed trunk.

Issued on December 13, 1999.

Stephen R. Kratzke,

Acting Associate Administrator for Safety Performance Standards.

[FR Doc. 99–32752 Filed 12–14–99; 3:51 pm]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 990922260–9260–01; I.D. 083199E]

RIN 0648–AM84

Designation of the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA) and Response to Petitions

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

ACTION: Proposed rule; request for comments; extension of comment period.

SUMMARY: On October 19, 1999, NMFS proposed to designate the Cook Inlet beluga whales as depleted under the MMPA. In response to requests from the public, NMFS is extending the comment period for 30 days.

DATES: Comments and information must be received by January 19, 2000.

ADDRESSES: Comments should be addressed to the Chief, Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Michael Payne, NOAA/NMFS, Alaska Region, (907) 586–7235, or Brad Smith, NOAA/NMFS, Alaska Region, Anchorage Field Office, (907) 271–5006.

SUPPLEMENTARY INFORMATION: On October 19, 1999, NMFS proposed to designate the Cook Inlet, Alaska, stock of beluga whales as depleted under the MMPA (64 FR 56298). Subsequently, NMFS received several requests from the public to extend the comment period for an additional 30 days to allow the public more time to review and comment on the proposed designation. NMFS agrees that an additional 30 days for public comments is warranted and extends the comment period through January 19, 2000.

Dated: December 13, 1999.

Andrew A. Rosenberg,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 99–32777 Filed 12–16–99; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 120699A]

RIN 0648–AK96

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 17

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

ACTION: Notice of availability of Amendment 17 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico; request for comments.

SUMMARY: NMFS announces that the Gulf of Mexico Fishery Management Council (Council) has submitted Amendment 17 to the Fishery Management Plan (FMP) for the Reef Fish Resources of the Gulf of Mexico for review, approval, and implementation by NMFS. Amendment 17 would extend the commercial reef fish vessel permit moratorium for 5 years to December 31, 2005. The current moratorium is scheduled to expire on December 31, 2000. The purpose of the moratorium is to provide a stable environment in the fishery for evaluation and development of a more comprehensive controlled access system for the entire commercial reef fish fishery.

DATES: Comments must be received no later than 5 p.m., eastern standard time, on February 15, 2000 at the appropriate address or fax number (See **ADDRESSES**).

ADDRESSES: Written comments must be mailed to the Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702. Comments may also be sent via facsimile (fax) to 727–570–5583. Comments will not be accepted if submitted via e-mail or Internet.

Requests for copies of Amendment 17, which includes an environmental assessment and a regulatory impact review, should be sent to the Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, Florida 33619–2266; phone: 813–228–2815; fax: 813–225–7015; e-mail: Gulf.Council@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Michael C. Barnette, NMFS, 727-570-5305, fax 727–570–5583, e-mail Michael.Barnette@noaa.gov.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each Regional Fishery Management Council to submit a FMP or amendment to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an amendment, immediately publish a document in the **Federal Register** stating that the amendment is available for public review and comment.

Amendment 4 to the FMP, as approved and implemented by NMFS on May 8, 1992, initiated the moratorium on the issuance of new commercial reef fish vessel permits, which was intended to last for 3 years. It was subsequently extended twice, the second of which was in 1995 for a duration of 5 years terminating on December 31, 2000. The Council and NMFS deemed the moratorium necessary to moderate short-term future increases in fishing effort and to stabilize fishing mortality while the Council considered a more comprehensive effort limitation program for the reef fish fishery. During the moratorium, the Council developed an individual transferable quota system for red snapper. However, before it was implemented, Congress prohibited individual fishing quotas (IFQs) under sections 303(d) and 407 of the Magnuson-Stevens Act. The current Congressional prohibition of IFQs will lapse on October 1, 2000.

The Council intends to evaluate a broad range of controlled access systems, including IFQ, for the commercial reef fish fishery. Development and implementation of a comprehensive controlled access system is expected to extend past the period of the current moratorium. Without the benefit of a moratorium, open access in the reef fish fishery is bound to increase fishing effort and complicate allocation of fishing privileges, thereby creating an unstable fishery environment.

NMFS will consider comments received by February 15, 2000, whether specifically directed to the amendment or the proposed rule, in its decision to approve, disapprove, or partially approve the amendment. NMFS will not consider comments received after that date in this decision. NMFS will address all comments on the amendment or the proposed rule received during their respective comment periods in the final rule.

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

Dated: December 13, 1999.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–32780 Filed 12–16–99; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[I.D. 120999A]

Western Pacific Fishery Management Council; Public Scoping Meetings

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

ACTION: Public scoping meetings; request for comments.

SUMMARY: The Western Pacific Fishery Management Council (Council) will convene public scoping meetings on its draft Coral Reef Ecosystem Fishery Management Plan (CREFMP), preliminary draft Environmental Impact Statement (PDEIS) for the CREFMP, and associated documents for the CREFMP.

The Council announces its intention to prepare an environmental impact statement (EIS) on the Federal management of crustaceans in the Western Pacific Region. The scope of the EIS analysis will include all activities related to the conduct of the fisheries and will examine the impacts of crustacean harvest on, among other things, protected species. The Council will hold public scoping meetings and accept written comments to provide for public input into the range of actions, alternatives, and impacts that the EIS should consider. The Council will continue scoping meetings for the EIS on bottomfish and seamount groundfish fisheries with meetings planned throughout Hawaii.

The Council also announces its intention to develop an amendment to the Fishery Management Plan for Pelagic Species Fisheries of the Western Pacific Region (Pelagics FMP) which will consider a range of alternatives and impacts for management of incidental and directed catches of management unit species of sharks, including finning. The Council will hold a series of meetings to give the public an opportunity to comment.

DATES: Written comments will be accepted until January 24, 2000. Public scoping meetings will be held from December 20, 1999, to January 13, 2000. See **SUPPLEMENTARY INFORMATION** for specific dates, times and locations.

ADDRESSES: Comments on the Council's draft CREFMP and PDEIS, intent to prepare EISs for crustacean fisheries, scoping for crustacean, bottomfish, and seamount groundfish fisheries and intent to develop an amendment to the pelagics FMP concerning shark catches should be sent to Kitty M. Simonds, Executive Director, Western Pacific Regional Fishery Management Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813. Copies of the draft CREFMP, PDEIS and documents for the crustacean EIS, bottomfish EIS and shark management are available from the Council office. Public scoping meetings will be held in American Samoa, Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and Hawaii. See **SUPPLEMENTARY INFORMATION** for specific scoping meeting locations and for special accommodations.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; Western Pacific Fishery Management Council, 808–522–8220.

SUPPLEMENTARY INFORMATION:

A. A summary of the Coral Reef Ecosystem FMP/PDEIS will be presented including the preferred alternatives identified by the Council for management action, as described below. Comments will be solicited from the public on these management alternatives.

At its 101st meeting, held from October 18–21, 1999, the Council took initial action to approve the following preferred alternatives for the FMP:

1. Marine Protected Areas (MPAs): (a) For the unincorporated atolls: MPAs would be zoned for limited take, subject to a special permit (see permit requirements below), to a depth of 50 fm around each island/atoll, with exceptions granted for personal consumption by island residents and for fishing for species managed under existing FMPs.

(b) For the Northwestern Hawaiian Islands (NWHI): the MPA would include all substrate from the shoreline to a depth of 50 fm and be zoned for no take from 0–10 fm and for limited take, by special permit only (see permit requirements below), from 10–50 fm, with exceptions granted for fishing for species managed under existing FMPs.

(c) For Guam's offshore southwest banks: This area would be designated a MPA, with the only initial restriction being a prohibition on anchoring on the banks by fishing vessels >50 ft. long.

2. Allowable Gear and Methods: Allowable gear would be limited to remotely operated vehicles (ROV)/

submersible, hand harvest, handline, hook-and-line, rod and reel, spear, slurp gun, hand net/dip net, barrier net (aquarium), and surround/purse net (for akule and aku bait fishing only). The use of hookah, and possession or use of any poisons, explosives or intoxicating substances would be prohibited. Fish traps (fish defined generally to include other organisms) would additionally be allowed in appropriate areas and with appropriate conditions if permanently marked to identify the owner. Nets would be allowed for use in limited applications permitted here and should always be tended. Also, the use of scuba with spear should be prohibited at night only.

3. Permits and Reporting: Include in the FMP two types of permits: a general permit for taxa harvested in non-MPA areas, and a special permit for non-targeted taxa in all areas and for targeted taxa in MPA areas:

(a) Regular (General) permits: To harvest Coral Reef Ecosystem (CRE) Management Unit Species/taxa (MUS) within the non-MPA areas, a regular permit would be required (subject to standard eligibility requirements such as completed Federal application, vessel documentation, US citizenship, etc.).

(b) Special coral reef ecosystem permit: The permit will be issued on a case-by-case basis, by the Southwest Regional Administrator in consultation with the Council, subject to specific conditions that restrict access. Individual application and the issuance of a special individual permit will be required until the Council develops, under the framework process, general permits (based on sufficient information) that can be applied broadly to a fleet of fishers for harvest of particular taxa or groups of taxa, harvest of CRE taxa, other than those covered by existing FMPs (exempt).

(c) No permits would be issued for the take of wild live rock or live hexacorals (hard corals); except for small amounts for brood-stock for breeding/aquaculture, (where consistent with local laws). Regulated culture of new live rock on labeled artificial substrates placed in the sea without harm to wild biota could be accommodated under special permit conditions.

(d) Permits issued under other FMPs would be unaffected by the above permit requirements.

4. MUS: The MUS would include essentially all biota in the ecosystem, divided into two groups. One group, ''Harvested Coral Reef Taxa,'' contains those species/taxa that are currently harvested or are believed to be subject to immediate harvest. For many of these taxa, enough may be known to make some reasonable estimates about their ability to support harvest. The other group, ''Non-targeted Coral Reef Taxa,'' includes those taxa for which there is no known harvest and, in many cases, no biological information to support decisions about sustainable harvest.

5. Essential Fish Habitat (EFH) requirements:

(a) EFH: Link MUS to specific habitat composites consistent with the depth of the ecosystem to 50 fm and to the limit of the exclusive economic zone (EEZ).

(b) For Habitat Areas of Particular Concern (HAPC): Based on the established criteria for HAPC designation and the list of ''Harvested CRE taxa'', revise the list to focus/refine HAPC based on established criteria. This list may include existing protected areas/reserves as HAPC.

6. Overfishing/Maximum Sustainable Yield (MSY) requirements: Determine overfishing and MSY as follows:

(a) For MUS/taxa with a good history of harvest, use existing catch data and other available information to make best estimates of MSY.

(b) When insufficient catch data exist from EEZ sources, extrapolate data from other similar areas where fishing has occurred.

(c) When no information exists, estimate MSY by proxy, state assumptions clearly, and/or explain why estimates cannot be made.

7. Bycatch requirement: Note that the highly selective gear listed in the allowable gear list should minimize bycatch. Other bycatch provisions should similarly follow those for existing FMPs.

8. Fishing communities requirement: Approve the Scientific and Statistical Committee's approach that coral reef ecosystem fishing communities be defined based on island areas: Guam, CNMI, American Samoa, and each of the major inhabited islands of Hawaii.

9. Fishing sectors requirement: Employ standard data reporting systems already developed for each island area, similar to those provisions for existing FMPs, with no exemption to the reporting requirement for subsistence fishermen.

10. Non-regulatory measures: Follow a formal process to be described in the FMP regarding interaction among the various FMP Plan Teams to coordinate in the monitoring and addressing of ecosystem impacts.

The CREFMP, and its associated EIS, will be the Council's fifth FMP for the EEZ for all US Pacific Islands. This area includes nearly 11,000 km^2 (4,000 square miles) of coral reefs. Development of the FMP is timely considering new mandates and initiatives such as the April 1999 report to Congress by the Ecosystem Principles Advisory Panel on Ecosystem-Based Fishery Management, the President' 1998 Executive Order on Coral Reefs (E.O. 13089) and priorities of the U.S. Coral Reef Task Force and the U.S. Coral Reef Initiative, as well as the provisions of the Magnuson Stevens Fishery Conservation and Management Act, including provisions of the Sustainable Fisheries Act. The draft FMP describes the importance of coral reef resources to the region and current and potential threats that warrant a management plan at this time. Information regarding the harvest of these resources in the EEZ is largely unknown. Potential for unregulated harvest and bio-prospecting for reef fish, live grouper, live rock and coral exists throughout the region. Marine debris, largely from fishing gear, is impacting reefs in the NWHI.

B. Scoping meetings for the crustacean EIS will held at all locations as listed under the ''Date'' section above. Bottomfish and seamount groundfish scoping meetings will be held at the Hawaii locations only. Public scoping meetings on the bottomfish and seamount groundfish EIS were completed for American Samoa, Guam, and the CNMI in July and August of 1999.

A summary of the current Federal management system for crustaceans, bottomfish and seamount groundfish will be reviewed during public scoping hearing. The Council will hear comments on the current management system and any proposed changes. A principal objective of the scoping and public input process is to identify a reasonable set of management alternatives that, with adequate analysis, will sharply define critical issues and provide a clear basis for choice among the alternatives. The intent of the EIS is to present an overall picture of the environmental effects of fishing as conducted under the FMPs. Rather than focusing narrowly on one management action, the EIS will include a range of reasonable management alternatives and an analysis of their impacts in order to define issues and provide clear basis for choice among options by the public and the Council.

The EIS will discuss the impacts of bottomfish, seamount groundfish, and crustacean harvest accruing with present management regulations and under a range of representative alternative management regulations on Western Pacific ecosystem issues. These issues include: EFH, target and non-target species of fish, fish that are discarded, marine mammals (Hawaiian

monk seals and cetaceans), and other protected species present in the Western Pacific ecosystem. In addition, the environmental consequences section will contain an analysis of socio-economic issues associated with conduct of the fishery on the following groups of individuals: (1) Those who participate in harvesting the fishery resources and other living marine resources, (2) those who process and market the fish and fishery products, (3) those who are involved in allied support industries, (4) those who consume fishery products, (5) those who rely on living marine resources in the management area either for subsistence needs or for recreational benefits, (6) those who benefit from non-consumptive uses of living marine resources, (7) those involved in managing and monitoring fisheries, and (8) fishing communities.

C. At its 101st meeting on October 18–21, 1999, the Council took initial action to approve the following preferred alternatives for incidental and directed shark catches in and around Hawaii's EEZ to be implemented by an amendment to the Pelagics FMP.

a. Establish a fleet-wide quota of 50,000 sharks harvested by vessels with a Hawaii longline limited entry permit. This limit would be established as a precautionary measure to prevent further expansion of fishing mortality on shark stocks caught by the Hawaii longline fishery.

b. Establish a framework mechanism which would adjust the shark quota annually based on changes in catch per unit effort or other objective indicators of the health of the stocks.

c. Prohibit the use of demersal longline to fish for pelagics in the NWHI protected species zone, and within the Main Hawaiian Islands longline 3–75 nm closed area.

Dates, Times, and Locations

The public scoping meetings will be held on:

Monday, December 20, 1999, from 3:00–6:00 p.m., Department of Marine and Wildlife Resources (DMWR) Conference Room, AS. Phone contact c/o DMWR 684–633–4456

Tuesday, December 28, 1999, from 7:00–9:00 p.m, Guam Fishermen's Cooperative Association, Hagatna, GU. Phone contact c/o Guam Dept. of Commerce 671–475–0321

Wednesday, December 29, 1999, from 6:30–8:30 p.m. Joeten-Kiyu Public Library Conference Room, Saipan, CNMI. Phone Division of Fish and Wildlife Resources (DFWR) 670–322–9834 for information;

Tuesday, December 28, 1999, from 6:00–7:00 p.m., King Kamehameha Hotel, Kamakahonu Ballroom, Kona, HI;

Wednesday, December 29, 1999, from 6:00–7:00 p.m., College of Agriculture, Cooperative Extension Service Conference Room A, 875 Komahana St., Hilo, HI;

Tuesday, January 4, 2000, from 6:00–9:00 p.m., Maui Beach Hotel, Maui Room, Kahalui, Maui, HI;

Wednesday, January 5, 2000, from 6:00–9:00 p.m., Haleiwa Alii Beach Park, John Kalili Surf Center, Oahu, HI;

Thursday, January 6, 2000 from 6:00–9:00 p.m., Wilcox Elementary School, Lihue, Kauai; Monday, January 10, 2000 from 6:00–9:00 p.m., Waianae Public Library, Oahu, HI;

Tuesday, January 11, 2000 from 6:00–9:00 p.m., Lanai Airport Conference Room, Lanai, HI;

Wednesday, January 12, 2000 from 6:00–9:00 p.m., Mitchell Pauole Center Conference Room, Kaunakakai, Molokai, HI and Thursday, January 13, 2000 from 6:00–9:00 p.m., Ala Moana Hotel, Carnation Room, Honolulu, HI. Phone: Council office–808–522–8220.

These meetings will be advertised in the local newspapers.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, 808–522–8220 (voice) or 808–522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: December 14, 1999.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

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Notices

Federal Register

Vol. 64, No. 242

Friday, December 17, 1999

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[AMS–00–01]

Guidelines for AMS Oversight of Commodity Research and Promotion Programs

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: The Department of Agriculture (USDA) is seeking comments on the ''Guidelines for AMS Oversight of Commodity Research and Promotion Programs'' (Guidelines). USDA's Agricultural Marketing Service (AMS) developed the guidelines to facilitate uniform oversight of national research and promotion programs which have been implemented under numerous Federal statutes. The guidelines are part of the findings and recommendations of the Research and Promotion Task Force (task force) that was created by Secretary Glickman in November 1998. The task force held a public meeting in March 1999 and held several working meetings to review the oversight responsibilities of AMS and board operations.

DATES: Comments must be received on or before March 17, 2000.

FOR FURTHER INFORMATION CONTACT: Interested persons are invited to submit written comments concerning this notice to: Barbara C. Robinson, Deputy Associate Administrator, Room 3069 South Bldg., U.S. Department of Agriculture, AMS, OA, Washington, DC 20250; telephone (202) 720–4276; fax (202) 690–3967. Comments should be submitted in triplicate and will be made available for public inspection at the above address during regular business hours. Comments may also be submitted electronically to: public.comments@usda.gov. All comments should indicate the docket number and the date and page number of this issue of the **Federal Register**. A copy of this notice may be found at: www.AMS.USDA.Gov/R&P/.

SUPPLEMENTARY INFORMATION: This notice is authorized under the following Federal statutes: the Beef Promotion and Research [7 U.S.C. 2901–2911]; the Canola and Rapeseed Research, Promotion, and Consumer Information Act [7 U.S.C. 7441–7452]; the Commodity Promotion, Research, and Information Act of 1996 [7 U.S.C. 7411–7425]; the Cotton Research and Promotion Act [7 U.S.C. 2101–2118]; the Dairy Production Stabilization Act of 1983 [7 U.S.C. 4501–4513]; the Egg Research and Consumer Information Act [7 U.S.C. 2701–2718]; the Floral Research and Consumer Information Act [7 U.S.C. 4301–4319]; the Fluid Milk Promotion Act of 1990 [7 U.S.C. 6401–6417]; the Fresh Cut Flowers and Fresh Cut Greens Promotion and Consumer Information Act [7 U.S.C. 6801–6814]; the Honey Research, Promotion, and Consumer Information Act, as amended [7 U.S.C. 4601–4612]; the Lime Research, Promotion, and Consumer Information Act, as amended [7 U.S.C. 6201–6212]; the Mushroom Promotion, Research, and Consumer Information Act of 1990 [7 U.S.C. 6101–6112]; the National Kiwifruit Research, Promotion, and Consumer Information Act [7 U.S.C. 7461–7473]; the Pecan Promotion and Research Act of 1990 [7 U.S.C. 6001–6013]; the Popcorn Promotion, Research, and Consumer Information Act [7 U.S.C. 7481–7491]; the Pork Promotion, Research, and Consumer Information Act [7 U.S.C. 4801–4819]; the Potato Research and Promotion Act, as amended [7 U.S.C. 2611–2627]; the Sheep Promotion, Research, and Information Act of 1994 [7 U.S.C. 7101–7111]; the Soybean Promotion, Research, and Consumer Information Act [7 U.S.C. 6301–6311]; the Watermelon Research and Promotion Act, as amended [7 U.S.C. 4901–4916]; and the Wheat and Wheat Foods Research and Nutrition Education Act [7 U.S.C. 3401–3417].

There are currently 13 active programs under these statutes: beef, cotton, dairy, eggs, fluid milk, honey, mushrooms, peanuts, popcorn, pork, potatoes, soybeans, and watermelons.

AMS is seeking public comment on the Guidelines which have been developed to promote uniformity in the oversight of these and any future programs.

Guidelines for AMS Oversight of Commodity Research and Promotion Programs

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Introduction

National research and promotion programs are designed to strengthen the position of a commodity in the marketplace, maintain and expand existing domestic and foreign markets, and develop new uses and markets for specified agricultural commodities. They are administered by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) and funded by assessments collected from designated segments of industry.

Until 1996, industry-specific legislation had to be passed by Congress before a national program could be established. (See Appendix I.) However, under the Commodity Promotion, Research, and Information Act of 1996 (generic statute), industry groups may

submit a proposal directly to AMS requesting that a program be implemented. All programs require rulemaking and a referendum to determine if those who pay assessments approve the programs.

The programs are run by industry boards and councils (boards) appointed by the Secretary of Agriculture (Secretary) from industry nominations.

Purpose of Guidelines

These Guidelines are designed to facilitate the application of the legislative and regulatory provisions of the acts and orders or plans (orders), subject to the unique language of individual legislation as determined by AMS. They are designed to promote uniformity in the oversight of all commodity research and promotion programs. The Guidelines shall be reviewed annually and amended as necessary.

Administration

Administrative Reviews

To the extent practicable, AMS will conduct periodic administrative reviews of board operations to ensure adherence to AMS policy. Selected areas for examination will include, but not be limited to, travel expenses of board members and staff, contract compliance, and investment of funds. In general, boards should operate through an appropriate set of oversight committees that deal with each board's major budget items (see Budgets section of these Guidelines); board members should be given adequate information on all significant projects, proposals, issues, etc., and an outline of options for their consideration in decision making; and the board and its committees should document their decisions in an official set of minutes. Board members must be given adequate information on ongoing operations to allow the board to exercise appropriate management control. This can be accomplished through a series of progress reports on ongoing activities and accomplishment reports on completed activities.

Audits

Each board shall engage a certified public accountant (CPA) to perform a comprehensive financial statement audit each year.

These audits must be conducted in accordance with the Generally Accepted Government Auditing Standards (GAGAS) prescribed by the Comptroller General of the United States. Such an audit must cover the financial statements specified in the Financial Accountability section of these Guidelines and must include such procedures as are necessary for the auditor to express an opinion on the financial statements and such additional procedures as may be necessary for the auditor to express an opinion on the board's internal control system and its compliance with all applicable laws and regulations including the program's enabling statute, the order which established the program, and AMS policies and guidelines.

AMS shall: (a) Review and approve each board's contract with its CPA; (b) review and approve the details of the engagement between the board and its CPA; (c) have the option of attending any entrance or exit conference with the CPA; and (d) receive a copy of the CPA's audit report and copies of all correspondence between the board and its CPA. AMS officials will evaluate each audit report and may request additional information if needed. Boards must promptly follow up on all audit findings and auditor's recommendations and must fully inform AMS of all such activity.

If special circumstances arise, (*e.g.,* a theft or loss of control of board assets or a serious breakdown in internal controls), AMS may require a board to engage a CPA to perform a one-time, focused review to ascertain the causes and results of a problem and to make recommendations for corrective or preventive action.

Board Administrative Expenses

Recognizing inherent differences in implementing laws or regulations, scope, and funding among promotion programs, AMS expects each board and state association or other organization, authorized by law to receive assessment funding, to establish and maintain the minimum level of annual administrative expenses necessary to efficiently and effectively carry out the programs mandated by law. Each board shall include its annual administrative expenses as a separate item in its annual report. AMS or the board may require a state association or other organization receiving board funds to report its annual administrative expenses in a similar manner. Each board must adhere to its fiduciary responsibilities and ensure that all monies are spent wisely and in accordance with laws and regulations.

The Secretary's costs for oversight of the commodity boards should not be considered as an administrative expense of the boards as these charges are outside of the boards' control and management.

Pursuant to 7 U.S.C. 7401, Commodity Promotion and Evaluation, AMS will annually provide to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate information on the administrative expenses of each research and promotion board.

Board Meetings

AMS requires advance notification from the boards of all board and committee meetings as well as conference calls. AMS will attend all board meetings and participate in conference calls and committee meetings when deemed necessary by AMS.

In addition, it is important for boards to recognize that there are many religious practices, and boards should keep this in mind when scheduling meetings.

Board Member Orientation

AMS will participate in the orientation of new board members for all programs. AMS will discuss USDA oversight responsibilities and policies, including these Guidelines, so that new members can understand and comply with them as well as the applicable statute and order. AMS will require that all board members certify that they understand the prohibition against using board funds to influence legislation or government action or policy. The Office of the General Counsel (OGC) will participate in the initial orientation of members of new boards at the board's organizational meeting. OGC may participate, at the request of AMS, in the orientation of new board members for existing programs.

Board Travel and Meeting Expenses

Board members are not allowed a fee or compensation for board service other than reimbursement for reasonable travel costs. However, board members and employees (including staff contracted to perform management and administrative services for a board) may be reimbursed for reasonable and appropriate expenses.

AMS will provide guidance for boards to develop a written policy, approved by AMS, for travel and meeting expenses. In addition, boards must have in place sufficient internal controls to prevent reimbursements or expenditures for unreasonable and potentially controversial travel and meeting expenses. Unreasonable and potentially controversial travel and meeting expenses include, but are not limited to, first class travel, member golf outings, and entertainment that does not directly

further the purposes of the acts and orders.

Boards are prohibited from using assessment funds for expenses for spouses or other family members of board members or employees, open bars, and adult entertainment.

Bylaws and Policy Statements

AMS will review for approval the bylaws and amendments to bylaws developed by the boards and require boards to establish policies which cover board member and staff responsibilities, meeting procedures, and travel and related expenses.

Compliance

The respective boards are responsible for promptly identifying violations and violators and for securing compliance with the statutes, order, and rules and regulations wherever possible. AMS will develop with each board requirements and a timetable for the referral of compliance cases to AMS for appropriate action. Upon receipt of compliance cases, AMS will take one or more of the following actions: (1) Send a certified letter requesting compliance within a specified period; (2) Utilize National Finance Center collection procedures, including administrative offset; and/or (3) Refer violations to the OGC for action. Before discharging any delinquent debt, AMS will take all appropriate steps to collect such debt.

Investments of Funds

AMS shall require the boards to follow the AMS investment policy to ensure proper investment of board funds.

Legal Counsel

OGC will provide all legal counsel to the boards, except as may be provided for under a Memorandum of Understanding (MOU) between a board and OGC. OGC will review all existing MOU's and recommend any needed changes to ensure consistency among the boards.

User Fees

The authorizing legislation for each program requires the various boards to reimburse AMS for its costs in overseeing the programs. It is the policy of AMS that all of these programs be charged in a fair and equitable manner and that all costs be covered.

All direct program costs should be charged to the appropriate program. These costs include salaries and benefits of employees directly involved in the daily workload associated with commodity boards. Other costs would be travel to board meetings, rent for office space for the employees directly working on the programs, printing of any documents, supplies, equipment, and anything else needed to complete the necessary work involved in overseeing the programs.

Direct program costs, including costs billed to AMS by other USDA and government agencies for authorized services provided in the support of the various boards, will be charged to the appropriate board. In addition, costs billed to AMS by states for actual unemployment claims paid to former board employees will be charged to the appropriate board when the bills are received by AMS.

The cost of agency overhead should also be charged to the boards. Overhead includes those costs incurred by the agency, the respective Deputy Administrator, and other offices involved in board oversight. These costs should be distributed in proportion to the direct program cost. In order to ensure that these costs are readily available for billing, internal AMS distributive subcenters should include a percentage charge for each program. As an option, depending on the organization levels involved in supervision of the boards and the amount of oversight provided, Deputy Administrator charges may be included in direct costs. The cost of agency overhead for the oversight of the boards is also charged to the boards.

Budgets

AMS will review for approval board-submitted budgets prior to the start of the board's fiscal year. When submitting budgets to AMS, the boards must include detailed information regarding administrative expenses and a written description of contract costs. Budget submissions must include, at a minimum, the following components:

(1) A statement of objectives and strategy in each major program area (promotion, advertising, research, etc.), including reasons for significant changes from the preceding budget period.

(2) A summary of anticipated revenue (assessments, interest, donations, etc.) and anticipated refunds, where applicable, with comparative data for at least one preceding year.

(3) A summary of proposed expenditures by major program areas with comparative data for at least one preceding year.

(4) Staff and administrative expense breakdown, with comparative data for at least one preceding year.

AMS will review for approval amendments or additions to approved budgets, including shifting of program funds from one major area to another. Shifts that are consistent with governing bylaws need not have prior approval by AMS.

Conflict of Interest

AMS will provide guidance to assist boards in developing written policies to safeguard against and deal with conflict of interest situations, and such policies will be reviewed and approved by AMS. These policies shall include, at a minimum, the requirements that: (1) Board members and employees must disclose any relationship with any organization or company that has a contract with the board or that operates a qualified state or regional program and (2) No board member may vote on any matter in which the member has a financial interest, or regarding any contract with any entity of which the member is a member of the board.

In addition, each board should ensure that its responsibilities and duties have not been delegated or otherwise relinquished to another organization.

Programs issued under the generic statute shall comply with the conflict of interest provisions of that statute.

Contracts

Competitive Bids

Boards must follow sound business principles and practices in awarding contracts. Fundamental elements of good contracting are the identification of realistic alternates and the use of competitive bidding procedures. AMS believes it is each board's responsibility to incorporate these principles and practices into its operation procedures. Accordingly, each board must (1) develop an acquisition plan that specifies its processes for identifying alternative sources and obtaining competitive bids and (2) assign to a board committee the responsibility for monitoring contracting practices. These practices should also be reviewed regularly by the board's CPA.

The principles applied in awarding board contracts must also be followed by those contractors in awarding subcontracts.

If competitive bidding is not used, a reason for not doing so will be stated and placed in the board's contract file along with an alternative process to verify the reasonableness of the cost.

None of the requirements stated here shall be interpreted to (1) prohibit multi-year contracting or (2) require boards to select the lowest cost bidder when, in the board's judgment, other factors are deemed more important.

Contract Approval

AMS will review for approval written contracts for the development and carrying out of programs or projects of promotion, advertising, development, or education and written contracts for legal assistance and other consultants. AMS will review contracts for conformance with the applicable statutes and regulations and with AMS and USDA requirements. Contracts must include a provision prohibiting the use of assessment funds for lobbying activities. Contracts must be approved prior to the start of activities to be carried out under the contract. AMS will require boards to formally notify potential contractors that any work they undertake prior to contract approval by USDA is at their own risk as boards are not financially liable if the contract is not approved by USDA. AMS reserves the right to review for approval any and all contracts and subcontracts and to require AMS prior approval of any such contracts.

When a board relies heavily on its industry trade association in carrying out its program, there must be highly effective ''fire walls'' between board activities and other activities of the trade association. These fire walls should include: (1) Completely separate accounting systems and thorough segregation of board funds from trade association funds, all of which should be audited each year by the board's independent CPA; (2) Careful computation and documentation of the trade association's overhead or indirect charges to the board, supported by strict recordkeeping; and (3) Strict policies on what the trade association may and may not do with checkoff funds.

Contract Compliance

Boards are responsible for ensuring compliance by the contractors and subcontractors with the terms of their contracts.

Diversity and Nominations

Diversity on Boards

It is USDA policy that membership on industry-governed boards and committees accurately reflect, to the extent practicable, the diversity of individuals served by the programs. Diversity includes the size of operation, segment of the industry, and geographical distribution as well as gender, ethnicity, race, and disability.

Nominations

To facilitate the nomination of individuals to serve as members of boards and nominating entities, AMS will work with the boards to establish time frames to seek to avoid bottlenecks in the clearance process within USDA. Boards are urged to provide, to the extent possible, statements to nominating entities that ''all nominees must be in good standing with Department of Agriculture programs.'' AMS will also include this statement in news releases and other publicity announcing nominations for boards and nominating entities.

Financial Accountability

Each board must maintain a comprehensive financial accounting system and must maintain and make available to USDA representatives, on request, all appropriate books and records.

Each board must prepare a comprehensive set of annual financial statements. These statements, which must be prepared in accordance with generally accepted accounting principles, should include:

(1) a balance sheet;

(2) a statement of revenues and expenses;

(3) a statement of changes in fund balance;

(4) a statement of cash flows;

(5) a schedule, showing the following in three columns and containing footnotes explaining any significant variances: (a) The USDA-approved budget (plan) by each major category; (b) The annual expenditures against each budget category (actual); and (c) and variances between planned and actual expenditures; and

(6) any other financial statements, schedules, or explanations as may be requested by the board or USDA to provide sufficient information for effective management, monitoring, or decision making.

Where refunds are applicable, the financial records should include all appropriate details on assessments paid, requests for refunds, and refunds issued.

Influencing Legislation or Government Policy or Action

In the process of monitoring board activities, it is important for AMS to be aware of any actions which may be in conflict with the legislative prohibitions regarding influencng legislative and/or government policy. This prohibition on the use of check-off funds applies equally to any trade/producer organizations funded wholly or in part by a particular board or contractors to the boards.

However, this does not affect a trade/producer organization's ability to lobby with non-check-off funds. Likewise, there are no restrictions on individual board members, except when acting in an official capacity for the board.

Influencing legislation is defined as (1) any attempt to influence any legislation or any attempt to affect the opinions of the general public or any segment thereof concerning legislation; or (2) any attempt to influence any legislation through communication with any member or employee of a legislative body or with any governmental official who may participate in the formulation of legislation.

Influencing of governmental policy or action is defined as any action the principal purpose of which is to bring about a change in existing policy or regulation or affect the outcome of proposed policy or regulation, except those actions which are specifically provided for in the act, order, and/or rules and regulations. *Exceptions:* With the approval of the Secretary, a board may request a ceremonial government action, such as the proclamation of a state or national month for the commodity it represents, and may provide information to USDA regarding government purchases of the commodity it represents.

These prohibitions do not preclude commodity boards from providing factual information to government officials, provided the information is presented in an unbiased manner and does not advocate a specific course of action.

AMS will require each board member to acknowledge in writing that the person understands the prohibition on using assessment funds for lobbying or attempting to influence legislation, government action or government policy, and agrees to act in accordance with that prohibition.

Other Government Agencies

AMS will be responsible for developing appropriate working relationships with other government agencies which have responsibilities related to these programs. For example, AMS will be responsible for ensuring close coordination with the FAS any time check-off funds are used for foreign activities. FAS has oversight responsibility of the Foreign Market Development and the Market Access Programs, and checkoff funding is made available to some participants in these FAS supervised programs. However, in all cases, FAS must have the opportunity to approve the boards' budgets, plans, and projects that focus on international activities. FAS approval will be subject to compliance with the checkoff legislation as well as other FAS requirements. Likewise, for programs with import assessment provisions, it is the responsibility of AMS to maintain a close liaison with

the U.S. Customs Service. Similarly, as required by section 1999T of the Food, Agriculture, Conservation, and Trade Act of 1990, AMS will consult with the United States Trade Representative on any proposed new or amended commodity promotion order which would assess imports.

Program Progress and Evaluation

AMS will receive copies of annual progress reports on program activities and expenditures.

Not less often than every five years, each board shall obtain an independent evaluation of the effectiveness of its generic promotion program. Each board shall submit to the Secretary and make available to the public the results of each periodic independent evaluation.

The methodology of the results must be credible, shareholder returns must be estimated, and the results must be presented in non-technical terms. Ideally, each board will commission econometric studies or other formal statistical models which would be subject to peer review. However, AMS recognizes differences in the availability of data and financial resources among the various boards. Therefore, other types of evaluation may also be used to meet the requirement to conduct periodic evaluations. Other types of evaluation include, but are not limited to, focus group interviews, Nielson and Gallup polls, National Eating Trend data, and supermarket scanning data. Boards which do not conduct econometric evaluations are required to submit their evaluation plans to AMS for review and comment.

Promotional and Educational Materials

AMS will review all plans and projects of commodity boards and approve those that are in compliance with the applicable legislative authority.

AMS will disapprove any advertising that it considers to be disparaging to another commodity or false and misleading. AMS will also disapprove any promotional material that it deems derogatory to individuals with respect to ethnicity, gender, race, physical abilities, or religion. The commodity programs may refer any questionable advertisements to the AMS Functional Committee on Research and Promotion Programs for review and for its recommendation.

Each board shall regularly provide to AMS all commodity promotional campaigns—advertising, consumer education programs, and other promotional materials for review and approval and the advertisements or printed materials generated in the campaign.

AMS review of nutritional claims will include verification of the supporting data to determine compliance with USDA Agricultural Handbook 8–1, the Dietary Guidelines for Americans, Federal Trade Commission policy, Food and Drug Administration food labeling regulations, and other applicable Federal regulations.

Referendum Policies

Bonds

AMS will require the proponent of a new program to post a bond or submit an irrevocable letter of credit to cover any up-front referendum and other implementation costs.

Influencing Voters

Boards, board members, and board employees acting in their official capacities are prohibited from attempting to influence voters, and no board funds may be expended for that purpose. Board funds may not be used to state a position for or against a referendum issue or a petition or to promote a ''yes'' or a ''no'' vote in a referendum.

During period of referenda, requests for referenda, polls, or any petition process, however, board funds may be used: (1) For communication activities to inform industry how checkoff dollars are being spent and (2) to provide unbiased factual information concerning the referendum, poll, or petition process. Board funds may also be used to encourage those covered by a program to exercise their right to vote.

Petitions for Referenda

All of the statutes provide some type of mechanism for industry to request a referendum to determine if an individual program should be terminated. The most common requirement is that the Secretary must hold a referendum at the request of 10 percent or more of the persons who are covered by the program.

Referendum Ballots

Unless another method is required by statute, AMS will conduct all referenda by mail ballot, fax, or electronic means (when proper safeguards are in place). Further, in order to facilitate the verification of voter eligibility and the validity of ballots cast in referenda, the voters' name, address, telephone number, and certification will not be separated from the vote. All referenda includes referenda on implementing, continuing, amending, suspending, or terminating national research and promotion programs.

Refunds for Programs Under the Generic Statute

When a new program is implemented with a delayed referendum and refunds of assessments are required if the industry votes to terminate the program:

(1) boards must disseminate procedures for receiving refunds to all persons subject to assessments under the program in a timely manner;

(2) boards, board members, and board employees may not exert pressure of any kind to discourage the application for refunds;

(3) the names of individuals applying for or obtaining refunds must be kept confidential and made available only to appropriate staff personnel; and

(4) refund information released will be limited to the aggregate dollar amount and the number of persons receiving refunds by State, region, or nationwide. No information may be released that would in any way readily identify individual persons or firms.

Appendix I—Industry-Specific Legislation

Legislation for Current Programs

Beef Promotion and Research Act (1985)
Cotton Research and Promotion Act (1996)
Dairy Production Stabilization Act (1983)
Egg Research and Consumer Information Act (1974)
Fluid Milk Promotion Act of 1990
Honey Research Promotion and Consumer Information Act of 1984)
Mushroom Promotion, Research and Consumer Information Act of 1990
Popcorn Promotion, Research, and Consumer Information Act of 1996
Pork Promotion, Research, and Consumer Information Act of 1985
Potato Research and Promotion Act (1971)
Soybean Promotion, Research, and Consumer Information Act of (1990)
Watermelon Research and Promotion Act (1985)

Other Legislation

Canola and Rapeseed Research, Promotion, and Consumer Information Act of (1996)
Floral Research and Consumer Information Act of (1981)
Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993
Lime Research, Promotion and Consumer Information Act of 1990
National Kiwifruit Research, Promotion, and Consumer Information Act (1996)
Pecan Promotion and Research Act of 1990
Sheep Promotion, Research and Information Act of 1994
Wheat and Wheat Foods Research and Nutrition Education Act (1977)

Dated: December 14, 1999.

Kathleen A. Merrigan,

Administrator, Agricultural Marketing Service.

[FR Doc. 99–32730 Filed 12–15–99; 12:00 pm]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Commodity Credit Corporation's intention to request an extension for and revision to a currently approved information collection in support of the Market Access Program.

DATES: Comments on this notice must be received by February 15, 2000 to be assured of consideration.

ADDITIONAL INFORMATION OR COMMENTS: Contact Denise Huttenlocker, Deputy Director, Marketing Operations Staff, Foreign Agricultural Service, U.S. Department of Agriculture, 14th and Independence Avenue, SW., Washington, DC 20250–1042, (202) 720–4327.

SUPPLEMENTARY INFORMATION:

Title: Market Access Program.

OMB Number: 0551–0227.

Expiration Date of Approval: April 30, 2000.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The primary objective of the Market Access Program is to encourage the development, maintenance, and expansion of commercial export markets for U.S. agricultural products through cost-share assistance to eligible trade organizations that implement a foreign market development program. Financial assistance under this program is made available on a competitive basis. Currently, there are more than 70 organizations participating directly in the program with activities in more than 100 countries. The Market Access Program is administered by personnel of the Foreign Agricultural Service (FAS).

Prior to initiating program activities, Participants must submit detailed applications to FAS which include country strategies, constraints, goals and benchmarks, proposed activities, estimated budgets, and performance measurements. Each Participant is also responsible for submitting: (1) Reimbursement claims for approved costs incurred in carrying out approved activities, (2) an end-of-year contribution report, (3) travel reports, and (4) program evaluations. Participants must maintain records on all information submitted to FAS. The information collection is used by FAS to manage, plan, evaluate and account for Government resources. The reports and records are required to ensure the proper and judicious use of public funds.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 24 hours per response.

Respondents: Non-profit organizations, state groups, cooperatives, and commercial entities.

Estimated Number of Respondents: 70.

Estimated Number of Responses per Respondent: 41.

Estimated Total Annual Burden on Respondents: 62,830.

Copies of this information collection can be obtained from Kimberly Chisley, the Agency Information Collection Coordinator, at (202) 720–2568.

Request for Comments

Send comments regarding the accuracy of the burden estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information, to:

Kent D. Sisson, Director, Marketing Operations Staff, U.S. Department of Agriculture, 14th and Independence Avenue, SW., STOP 1042, Washington, DC 20250–1042.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public records.

Signed at Washington, DC on December 8, 1999.

Timothy J. Galvin,

Administrator, Foreign Agricultural Service and Vice President, Commodity Credit Corporation.

[FR Doc. 99–32731 Filed 12–16–99; 8:45 am]

BILLING CODE 3410–01–M

DEPARTMENT OF AGRICULTURE

Cooperative State Research, Education, and Extension Service

Higher Education Challenge Grants Program for Fiscal Year 2000; Request for Proposals and Request for Input

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

ACTION: Notice of request for proposals and request for input.

SUMMARY: The Cooperative State Research, Education, and Extension Service (CSREES) is announcing the Higher Education Challenge Grants Program for Fiscal Year (FY) 2000. Proposals are hereby requested from eligible institutions as identified herein for competitive consideration of Challenge Grant awards. CSREES also is soliciting comments regarding this request for proposals from any interested party. These comments will be considered in the development of the next request for proposals for this program. Such comments will be forwarded to the Secretary or his designee for use in meeting the requirements of section 103(c)(2) of the Agricultural Research, Extension, and Education Reform Act of 1998.

DATES: Proposals must be received on or before February 14, 2000. Proposals received after the closing date will not be considered for funding. Forms indicating intent to submit a proposal are due on January 17, 2000. User comments are requested within six months from the issuance of the request for proposals. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Hand-delivered proposals (brought in person by the applicant or through a courier service) must be received on or before March 6, 2000, at the following address: Challenge Grants Program; c/o Proposal Services Unit; Office of Extramural Programs; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture, Room 303, Aerospace Center, 901 D Street, SW; Washington, DC 20024. The telephone number is (202) 401–5048. Proposals transmitted via a facsimile (fax) machine will not be accepted.

Proposals submitted through the U.S. mail must be received on or before February 14, 2000. Proposals submitted through the U.S. mail should be sent to the following address: Challenge Grants Program; c/o Proposal Services Unit, Office of Extramural Programs, Cooperative State Research, Education, and Extension Service, U.S. Department of Agriculture, STOP 2245, 1400 Independence Avenue, SW, Washington, DC 20250–2245.

Form CSREES–711, ''Intent to Submit a Proposal,'' is requested for the Higher Education Challenge Grants Program and is due February 7, 2000. Applicants may either mail Form CSREES–711 to Higher Education Programs, Mail Stop 2251; CSREES–USDA, 1400 Independence Avenue, S.W., Washington, DC 20250–2251, or fax Form CSREES–711 to the Higher Education Programs office at (202) 720–2030.

Written user comments should be submitted by first-class mail to: Policy and Program Liaison Staff, Office of Extramural Programs, USDA–CSREES, STOP 2299; 1400 Independence Avenue, SW, Washington, DC 20250–2299; or via e-mail to: RFP–OEP@reeusda.gov. In your comments, please include the name of the program and the fiscal year of the request for proposals to which you are responding.

FOR FURTHER INFORMATION CONTACT: Jeffrey L. Gilmore, Ph.D., Higher Education Programs, Cooperative State Research, Education, and Extension Service, U.S. Department of Agriculture, STOP 2251, 1400 Independence Avenue, SW, Washington, DC 20250–2251; telephone: (202) 720–2211; e-mail: jgilmore@reeusda.gov.

SUPPLEMENTARY INFORMATION:

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A. Administrative Provisions and Legislative Authority

This Program is subject to the provisions found at 7 CFR Part 3405. These provisions set forth procedures to be followed when submitting grant proposals, rules governing the evaluation of proposals and the awarding of grants, and regulations relating to the post-award administration of grant projects.

This program is authorized by section 1417(b)(1) of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (NARETPA) (7 U.S.C. 3152(b)(1)).

B. Program Description

Proposals may be submitted by land-grant and other U.S. colleges and universities offering a baccalaureate degree or first professional degree in at least one discipline or area of the food and agricultural sciences and having a demonstrable capacity for, and a significant ongoing commitment to, the teaching of food and agricultural sciences generally and to the specific need and/or subject area(s) for which a grant is requested. For FY 2000, grants will be made to U.S. colleges and universities to strengthen their baccalaureate-level teaching programs in the food and agricultural sciences. Proposals directed to the first professional degree in veterinary medicine also are requested for this program. Other projects directed to the graduate level of study will not be supported. An institution eligible under this program includes a research foundation maintained by an eligible college or university. For the purposes of this program, the individual branches of a State university system or public system of higher education, that are separately accredited at the college level as degree granting institutions, are treated as separate institutions. It is intended that projects supported by the program will: (1) Address a State, regional, national, or international educational need; (2) involve a creative or nontraditional approach toward addressing that need which can serve as a model to others; (3) encourage and facilitate better working relationships in the university science and education community, as well as between universities and the private sector, to enhance program quality and supplement available resources; and (4) result in benefits which will likely transcend the project duration and USDA support.

CSREES anticipates that the total amount available for project grants under this program in FY 2000 will be approximately $4,082,000. Projects may be for 18–36 months duration. Grant awards must be matched on a one-for-one basis from a non-Federal source(s). Awards may be up to $100,000 for regular or complementary projects, and up to $250,000 for a joint project. (Please refer to the Administrative Provisions at 7 CFR 3405.2 for the definitions of complementary and joint project proposals.)

Pursuant to section 1462 of NARETPA, 7 U.S.C. 3310, indirect costs charged against a grant award under this program may not exceed 19 percent of the total Federal funds provided under the award. An alternate method to calculate this limit is to multiply total direct costs by 23.456 percent.

For FY 2000, a maximum of two grants may be awarded to any one institution under the Higher Education Challenge Grants Program. This ceiling excludes any subcontracts awarded to an institution pursuant to other grants issued under this program. In FY 2000, there are no limits on the total funds that may be awarded to any one institution. The award of any grants under this program is subject to the availability of appropriations.

The Administrative Provisions require applicant institutions receiving grant awards for joint project proposals to transfer at least one-half of the awarded funds to the two or more other colleges, universities, community colleges, or other institutions assuming a major role in the conduct of the project. For FY 2000, the applicant institution submitting a joint project proposal must retain at least 30 percent of awarded funds to demonstrate a substantial involvement with the project.

For a joint project proposal, each cooperating institution also must provide a project budget for each year of support under the grant as well as a summary budget using Form CSREES–713.

Proposals for FY 2000 must address one or more of the following targeted need areas: (1) Curricula Design and Materials Development; (2) Faculty Preparation and Enhancement for Teaching; (3) Instruction Delivery Systems; and (4) Student Experiential Learning.

C. Evaluation Criteria

NARETPA requires that certain priorities be given for teaching enhancement projects in awarding grants under section 1417(b). CSREES considers all applications received in response to this solicitation as teaching enhancement project applications. To implement the NARETPA priorities for proposals submitted for the FY 2000 competition, the evaluation criteria used to evaluate proposals, as stated in the Administrative Provisions (7 CFR 3405.15), have been modified to include new criteria or extra points for proposals demonstrating enhanced coordination among eligible institutions and for proposals focusing on innovative, multidisciplinary education programs, material, or curricula.

Evaluation Criterion andWeight

(a) Potential for addressing a State, regional, national or international need: 65 points.

This criterion assesses the potential of the project to add value by advancing the quality of food and agricultural sciences higher education and producing graduates capable of strengthening the Nation's food and agricultural scientific and professional work force. This criterion includes the following elements: impact, innovation, multidisciplinary, expected products and results, and continuation plans.

(1) Impact—Does the project address a significant and clearly documented State, regional, multistate, national, or international need? Will the benefits to be derived from the project transcend the applicant institution and/or the grant period?

(2) Innovative and Multidisciplinary Focus—Does the project focus on innovative, multidisciplinary education programs, material, or curricula? Is the project based on a non-traditional approach toward solving a higher

education problem? Is the project relevant to multiple fields in the food and agricultural sciences? Will the project expand partnership ventures among disciplines at a university?

(3) Products and results—Are the expected products and/or results of the project clearly explained? Will the project contribute to an improvement in the quality or diversity of the Nation's food and agricultural scientific and professional expertise base?

(4) Continuation plans—Are there plans for continuation or expansion of the project beyond USDA support? Are there indications of external, non-Federal support? Are there realistic plans for making the project self-supporting?

(b) Potential of submitting institution(s) to successfully complete project objectives: 70 points.

This criterion assesses the soundness of the proposed approach, the adequacy of human and physical resources available to carry out the project, the institution's commitment to the project, partnerships and collaborative efforts involving all types of institutions, its cost-effectiveness, and the extent to which the total budget adequately supports the project.

(1) Proposed approach—Are the objectives achievable, logical, and based on review of literature? Is the plan of operation managerially, educationally, and/or scientifically sound? Is the overall plan integrated with or does it expand upon other major efforts to improve the quality of food and agricultural sciences higher education? Is the timetable realistic?

(2) Resources—Are there adequate institutional resources to carry out the project? Do the project personnel possess requisite expertise to complete successfully the project? Have personnel committed adequate effort to achieve stated objectives and anticipated outcomes? Will the project have adequate administrative support to carry out the proposed activities? Will the project have access to needed resources such as instrumentation, facilities, computer services, library, and other instruction support resources?

(3) Institutional commitment—Is there evidence to substantiate that the institution has a long term commitment to support the result(s) and/or product(s) produced by this project, that it will help satisfy the institution's high-priority objectives, or that the project is supported by the strategic plans?

(4) Coordination and partnership efforts—Will the project demonstrate enhanced coordination between the applicant institution(s) and other colleges and universities with food and agricultural sciences programs eligible for grants under this program? Will the project expand partnership ventures among eligible colleges and universities, or with the private sector, that are likely to enhance program quality or supplement resources available to food and agricultural sciences higher education? Will the arrangements for partner(s) and/or collaborator(s) enhance dissemination of the result(s) and/or product(s)?

(5) Budget and cost-effectiveness—Is the budget request justifiable? Are costs reasonable and necessary? Will the total budget be adequate to carry out project activities? Are the source(s) and amount(s) of non-Federal matching support clearly identified and appropriately documented? For a joint project proposal, is the shared budget for three or more institutions explained clearly and in sufficient detail? Is the proposed project cost-effective? Does it demonstrate a creative use of limited resources, maximize educational value per dollar of USDA support, achieve economies of scale, leverage additional funds or have the potential to do so, focus expertise and activity on a targeted need area, or promote coalition building for current or future ventures?

(c) Effectiveness of evaluation plan and potential for dissemination of the result(s) and/or product(s) to other institutions and for utilization by other institutions: 65 points.

This criterion assesses the adequacy of the evaluation strategy, the quality of outcome measures, the expertise and availability of human resources to conduct the evaluation, the record of the key personnel is disseminating advancements in education, e.g., publishing educational articles in peer reviewed journals, the adequacy of the plan for dissemination, and the potential for utilization by other institutions.

(1) Evaluation—Does the proposal contain a well-designed plan to evaluate results of the project? Will this plan provide conclusions suitable for convincing a peer review audience of the accomplishment? Does it allow for continuous and/or frequent feedback during the life of the project? Does the evaluation plan contain outcome measures? Are the outcome measures capable of assessing the quality and usefulness of project results and products? Are the individuals involved in project evaluation skilled in evaluation strategies and procedures? Can the outcome measures provide an objective evaluation? Is the outcome assessment designed in such a way that it can assist faculty at other institutions in deciding whether to use project results or products?

(2) Dissemination—Is there a commitment to submit the results of the project evaluation to peer review by the academic community in the food and agricultural sciences? Does the proposed project include clearly outlined and realistic mechanisms that will lead to widespread dissemination of project results, including national electronic communication systems, publications, presentations at professional conferences, and/or use by faculty development or research/teaching skills workshops?

(3) Utilization—Is it probable that other institutions will adapt the result(s) and/or product(s) of this project for their own use? Can the project serve as a model for others? If successful, is the project likely to lead to education reform? Is the product(s) and/or result(s) likely to provide a significant contribution to the advancement of higher education in the food and agricultural sciences? Are partner(s) and/or collaborator(s) committed to utilize the product(s) and/or result(s)?

D. How to Obtain Application Materials

An Application Kit containing program application materials will be made available to eligible institutions upon request. These materials include the Administrative Provisions, forms, instructions, and other relevant information needed to prepare and submit grant applications. Copies of the Application Kit may be requested from the Proposal Services Unit, Office of Extramural Programs, Cooperative State Research, Education, and Extension Service, U.S. Department of Agriculture, STOP 2245; 1400 Independence Avenue, SW, Washington, DC 20250–2245. The telephone number is (202) 401–5048. When contacting the Proposal Services Unit, please indicate that you are requesting forms for the FY 2000 Challenge Grants Program.

Application materials may also be requested via Internet by sending a message with your name, mailing address (not e-mail) and telephone number to psb@reeusda.gov that states that you wish to receive a copy of the application materials for the FY 2000 Challenge Grants Program. The materials will then be mailed to you (not e-mailed) as quickly as possible.

E. Submission of a Proposal

An original and seven (7) copies of a proposal must be submitted. Proposals should contain all requested information when submitted. Further information regarding proposal submission is provided in the Program

Announcement in the FY 2000 Application Kit.

F. Catalog of Federal Domestic Assistance

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.217, Higher Education Challenge Grants Program.

G. Stakeholder Input

CSREES is soliciting comments regarding this solicitation of applications from any interested party. These comments will be considered in the development of the next request for proposals for the program. Such comments will be forwarded to the Secretary or his designee for use in meeting the requirements of section 103(c)(2) of the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. 7613(c)(2)). Written comments should be submitted by first-class mail to: Policy and Program Liaison Staff, Office of Extramural Programs, USDA–CSREES; STOP 2299, 1400 Independence Avenue, SW., Washington, DC 20250–2299; or via e-mail to: RFP–OEP@reeusda.gov. (This e-mail address is intended only for receiving stakeholder input comments regarding this RFP, and not for requesting information or forms.)

In your comments, please indicate that you are responding to the FY 2000 Higher Education Challenge Grants Program. Submissions of comments are requested within six months from the issuance of the solicitation of applications. Comments received after that date will be considered to the extent practicable.

Done at Washington, D.C., this 10th day of December 1999.

Charles W. Laughlin,

Administrator, Cooperative State Research, Education, and Extension Service.

[FR Doc. 99–32732 Filed 12–16–99; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 99–052N]

Equivalence Evaluation Process for Foreign Meat and Poultry Food Regulatory Systems; Response to Comments

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice, response to comments.

SUMMARY: The Food Safety and Inspection Service (FSIS) published a notice in the **Federal Register** of March 12, 1999 (64 F.R. 12281) announcing the availability of a document that describes the Agency's process for evaluating foreign meat and poultry inspection systems to determine whether they are equivalent to the United States' inspection system. FSIS solicited public comments on this document and held a public meeting on April 14, 1999, to discuss the equivalence evaluation process. The comment period ended May 11, 1999. This notice responds to the comments received from the public.

ADDRESSES: Copies of the comments are available from the FSIS Docket Clerk, Room 102 Cotton Annex, 300 12th Street, SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Mr. Clark Danford, Acting Director, International Policy Division; Office of Policy, Program Development, and Evaluation; (202) 720–6400, or by electronic mail to clark.danford@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The equivalence concept was introduced in the Agreement on the Application of Sanitary and Phytosanitary Measures (the ''SPS Agreement''), which appears in the Final Act of the Uruguay Round of Multilateral Trade Negotiations signed in Marrakech on April 15, 1994. The SPS Agreement became effective in January 1995, concurrently with establishment of the World Trade Organization (WTO), which superseded the General Agreement on Tariffs and Trade (GATT) as the umbrella organization for international trade. The United States is a signatory to the SPS Agreement and is a member of the WTO.

Under Article 4 of the SPS Agreement, an importing member nation must accept an exporting member's SPS measures as equivalent to its own measures if the exporting member has objectively demonstrated that its measures achieve the importing member's appropriate level of sanitary or phytosanitary protection (ALOP). In other words, each member nation of the WTO, including the United States, must accept as equivalent to its own food regulatory system the food regulatory system of another member that has been demonstrated to furnish the same level of public health protection. However, the burden of demonstrating equivalence is on the exporting country.

Equivalent regulatory systems need not be identical. The specific SPS measures applied by an exporting nation may differ from those required by an importing nation. On the other hand, though WTO members are encouraged to adopt international food standards in order to ''harmonize'' the world's food regulatory systems and facilitate trade, an importing country has the right to decide whether a food regulatory system employed by an exporting country is equivalent to its own or is adequate to achieve the importing country's appropriate level of sanitary or phytosanitary protection. The importing country also has the right to decide whether the evidence provided to demonstrate equivalence is adequate.

FSIS Equivalence Evaluation Process

FSIS has developed a process for evaluating whether a foreign country's meat and poultry food regulatory system and specific sanitary measures are equivalent to the U.S. system and measures. This process is described in a January 1999 document entitled ''FSIS Process for Evaluating the Equivalence of Foreign Meat and Poultry Regulatory Systems'' (hereafter cited as ''FSIS Process''). Copies of this document are available at the location indicated above in **ADDRESSES.** An electronic copy may be found at the following Internet address www.fsis.usda.gov/oa/news/equiv.htm.

FSIS published a notice in the **Federal Register** of March 12, 1999 (64 F.R. 12281) announcing the availability of this document and soliciting public comments. The Agency also held a public meeting on April 14, 1999, to discuss the equivalence evaluation process. FSIS announced that the comments received would be the basis for further development of this Agency's equivalence evaluation process. The substance of those comments and FSIS responses follows.

Response to Comments

The **Federal Register** notice comment period closed on May 11, 1999. Four organizations commented. Following is a summary of themes presented in the public comments and responses from FSIS.

One commenter expressed support for the FSIS equivalence evaluation process with a caveat that prior notification of which establishments FSIS will visit during a system audit allows establishments to alter their processes and procedures in preparation for the visit and to revert to ''normal'' operations thereafter. This commenter recommended that establishment audits be unannounced.

FSIS responds that foreign inspection system audits are, by necessity, cooperative events. For example, FSIS must first request permission from a

foreign government to visit the country and conduct an audit. FSIS is obliged to provide a proposed itinerary with its request. This is necessary, in part, because FSIS is a guest in the foreign country and is escorted from place to place by foreign officials. The same process is applied in the United States when a foreign government asks to visit U.S. establishments. Additionally, the U.S. system of prior notification is modeled on draft Codex guidelines titled ''Draft Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems'' which have been advanced to Step 8 of the approval procedure (ALINORM 97/30A, Appendix II, Annex).

A second commenter emphasized the necessity for a ''level playing field'' in that inspection procedures in countries that export to the United States must be as effective as U.S. domestic programs. This commenter found the ''FSIS Process'' document to accurately portray SPS Agreement principles and applauded FSIS for being ''out front'' in international equivalence implementation. The commenter said that, while the document analysis portion of this process is important, the challenge is to verify foreign inspection systems and individual sanitary measures by on-site audits. The commenter noted that during times of budget stress FSIS managers may be tempted to cut back on system audits to less often than once a year. The commenter stated that this must not happen—that FSIS is obligated to conduct system audits at least annually in all exporting countries and share the results quarterly with public stakeholders. In a related matter, the commenter believed that the ''FSIS Process'' section on Initial System Equivalence did not clearly state what initial audits evaluate and requested further clarification. Finally, this commenter said that reference to animal disease issues should be lifted from footnote 1 and included in the body of the document to emphasize the important coordination between FSIS and the Animal and Plant Health Inspection Service on applications for eligibility.

FSIS responds with a pledge that budget priority will be given to support annual system audits in all exporting countries. With regard to what FSIS evaluates during initial audits of foreign inspections systems, these criteria are regulatory and set forth in 9 CFR 327.2, Eligibility of foreign countries for importation of products into the United States. The same criteria apply to poultry importation and appear at 9 CFR 381.196. The next version of ''FSIS Process'' will incorporate a summary of these criteria. Additionally, the Agency will incorporate most of the editorial changes suggested by this commenter in the next revision of ''FSIS Process,'' which will be made in the Spring of 2000 and posted on the FSIS homepage. At that time FSIS will also begin posting foreign inspection system audit results on the FSIS homepage.

A third commenter noted that FSIS has appropriately recognized the U.S. commitment to equivalence under the SPS Agreement and said that the ''FSIS Process'' document affirms that commitment. The commenter stated that the principles of equivalence will help to enhance food safety globally as other nations strive to attain the U.S. level of protection necessary for market access. The commenter commended FSIS for consistency with Codex work, stating that it is appropriate to incorporate Codex guidelines within U.S. standards where suitable. The commenter also voiced support for the concept of Food Safety Objective (FSO) as a bridge to describe how sanitary measures attain an importing country's level of protection. The commenter noted that ''FSIS Process'' contains an excellent description of FSO work underway in Codex and generally praised the transparent manner that FSIS is proceeding with its equivalence evaluation process. However, this commenter also advised that some aspects of ''FSIS Process'' needed improvement. For example, the commenter did not find the process document adequate to provide sufficient operational guidance to assist the United States' trading partners in the submission of an equivalence request. The commenter recommended that FSIS add to ''FSIS Process'' the detailed information it presented at the April 14 public meeting. Several editing changes were also suggested in other portions of the ''FSIS Process'' document.

FSIS responds that this commenter's suggestions for a revision of ''FSIS Process'' were thoughtful and useful. The next revision of ''FSIS Process'' will include the material suggested by the commenter, including guidance on information that should be included in an equivalence request.

A fourth commenter found considerable fault with the ''FSIS Process'' document. This commenter stated that FSIS should correct misstatements in ''FSIS Process'' that assert the equivalence of all countries that now export to the U.S. because FSIS has not verified that all of these countries have implemented equivalent PR/HACCP sanitary measures. The commenter recommended that FSIS amend its regulations to provide for public participation in all determinations of foreign inspection system equivalence. This commenter also said that FSIS should correct a misstatement in ''FSIS Process'' that asserts that a country can set any level of protection it deems appropriate because, under SPS, the level of protection must be based on scientific evidence of risk.

FSIS responds that every country presently eligible to export meat or poultry products to the United States has a food inspection system that is equivalent to the FSIS domestic inspection system. This agency is committed to protecting the health of U.S. consumers, and it will continue to make every effort to ensure that meat, poultry, and egg products imported into the United States are as safe as products produced in this country.

Prior to the World Trade Organization (WTO) Agreement on Sanitary and Phytosanitary measures (commonly referred to as the ''SPS Agreement''), FSIS evaluated foreign food regulatory systems under provisions in U.S. inspection laws that required programs to be ''at least equal to'' the U.S. system. The eligibility of countries to export meat or poultry to the United States was initially evaluated through analysis of applications followed by on-site audits. When the SPS Agreement was ratified in 1994, all ''at least equal to'' countries that were eligible to export meat or poultry to the United States were automatically judged to be ''equivalent.''

The SPS Agreement obliges the United States to respond to requests by other contracting parties to determine whether specified meat and poultry processing sanitary measures are equivalent to those of the United States. Alternative sanitary measures may be raised independently by exporting countries in the form of proposed foreign inspection system changes, or they may be offered in response to new U.S. import requirements.

All alternative sanitary measures are evaluated by FSIS against two generic criteria:

(1) Does the alternative sanitary measure comport with USDA regulatory requirements for the import of meat and poultry products to the United States? and (2) Does the alternative sanitary measure afford American consumers the same level of public health protection as is provided by USDA domestic measures?

Each of the thirty-six countries that are presently permitted to export meat or poultry products to the United States

has a food regulatory system that FSIS has determined to be equivalent to the US inspection system. From this baseline of equivalence, FSIS has sought to ensure that equivalence is maintained. For example, when FSIS implements new sanitary measures domestically-such as the Pathogen Reduction/HACCP final rule-notice is given to each exporting country that the new measures must be adopted by the foreign food regulatory system in either the same way or in an equivalent manner. Exporting countries are asked first to provide FSIS written assurance that the new requirement will be implemented and second to submit documentary evidence to support equivalence. FSIS reviews this documentation on a country-by-country basis and makes a determination of whether the foreign country's measure appears to be equivalent. During the next on-site foreign inspection system audit, the implementation of that measure is verified.

There is no reason to stop trade with exporting countries while the document analysis and verification process is underway. Consumers are fully protected because FSIS will interrupt trade in three circumstances. One is where an emergency sanitary measure is implemented by FSIS to address a hazard that is so severe that no product can enter the marketplace from a foreign establishment until the control is in place. The second is where an exporting country does not provide satisfactory documentary evidence of an equivalent sanitary measure. The third is where a system audit reveals that an exporting country is not implementing a sanitary measure in the manner that FSIS initially determined to be equivalent.

In the case of FSIS' Pathogen Reduction/HACCP sanitary measures, the first circumstance does not apply because none of the requirements are of an emergency nature. Thus, FSIS has proceeded to evaluate from each exporting country documentation that explains the country's method of implementing PR/HACCP sanitary measures. On-site verification is proceeding as well.

FSIS has sought public participation in the equivalence verification process through the publication of ''FSIS Process'' along with the public meeting held on April 14, 1999, and this **Federal Register** notice. FSIS will provide for additional participation periodically about foreign inspection system equivalence verification audit results, port-of-entry reinspection results, and other notices of significant events regarding equivalence. In particular, FSIS will host a public meeting on December 14, 1999, to report completion of document analyses to evaluate the equivalence of foreign countries with USDA's Pathogen Reduction/HACCP final rule requirements. For further information, see FSIS Notice 99–051N, dated November 24, 1999 [64 FR 66164].

A central purpose of ''FSIS Process'' is to apprise the public of how FSIS is carrying out the day-to-day business of equivalence evaluations. FSIS believes that all routine equivalence determinations are being made in a sound and wholly transparent manner.

In the case of a new application for eligibility, FSIS generally begins with little or no knowledge of the foreign food regulatory system. After extensive document analysis and an onsite system audit, FSIS notifies the public of an impending equivalence determination and allows time for comment. This process provides maximum assurance that a new exporting country is equivalent.

Once the initial equivalence determination is made, FSIS follows the procedures set forth in ''FSIS Process'' to ensure that equivalence is maintained. FSIS pledges to conduct its equivalence activities in a fully transparent manner and will continue to advise and involve the public in its equivalence work.

FSIS attempted in its ''FSIS Process'' document to explain ''level of protection'' (LOP) by using a quote from the Administrative Action Statement accompanying ''The Uruguay Round Agreements Act,'' (P.L. 103–465; December 8, 1994), as follows:

''The [SPS] Agreement explicitly affirms the right of each government to choose its levels of protection, including a 'zero risk' level if it so chooses. A government may establish its levels of protection by any means available under its law, including by referendum. In the end, the choice of the appropriate level of protection is a societal value judgment. The Agreement imposes no requirement to establish a scientific basis for the chosen level of protection because the choice is not a scientific judgment.'' [Administrative Action Statement accompanying ''The Uruguay Round Agreements Act,'' (P.L. 103–465; December 8, 1994); at A.3. House Report No. 103–826 (II) accompanying H.R. 5110.]

This statement describes significant administrative actions proposed to implement the Uruguay Round Agreements. It represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements, both for purposes of U.S. international obligations and domestic law. Since this Statement was approved by the Congress at the time it implemented the Uruguay Round agreements, the interpretations of those agreements in this statement carry particular authority.

The SPS Agreement defines appropriate level of protection as follows: ''Appropriate level of sanitary or phytosanitary protection-The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory. NOTE: Many Members otherwise refer to this concept as the 'acceptable level of risk.' ''

Article 2 sets forth a requirement that *sanitary measures* (not LOP) employed to meet an importing country's appropriate level of protection must be based on ''scientific principles.'' Additionally, Article 5 requires that *sanitary measures* (not LOP) be based on ''an assessment, as appropriate to the circumstances, of the risks to human * * * health.''

Neither provision limits a country's right to set its *level of protection* at any point it deems appropriate because that decision is a societal value judgment, not a scientific conclusion. For example, an importing country may decide that its tolerance for a particular ''hazard'' in meat products is zero and put in place sanitary measures designed to achieve zero risk. Where science does enter this equation is that the hazard must actually exist and be scientifically supported. Specifically, an importing country could not ban a substance in meat under the zero risk criterion if there is no scientific evidence that the substance qualifies as a hazard to human health. That would be a ''disguised restriction on international trade'' which is prohibited by Article 5.5 of the SPS Agreement.

FSIS is pleased with the overall acceptance of its equivalence evaluation process and is committed to a continuation of the open and transparent manner in which we have conducted our equivalence activities.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce and provide copies of this **Federal Register** publication in the *FSIS Constituent Update.* FSIS provides a weekly *FSIS Constituent Update,* which is communicated via fax to over 300

organizations and individuals. In addition, the update is available on line through the FSIS web page located at http://www.fsis.usda.gov. The update is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/stakeholders. The constituent fax list consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals that have requested to be included. Through these various channels, FSIS is able to provide information to a much broader, more diverse audience than would otherwise be possible. For more information or to be added to the constituent fax list, fax your request to the Congressional and Public Affairs Office, at (202) 720–5704.

Done at Washington, DC on: December 8, 1999.

Thomas J. Billy,

Administrator.

[FR Doc. 99–32551 Filed 12–16–99; 8:45 am]

BILLING CODE 3460–DM–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service in Alabama

Notice of Proposed Change to Section IV of the Field Office Technical Guide (FOTG) of the Natural Resources Conservation Service in Alabama

AGENCY: Natural Resources Conservation Service (NRCS) in Alabama, U.S. Department of Agriculture.

ACTION: Notice of availability of proposed changes in Section IV of the FOTG of the NRCS in Alabama for review and comment.

SUMMARY: It is the intention of NRCS in Alabama to issue conservation practice standards: Constructed Wetland—(Code 656).

DATES: Comments will be received until January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Inquire in writing to Robert N. Jones, Acting State Conservationist, Natural Resources Conservation Service (NRCS), 3381 Skyway Drive, P.O. Box 311, Auburn, AL 36830. Copies of the practice standards will be made available upon written request.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that revisions made after enactment of the law to NRCS State technical guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days the NRCS in Alabama will receive comments relative to the proposed changes. Following that period a determination will be made by the NRCS in Alabama regarding disposition of those comments and a final determination of change will be made.

Dated: December 3, 1999.

J.B. Chaffin,

Assistant State Conservationist, Natural Resources Conservation Service, Auburn, Alabama.

[FR Doc. 99–32493 Filed 12–16–99; 8:45 am]

BILLING CODE 3410–16–M

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Municipal Interest Rates for the First Quarter of 2000

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of municipal interest rates on advances from insured electric loans for the first quarter of 2000.

SUMMARY: The Rural Utilities Service hereby announces the interest rates for advances on municipal rate loans with interest rate terms beginning during the first calendar quarter of 2000.

DATES: These interest rates are effective for interest rate terms that commence during the period beginning January 1, 2000, and ending March 31, 2000.

FOR FURTHER INFORMATION CONTACT: Carolyn Dotson, Loan Funds Control Assistant, U.S. Department of Agriculture, Rural Utilities Service, Room 0227–S, Stop 1524, 1400 Independence Avenue, SW, Washington, DC 20250–1500. Telephone: 202–720–1928. FAX: 202–690–2268. E-mail: CDotson@rus.usda.gov.

SUPPLEMENTARY INFORMATION: The Rural Utilities Service (RUS) hereby announces the interest rates on advances made during the first calendar quarter of 2000 for municipal rate electric loans. RUS regulations at § 1714.4 state that each advance of funds on a municipal rate loan shall bear interest at a single rate for each interest rate term. Pursuant to § 1714.5, the interest rates on these advances are based on indexes published in the ''Bond Buyer'' for the four weeks prior to the fourth Friday of the last month before the beginning of the quarter. The rate for interest rate terms of 20 years or longer is the average of the 20 year rates published in the Bond Buyer in the four weeks specified in § 1714.5(d). The rate for terms of less than 20 years is the average of the rates published in the Bond Buyer for the same four weeks in the table of ''Municipal Market Data—General Obligation Yields'' or the successor to this table. No interest rate may exceed the interest rate for Water and Waste Disposal loans.

The table of Municipal Market Data includes only rates for securities maturing in 2000 and at 5 year intervals thereafter. The rates published by RUS reflect the average rates for the years shown in the Municipal Market Data table. Rates for interest rate terms ending in intervening years are a linear interpolation based the average of the rates published in the Bond Buyer. All rates are adjusted to the nearest one-eighth of one percent (0.125 percent) as required under § 1714.5(a). The market interest rate on Water and Waste Disposal loans for this quarter is 5.750 percent.

In accordance with § 1714.5, the interest rates are established as shown in the following table for all interest rate terms that begin at any time during the first calendar quarter of 2000.

Interest rate term ends in (year)	RUS rate (0.000 percent)
2021 or later	5.750
2020	5.750
2019	5.750
2018	5.750
2017	5.625
2016	5.625
2015	5.500
2014	5.375
2013	5.375
2012	5.250
2011	5.125
2010	5.000
2009	5.000
2008	4.875
2007	4.750
2006	4.750
2005	4.625
2004	4.375
2003	4.250
2002	4.000
2001	3.875

Dated: December 10, 1999.

Christopher A. McLean,

Acting Administrator, Rural Utilities Service.

[FR Doc. 99–32733 Filed 12–16–99; 8:45 am]

BILLING CODE 3410–15–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and Deletions from 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, and to delete commodities and a service previously furnished by such agencies.

COMMENTS MUST BE RECEIVED ON OR BEFORE: January 18, 2000.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, Virginia 22202–4302.

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.

Additions

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 will result in authorizing small entities to furnish the commodities and services to the Government.

3. 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

Kit, Computer Maintenance
7035–01–452–9086
7045–01–315–0850
7045–01–450–8599
NPA: North Central Sight Services, Inc., Williamsport, Pennsylvania

Services

Food Service Attendant

Fort Drum, New York
NPA: Jefferson County Chapter, NYSARC, Watertown, New York

Grounds Maintenance

U.S. Dept. of the Interior, National Park Service, Golden Gate National Recreation Area, Fort Mason, San Francisco, California
NPA: Recreation Center for the Handicapped, Inc., San Francisco, California

Janitorial/Custodial

U.S. Merchant Marine Academy, Kings Point, New York
NPA: The Corporate Source, Inc., New York, New York
Kingsville Naval Air Station, Kingsville, Texas
NPA: The RC Foundation, Corpus Christi, Texas

Mailing Services

Centers for Disease Control and Prevention, National Center for Infectious Diseases, Atlanta, Georgia
NPA: Nobis Enterprises, Inc., Marietta, Georgia

Deletions

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.

2. The action will result in authorizing small entities to furnish the commodities and services to the Government.

3. 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 deletion from the Procurement List.

The following commodities and service have been proposed for deletion from the Procurement List:

Commodities

Paper, Tabulating Machine
7530–00–249–4847
7530–00–057–9487

Services

Base Supply Center, Fort McClellan, Alabama.

G. John Heyer,
General Counsel.

[FR Doc. 99–32742 Filed 12–16–99; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List commodities previously furnished by such agencies.

EFFECTIVE DATE: January 18, 2000.

ADDRESS: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, Virginia 22202–4302.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: On October 22 and 29, and November 5, 1999, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (64 FR 57031, 58378 and 60407) of proposed additions to and deletions from the Procurement List:

Additions

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the 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 services to the Government.

2. The action will not have a severe economic impact on current contractors for the services.

3. The action will result in authorizing small entities to furnish the 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 services proposed for addition to the Procurement List.

Accordingly, the following services are hereby added to the Procurement List:

Administrative Services

U.S. Army Corps of Engineers, New England District, 696 Virginia Road, Concord, Massachusetts

Administrative Services

Puget Sound Area, Navy Region Northwest, Bremerton, Washington

Administrative/General Support Services

Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Cumberland, Maryland

Base Supply Center and Operation of Individual Equipment Element Store, Grand Forks Air Force Base, North Dakota

Management Services

U.S. Department of Housing and Urban Development, 611 W. Sixth Street, Los Angeles, California

U.S. Department of Housing and Urban Development, 450 Golden Gate Avenue, San Francisco, California

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.

Deletions

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 may not result in any additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action will not have a severe economic impact on future contractors for the commodities.

3. The action may result in authorizing small entities to furnish the commodities 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 deleted from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the commodities listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Accordingly, the following commodities are hereby deleted from the Procurement List:

Fasteners, Fence Post
5660–00–148–7251

Stay, Fence
5660–00–943–9927
5660–00–904–8023
5660–00–607–0286
5660–00–607–0287

Water Bag, Nylon Duck
8465–01–185–5511

G. John Heyer,

General Counsel.

[FR Doc. 99–32743 Filed 12–16–99; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[I.D. 120999H]

Availability of a Draft Environmental Impact Statement and Receipt of an Application for an Incidental Take Permit Submitted by Plum Creek Timberlands, L.P., (and its partners Plum Creek Timber Company, Inc. and Plum Creek Timber I L.L.C.), Plum Creek Marketing Inc., Plum Creek Land Company, Plum Creek Northwest Lumber, Inc., Plum Creek Northwest Plywood, Inc., and Plum Creek MDF, Inc., for Lands in Montana, Idaho, and Washington

AGENCIES: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce; Fish and Wildlife Service (FWS), Interior.

ACTION: Notice of application and availability for public comment.

SUMMARY: This notice advises the public that Plum Creek Timberlands, L.P. and associated companies identified above (Plum Creek) have submitted an application to NMFS and FWS (together, the Services) for an Incidental Take Permit (Permit) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (ESA). As required by section 10(a)(2)(B) of the ESA, the applicant has also prepared a Habitat Conservation Plan (Plan) designed to minimize and mitigate for any take of endangered or threatened species. The Permit application is related to forest management and other Plum Creek activities on approximately 1.7 million acres of Plum Creek land in western Montana, northern Idaho, and western Washington. Of the 1.7 million acres, approximately 88 percent occur in Montana, 8 percent occur in Idaho, and 4 percent occur in Washington.

The proposed permit would authorize the take of the following eight listed endangered or threatened species incidental to otherwise lawful activities:

Bull trout (*Salvelinus confluentus*): Columbia River (ClR) distinct population segment (DPS).

Steelhead (*Oncorhynchus mykiss*): Snake River (SnR) evolutionarily significant unit (ESU), middle Columbia River ESU, lower Columbia River (LCR) ESU.

Chinook salmon (*O. tshawytscha*): SnR spring/summer ESU, SnR fall ESU; LCR ESU.

Chum salmon (*O. keta*): ClR ESU.

Plum Creek is also seeking coverage for nine currently unlisted anadromous and resident fish under specific provisions of the Permit, should these species be listed in the future. These species include: redband trout (*O. mykiss*); coastal rainbow trout (*O. mykiss*); westslope cutthroat trout (*O. clarki lewisi*); mountain whitefish (*Prosopium williamsoni*) pygmy whitefish (*P. coulteri*); coastal cutthroat trout (*O. clarki clarki*), including the proposed Southwestern Washington/Columbia River coastal cutthroat trout ESU and populations above barriers; Upper Columbia River summer/fall chinook salmon ESU (*O. tshawytscha*); candidate LCR/Southwest Washington coho salmon ESU (*O. kisutch*) and Mid-Columbia River spring chinook salmon ESU (*O. tshawytscha*). Six of the 17 covered species are resident fish species, and eleven are anadromous fish species or have an anadromous life history form. The duration of the proposed Permit and Plan is 30 years.

Plum Creek's Permit application includes: (1) the proposed Plan; and, (2) a proposed Implementing Agreement (Agreement). The Services also announce the availability of a draft Environmental Impact Statement (EIS) for the Permit application. To facilitate public review and comment, and to avoid voluminous documentation, the

proposed Plan is included in the draft EIS in Chapter 3.

This notice is provided pursuant to section 10(a) of the ESA and National Environmental Policy Act (NEPA) regulations. The Services are furnishing this notice in order to allow other agencies and the public an opportunity to review and comment on these documents. All comments received will become part of the public record and will be available for review pursuant to section 10(c) of the ESA.

DATES: Written comments on the Permit application, draft EIS, Plan, and Agreement must be received at the appropriate address or fax number (See **ADDRESSES**) from interested parties no later than 5:00pm mountain standard time on February 15, 2000. In addition, comments will be accepted during public meetings to be held at various locations in the vicinity of the proposed project area. All meetings are scheduled from 3:30 to 7:30 p.m. on dates and at locations as follows:

January 11th - Kelso, Washington Doubletree Hotel

January 12th - Yakima, Washington Cavanaugh's Gateway

January 17th - Libby, Montana Venture Inn

January 18th - Kalispell, Montana Outlaw Inn (Cavanaugh's/Best Western)

January 19th - Missoula, Montana Holiday Inn Parkside

January 20th - Coeur D 'Alene, Idaho Shilo Inn

ADDRESSES:

Written comments should be sent to Ted Koch, Project Biologist, FWS, 1387 S. Vinnell Way, Room 368, Boise, Idaho 83709 (fax: 208/378–5262), and Bob Ries, Project Biologist, NMFS, 1387 S. Vinnell Way, Room 377, Boise, Idaho 83709 (fax: 208/378–5699). Comments will not be accepted if submitted via e-mail or the internet.

Requests for documents on CD ROM may be made by calling Ted Koch, FWS, at (208)378–5243. Hardbound copies are also available for viewing, or partial or complete duplication, at the following libraries:

Boise Public Library, 715 S. Capitol Blvd., Boise, ID 83702 (208/384–4340);

Lewiston City Library, 101 Fifth Street, Lewiston, ID 83501 (208/743–7221);

Coeur d'Alene Public Library, 201 E. Harrison Avenue, Coeur d'Alene, ID 83814–2373 (208/769–2315);

Missoula Public Library, 301 East Main, Missoula, MT 59802–4799 (406/721–2665);

Spokane Public Library, 906 W Main Ave, Spokane, WA 99201–0976 (509/444–5300);

Olympia Timberland Library, 313 8th Ave SE, Olympia, WA 98501–9300 (360/352–0595);

Yakima Valley Regional Library, 102 N Third St, Yakima, WA 98901–2705 (509/ 452–8541);

Lewis and Clark Library, 120 S. Last Chance Gulch, Helena, MT 59601–4133 (406/447–1690);

Flathead County Library, 247 First Avenue E., Kalispell, MT 59901–4598 (406/758–5820).

The documents are also available electronically on the World Wide Web at http://www.fws.gov/r1srbo/SRBO/Plumck.htm.

Comments and materials received will also be available for public inspection, by appointment, during normal business hours by calling the U.S. Fish and Wildlife Service Snake River Basin Office in Boise, ID, at (208)378–5243.

FOR FURTHER INFORMATION CONTACT: Ted Koch, 208/378–5243, fax 208/378–5262, e-mail Ted_Koch@mail.fws.gov; or Bob Ries, 208/378–5696, fax 208/378–5699, e-mail Bob.Ries@noaa.gov.

SUPPLEMENTARY INFORMATION: Section 9 of the ESA and Federal regulations prohibit the ''taking'' of a species listed as endangered or threatened. The term take is defined under the ESA to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. However, the Services, under limited circumstances, may issue permits to take listed species incidental to, and not the purpose of, otherwise lawful activities. FWS regulations governing permits for endangered species are promulgated in 50 CFR 17.22; and, regulations governing permits for threatened species are promulgated in 50 CFR 17.32. NMFS regulations governing permits for endangered species are promulgated at 50 CFR 222.307; and, regulations governing permits for threatened species are promulgated at 50 CFR 223.

Background

Plum Creek owns and manages approximately 1.7 million acres of land in western Montana (88% of lands), northern Idaho (8% of lands), and western Washington (4% of lands). The Plan area includes portions of 17 major watersheds (or Planning Area Basins); eleven in Montana, three in Idaho, and three in Washington. Most lands are closely intermingled with U.S. Department of Agriculture, Forest Service lands. Plum Creek proposes to manage these lands pursuant to the Plan, and has applied to the Services for a Permit authorizing incidental take that may result from certain activities on these lands. Plum Creek proposes to include seven conservation commitment categories, with a variety of associated land management activities, for coverage under the permit, including: roads and upland management actions and conservation commitments; riparian area forest management and conservation commitments; range and livestock grazing management and conservation commitments; land use planning commitments; legacy and restoration activity commitments; administration and implementation commitments; and monitoring and adaptive management commitments. Specific actions to be permitted include commercial forestry and associated activities, including road building, use, maintenance, and gravel quarrying; silvicultural activities, including upland and riparian timber harvest, tree planting, site preparation, stand maintenance, and prescribed burning; manufacturing of forest products; forest fire suppression; livestock grazing; special use permits; conservation activities; and other forest land product sales. The duration of the proposed Permit and Plan is 30 years.

Some proposed covered activities have the potential to impact species subject to protection under the Act. Section 10 of the Act contains provisions for the issuance of incidental take permits to non-Federal land owners for the take of endangered and threatened species, provided the take is incidental to otherwise lawful activities and will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. In addition, the applicant must prepare and submit to the Services for approval a Plan containing a strategy for minimizing and mitigating take associated with the proposed activities to the maximum extent practicable. The applicant must also ensure that adequate funding for the Plan will be provided.

The Services formally initiated an environmental review of the project through a Notice of Intent to prepare an EIS in the Federal Register on December 12, 1997 (62 FR 65437). This notice also announced a public scoping comment opportunity, during which other agencies, tribes, and the public were invited to provide comments and suggestions regarding issues and alternatives to be included in the EIS. Following this scoping period a draft EIS was prepared which considers the No Action alternative, the Proposed Plan, and two additional action alternatives.

Under the No Action Alternative, incidental take permits would not be issued and Plum Creek would continue

a forest management program which complies with local, State, and Federal laws. Under Plum Creek's Proposed Plan, the Services would issue incidental take permits and Plum Creek would implement the Plan on their 1.7 million acres of timberlands. Under the Internal Conservation Plan alternative, Plum Creek would implement conservation measures designed to avoid take of currently listed species. Under the Simplified Prescription alternative, Plum Creek would implement riparian buffers and severely limit roads and livestock grazing on their lands. Conservation measures identified in the Plan alternative would not be implemented under any of the other alternatives.

The No Action, Plum Creek's Proposed Plan, the Internal Plum Creek Plan, and the Simplified Prescriptions alternatives are analyzed in detail in the draft EIS.

The Services will evaluate the application, associated documents, and comments received to determine whether the application meets the requirements of the ESA and NEPA. If it is determined that the requirements are met, a permit will be issued for the incidental take of listed species. The final permit decision will be made no sooner than 60 days from the date of this notice.

Dated: December 7, 1999.

Anne Badgley,

Regional Director, Region 1, Fish and Wildlife Service.

Dated: December 13, 1999.

Wanda L. Cain,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 99–32778 Filed 12–16–99; 8:45 am]

BILLING CODES 3510–22–F, 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120999I]

Endangered Species; Permits

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

ACTION: Receipt of applications for scientific research and enhancement permits (1224, 1225).

SUMMARY: Notice is hereby given that NMFS has received an application for a scientific research permit from U.S. Army Corps of Engineers at Cascade Locks, OR (COE) (1224), and an application for an enhancement permit from Mr. Bruce Hecker, of the South Carolina Aquarium (BH-SCA) (1225).

DATES: Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number no later than 5:00pm eastern standard time on January 18, 2000.

ADDRESSES: Written comments on the applications should be sent to the appropriate office as indicated below. Comments may also be sent via fax to the number indicated for the application. Comments will not be accepted if submitted via e-mail or the internet. The applications and related documents are available for review in the indicated office, by appointment:

For permit 1224: Protected Resources Division, F/NWO3, 525 NE Oregon Street, Suite 500, Portland, OR 97232–2737 (ph: 503–230–5400, fax: 503–230–5435).

For permit 1225: Office of Protected Resources, Endangered Species Division, F/PR3, 1315 East-West Highway, Silver Spring, MD 20910 (ph: 301–713–1401, fax: 301–713–0376).

FOR FURTHER INFORMATION CONTACT:

For permit 1224: Leslie Schaeffer, Portland, OR (ph: 503–230–5433, fax: 503–230–5435, e-mail: Leslie.Schaeffer@noaa.gov).

For permit 1225: Terri Jordan, Silver Spring, MD (ph: 301–713–1401, fax: 301–713–0376, e-mail: Terri.Jordan@noaa.gov).

SUPPLEMENTARY INFORMATION:

Authority

Issuance of permits and permit modifications, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) (ESA), is based on a finding that such permits/modifications: (1) Are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222–226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Species Covered in this Notice

The following species and evolutionarily significant units (ESU's) are covered in this notice:

Steelhead (*Oncorhynchus mykiss*): Threatened Snake River (SnR), threatened lower Columbia River (LCR), threatened middle Columbia River (MCR), endangered upper Columbia River (UCR).

Endangered shortnose sturgeon (*Acipenser brevirostrum*).

To date, protective regulations for threatened SnR, LCR, and MCR steelhead under section 4(d) of the ESA have not been promulgated by NMFS. This notice of receipt of an application requesting takes of these species is issued as a precaution in the event that NMFS issues protective regulations. The initiation of a 30-day public comment period on the application, including its proposed takes of LCR steelhead, SnR steelhead, and MCR steelhead, does not presuppose the contents of the eventual protective regulations.

New Applications Received

COE (1224) requests a 5-year scientific research permit to authorize annual takes of SnR steelhead kelts; LCR steelhead kelts, MCR steelhead kelts, and naturally produced and artificially propagated, UCR steelhead kelts associated with research designed to evaluate the survival, travel times and passage routes of adult steelhead that have spawned and are emigrating past John Day, The Dalles, and Bonneville Dams on the Columbia River on their migration back to the Pacific Ocean. Fish will be obtained from Smolt Monitoring Personnel at sampling facilities at John Day and McNary Dams on the Columbia River and from Oregon Department of Fish and Wildlife personnel at Powerdale Dam on the Hood River, anesthetized, sampled for length, fin condition and descaling percentages and tagged with passive integrated transponder, radio and/or visual implant tags, and released or transported to a location either above or below Bonneville Dam and released. Indirect mortalities are requested as part of this research.

BH-SCA (1225) requests a 5-year enhancement permit to maintain a population of up to eight juvenile shortnose sturgeon in a captive environment for educational purposes. This application meets Recovery Task 2.5 C concerning public education and raising public awareness of sturgeon

issues. The aquarium proposes to present the fish in a manner that will enhance the conservation of the species through public education.

Dated: December 13, 1999.

Wanda L. Cain,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 99–32779 Filed 12–16–99; 8:45 am]

BILLING CODE 3510–22–F

COMMODITY FUTURES TRADING COMMISSION

RIN 3038–ZA02

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice; Information Collection 3038–0043, Rules Relating to Review of National Futures Association Decisions in Disciplinary, Membership Denial, Registration, and Member Responsibility Actions.

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 costs and burden; it includes the actual data collection instruments [if any].

DATES: Comments must be submitted on or before January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Gina Lightfoot Walker at CFTC, (202) 418–5121; FAX: (202) 418–5524; email: *gwalker@cftc.gov* and refer to OMB Control No. 3038–0043.

SUPPLEMENTARY INFORMATION:

Title: Rules Relating to Review of National Futures Association Decisions in Disciplinary, Membership Denial, Registration, and Member Responsibility Actions, OMB Control No. 3038–0043. This is a request for extension of a currently approved information collection.

Abstract: 17 CFR Part 171 rules require a registered futures association to provide fair and orderly procedures for membership and disciplinary actions. The Commission's review of decisions of registered futures associations in disciplinary, membership denial, registration, and member responsibility actions is governed by Section 17(h)(2) of the Commodity Exchange Act, 7 U.S.C. Section 21(h)(2) (1994). The rules establish procedures and standards for Commission review of such actions, and the reporting requirements included in the procedural rules are either directly required by Section 17 of the Act or are necessary to the type of appellate review role Congress intended the Commission to undertake when it adopted that provision.

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 CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981). The Federal Register notice with a 60-day comment period soliciting comments on this collection of information was published on September 1, 1999 (64 FR 47773).

Burden statement: the respondent burden for this collection is estimated to average 1.42 hours per response. This estimate 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; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 22.

Estimated number of responses: 89.

Estimated total annual burden on respondents: 126 hours.

Frequency of collection: On occasion.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038–0043 in any correspondence.

Gina Lightfoot Walker, Office of General Counsel, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, DC 20581 and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Office for CFTC, 725 17th Street, Washington, DC 20503.

Issued in Washington, DC on December 13, 1999.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 99–32728 Filed 12–16–99; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 15, 2000.

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 Leader, Information Management Group, Office of the Chief Information Officer, publishes that 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.

The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 10, 1999.

William Burrow,

Leader, Information Management Group, Office of the Chief Information Officer.

Office of Vocational and Adult Education

Type of Review: New.

Title: National Survey to Determine the Need for Special Education Services.

Frequency: One time.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 689

Burden Hours: 669

Abstract: The Office of Correctional Education is conducting a study to determine the number of incarcerated juvenile and youthful offenders with disabilities. This study is being undertaken by the American Institutes for Research. Three surveys and methodology are being presented for review.

Requests for copies of the proposed information collection request should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, D.C. 20202–4651, or should be electronically mailed to the internet address OCIO__IMG__Issues@ed.gov or should be faxed to 202–708–9346.

Written comments or questions regarding burden and/or the collection activity requirements should be directed to Sheila Carey at (202) 708–6287 or via her internet address Sheila__Carey@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 99–32561 Filed 12–16–99; 8:45 am]

BILLING CODE 4000–01–U

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Leader, Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507 (j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by December 30, 1999. A regular clearance process is also beginning. Interested persons are invited to submit comments on or before February 15, 2000.

ADDRESSES: Written comments regarding the emergency review should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer: Department of Education, Office of Management and Budget; 725 17th Street, N.W., Room 10235, New Executive Office Building, Washington, D.C. 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (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 Leader, Information Management Group, Office of the Chief Information Officer, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. 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. ED invites public comment. The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on respondents, including through the use of information technology.

Dated: December 10, 1999.

William E. Burrow,

Leader, Information Management Group, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review Reinstatement

Title: Annual Program Cost Report.

Abstract: Vocational Rehabilitation Services data submitted on the RSA–2 by State VR agencies for each FY used by RSA to administer and manage the Title I Program; to analyze expenditures, evaluate program performance and identify problem areas.

Additional Information: Education is currently working on revising this collection instrument to make it consistent with 1998 Rehabilitation Act Amendments. Education's plans are to implement the revised form in FY 2000, allowing the respondents an adequate opportunity to adjust, as necessary, their data collection systems in light of the new changes.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 82

Burden Hours: 385

Requests for copies of the proposed information collection request should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, S.W., Room 5624, Regional Office Building 3, Washington, D.C. 20202–4651, or should be electronically mailed to the internet address OCIO__IMG__Issues@ed.gov, or should be faxed to 202–708–9346.

Written comments or questions regarding burden and/or the collection activity requirements, contact Sheila Carey at 708–6287 or via her internet address Sheila__Carey@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 99–32562 Filed 12–16–99; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Educational Research Policy and Priorities Board; Teleconference

AGENCY: National Educational Research Policy and Priorities Board; Education.

ACTION: Notice of Executive Committee Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a

forthcoming meeting of the Executive Committee of the National Educational Research Policy and Priorities Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend the meeting. The public is being given less than 15 days notice of this meeting because of the need to expedite a decision on funding major initiative of the Board.

DATE: December 21, 1999.

TIME: 3–4 p.m., EST.

LOCATION: Room 100, 80 F St., NW, Washington, DC 20208–7564.

FOR FURTHER INFORMATION CONTACT: Thelma Leenhouts, Designated Federal Official, National Educational Research Policy and Priorities Board, Washington, D.C. 20208–7564. Tel.: (202) 219–2065; fax: (202) 219–1528; e-mail:

Thelma__Leenhouts@ed.gov. The main telephone number for the Board is (202) 208–0692.

SUPPLEMENTARY INFORMATION: The National Educational Research Policy and Priorities Board is authorized by section 921 of the Educational Research, Development, Dissemination, and Improvement Act of 1994. The Board works collaboratively with the Assistant Secretary for the Office of Educational Research and Improvement to forge a national consensus with respect to a long-term agenda for educational research, development, and dissemination, and to provide advice and assistance to the Assistant Secretary in administering the duties of the Office. The meeting is open to the public. The Executive Committee will consider the authorization of funds for a national conference on middle school research and practice. Records are kept of all Board proceedings and are available for public inspection at the office of the National Educational Research Policy and Priorities Board, Suite 100, 80 F St., NW, Washington, DC 20208–7564.

Dated: December 13, 1999.

Eve M. Bither,

Executive Director.

[FR Doc. 99–32686 Filed 12–16–99; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF EDUCATION

[CFDA No.: 84.038, 84.033, and 84.007]

Office of Student Financial Assistance; Federal Perkins Loan, Federal Work-Study, and Federal Supplemental Educational Opportunity Grant Programs

AGENCY: Department of Education.

ACTION: Notice of the closing date for institutions to file an Application for Approval to Participate in Federal Student Financial Aid Programs (ED Form E40–34P, OMB #1845–0012) to participate in the Federal Perkins Loan, Federal Work-Study, and Federal Supplemental Educational Opportunity Grant programs (known collectively as the campus-based programs) for the 2000–2001 award year.

SUMMARY: We invite currently ineligible institutions of higher education that filed a Fiscal Operations Report and Application to Participate (FISAP) (ED Form 646–1) in one or more of the campus-based programs for the 2000–2001 award year to submit to us an Application for Approval to Participate and all required supporting documents for an eligibility and certification determination.

The campus-based programs are the Federal Perkins Loan Program, the Federal Work-Study Program, and the Federal Supplemental Educational Opportunity Grant Program and are authorized by title IV of the Higher Education Act of 1965, as amended (HEA). The 2000–2001 award year is July 1, 2000, through June 30, 2001.

CLOSING DATE: To participate in the campus-based programs in the 2000–2001 award year, a currently eligible institution must mail or hand-deliver its Application for Approval to Participate on or before January 21, 2000. The application, along with all required supporting documents for an eligibility and certification determination, must be submitted to the Institutional Participation and Oversight Service at one of the addresses indicated below.

ADDRESSES: Applications and Required Documents Delivered by Mail. The application for approval to participate and required supporting documents delivered by mail must be addressed to the U.S. Department of Education, Institutional Participation and Oversight Service, P.O. Box 44805, L'Enfant Plaza Station, Washington D.C. 20026–4805.

An applicant must show proof of mailing consisting of one of the following: (1) A legibly dated U.S. Postal Service postmark; (2) a legible mail receipt with the date of mailing stamped by the U.S. Postal service; (3) a dated shipping label, invoice, or receipt from a commercial carrier; or (4) any other proof of mailing acceptable to us.

If an application is sent through the U.S. Postal Service, we do not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service.

An applicant should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

An applicant is encouraged to use certified or at least first class mail. Institutions that submit applications for approval to participate and required supporting documents after the closing date of January 21, 2000, will not be considered for funding under the campus-based programs for award year 2000–2001.

Applications and Required Documents Delivered by Hand.

An application for approval to participate and required supporting documents delivered by hand must be taken to the U.S. Department of Education, Institutional Participation and Oversight Service, 7th and D Streets, S.W., Regional Office Building 3, (GSA Building), Room 3514, Washington, D.C. 20407. We will accept hand-delivered applications between 8:00 a.m. and 4:30 p.m. (Eastern time) daily, except Saturdays, Sundays, and Federal holidays. An application for approval to participate for the 2000–2001 award year that is delivered by hand will not be accepted after 4:30 p.m. on January 21, 2000.

SUPPLEMENTARY INFORMATION: Under the three campus-based programs, we allocate funds to eligible institutions of higher education. We will not allocate funds under the campus-based programs for award year 2000–2001 to any currently ineligible institution unless the institution files its ''Application for Approval to Participate in Federal Student Financial Aid Programs'' and other required supporting documents by the closing date. If the institution submits its application for approval to participate or other required supporting documents after the January 21, 2000 closing date, we will use this application in determining the institution's eligibility to participate in the campus-based programs beginning with the 2001–2002 award year.

For purposes of this notice, ineligible institutions only include:

(1) An institution that has not been designated as an eligible institution by us but has previously filed a FISAP; or

(2) An additional location of an eligible institution that is currently not included in the Department's eligibility certification for that eligible institution, but has been included in the institution's 2000–2001 FISAP.

We wish to advise institutions that the institutional eligibility form, ''Application for Approval to Participate in Federal Student Financial Aid Programs,'' should not be confused with the FISAP form that institutions were required to submit electronically as of October 1, 1998, in order to be considered for funds under the campus-based programs for the 2000–2001 award year.

Applicable Regulations: The following regulations apply to the campus-based programs:

(1) Student Assistance General Provisions, 34 CFR Part 668.

(2) General Provisions for the Federal Perkins Loan Program, Federal Work-Study Program, and Federal Supplemental Educational Opportunity Grant Program, 34 CRF Part 673.

(3) Federal Perkins Loan Program, 34 CFR Part 674.

(4) Federal Work-Study Program, 34 CFR 675.

(5) Federal Supplemental Opportunity Grant Program, 34 CFR Part 676.

(6) Institutional Eligibility Under the Higher Education Act of 1965, as amended, 34 CFR Part 600.

(7) New Restrictions on Lobbying, 34 CFR Part 82.

(8) Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 34 CFR Part 85.

(9) Drug-Free Schools and Campuses, 34 CFR Part 86.

FOR FURTHER INFORMATION CONTACT: For information concerning designation of eligibility, contact the appropriate ED Institutional Participation and Oversight Service (IPOS) case management team by telephone, fax, or over the Internet. The case management teams are listed with telephone and fax numbers and Internet addresses in the Application for Approval to Participate in Federal Student Financial Aid Programs on pages 5, 6, and 7 of the Introduction.

For technical assistance concerning the FISAP or other operational procedures of the campus-based programs, contact: Sandra K. Donelson, Title IV Delivery, Campus-Based Operations, U.S. Department of Education, P.O. Box 23781, Washington, D.C. 20026–0781. Telephone: (202) 708–9751. 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. Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the Alternate Format Center at (202) 260–9895 between 8:30 a.m. and 4:30 p.m., Eastern time, Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
http://www.ed.gov/news.html

To use the PDF you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, D.C., area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html*

Program Authority: 20 U.S.C. 1087aa *et seq.*; 42 U.S.C. 2751 *et seq.*; and 20 U.S.C. 1070b *et seq.*)

Dated: December 13, 1999.

Greg Woods,

Chief Operating Officer, Office of Student Financial Assistance.

[FR Doc. 99–32756 Filed 12–16–99; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Fossil Energy

[FE Docket No. 99–81–NG, et al.]

Northern Utilities, Inc., et al.; Orders Granting, Amending and Vacating Authorizations To Import and Export Natural Gas

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that it has issued Orders granting, amending and vacating natural gas import and export authorizations. These Orders are summarized in the attached appendix.

These Orders may be found on the FE web site at http://www.fe.doe.gov., or on the electronic bulletin board at (202) 586–7853.

They are also available for inspection and copying in the Office of Natural Gas & Petroleum Import & Export Activities, Docket Room 3E–033, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, (202) 586–9478. The Docket Room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, D.C., on December 13, 1999.

John W. Glynn,

Manager, Natural Gas Regulation, Office of Natural Gas & Petroleum, Import & Export Activities, Office of Fossil Energy.

Appendix—Orders Granting, Amending and Vacating Import/Export Authorizations

Order No.	Date issued	Importer/Exporter FE Docket No.	Import volume	Export volume	Comments
1537	11–01–99	Northern Utilities, Inc., 99–81–NG	15Bcf		Import from Canada beginning on December 10, 1999, and extending through December 9, 2001
1538	11–05–99	Nova Scotia Resources (U.S.) Limited, 99–90–NG.	3.65 Bcf		Import from Canada over a two-year term beginning on the date of first dellivery
1450–A	11–10–99	Amoco Energy Trading Corporation, 98–101–NG.			Vacate blanket import authority.
1378A	11–10–99	Amoco Energy Trading Corporation, 98–29–NG.			Vacate blanket import authority.
361–A	11–10–99	Amoco Energy Trading Corporation, 89–65–NG.			Vacate blanket import authority.
1540	11–10–99	Amoco Energy Trading Corporation, 99–89–NG.	1,100 Bcf		Import and export up to an aggregate volume beginning on November 10, 1999, and extending through November 9, 2001.
1541	11–22–99	Suncor Energy Inc., 99–94–NG	127.66 Bcf		Import from Canada beginning on January 1, 2000, and extending through December 31, 2001.
1542	11–23–99	Amoco Energy Trading Corporation, 99–96–LNG.	600 Bcf		Import LNG from various international sources over a two-year term beginning on the date of first delivery.
368–I	11–23–99	The Brooklyn Union Gas Company, Keyspan Gas East, Corporation (D/B/A Brooklyn, Union of Long Island), Connecticut Natural Gas Corporation, New Jersey Natural Gas Company, Southern Connecticut Gas Company, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Boston Gas Company, Public Service Electric and Gas Company, Essex County Gas Company, Energynorth Natural Gas, Inc., Colonial Gas Company, National Fuel Gas Distribution Corporation, Valley Gas Company, and Yankee Gas Services Company; ERA Docket Nos. 86–44–NG; 86–45–NG; 86–46–NG; 86–48–NG; 87–02–NG and FE Docket No. 94–43–NG.			Amendment to long-term authority. Transfer of contracts and a reduction in volumes.
1544	11–23–99	Puget Sound Energy, Inc. 99–101–NG	50 Bcf		Import from Canada beginning on December 6, 1999, and extending through December 5, 2001.
1545	11–26–99	The Montana Power Trading & Marketing Company, 99–91–NG.	55 Bcf		Import from Canada over a two-year term beginning on the date of first delivery after January 27, 2000.
1406–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 98–40–NG.			Name change.
1470–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 99–19–NG.			Name change.
1379–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 99–17–NG.			Name change.
1135–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 99–109–NG.			Name change.
1367–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 99–12–NG.			Name change.
1260–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 97–20–NG.			Name change.
1323–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 97–76–NG.			Name change.
1322–A	11–26–99	Enron North America Corp. (Formerly Enron Capital & Trade Resources Corp.), 99–75–NG.			Name change.

Order No.	Date issued	Importer/Exporter FE Docket No.	Import volume	Export volume	Comments
1546	11–26–99	Murphy Gas Gathering Company, 99–95–NG.	75 Bcf	.....	Import from Canada beginning on December 1, 1999, and extending through November 30, 2001.
305C	11–30–99	Midland Cogeneration Venture Limited Partnership, 99–70–NG.	.....	.....	Amendment to long-term authority to extend its term by one year.

[FR Doc. 99–32751 Filed 12–16–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Fossil Energy

[Docket Nos. FE C&E 99–26; Certification Notice—181]

Notice of Filings of Coal Capability of Panda Oneta Power, L.P.; Powerplant and Industrial Fuel Use Act

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of Filing.

SUMMARY: Panda Oneta Power, L.P., has submitted a coal capability self-certification pursuant to section 201 of the Powerplant and Industrial Fuel Use Act of 1978, as amended.

ADDRESSES: Copies of self-certification filings are available for public inspection, upon request, in the Office of Coal & Power Im/Ex, Fossil Energy, Room 4G–039, FE–27, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Ellen Russell at (202) 586–9624.

SUPPLEMENTARY INFORMATION: Title II of the Powerplant and Industrial Fuel Use Act of 1978 (FUA), as amended (42 U.S.C. 8301 *et seq.*), provides that no new baseload electric powerplant may be constructed or operated without the capability to use coal or another alternate fuel as a primary energy source. In order to meet the requirement of coal capability, the owner or operator of such facilities proposing to use natural gas or petroleum as its primary energy source shall certify, pursuant to FUA section 201(d), to the Secretary of Energy prior to construction, or prior to operation as a base load powerplant, that such powerplant has the capability to use coal or another alternate fuel. Such certification establishes compliance with section 201(a) as of the date filed with the Department of Energy. The Secretary is required to publish a notice in the **Federal Register** that a certification has been filed. The following owner/operator of the proposed new baseload powerplant has filed a self-certification in acccordance with section 201(d).

Owner: Panda Oneta Power, L.P.

Operator: Panda Oneta Power, L.P.

Location: Coweta, Wagoner County, Oklahoma.

Plant Configuration: Combined-cycle.

Capacity: 1,000 MW.

Fuel: Natural gas.

Purchasing Entities: Various interconnected utilities within the Southwest Power Pool.

In-Service Date: December 2001.

Issued in Washington, DC, December 13, 1999.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Im/Ex, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 99–32749 Filed 12–16–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

MEETING

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the State Energy Advisory Board. Federal Advisory Committee Act (Public Law 92–463; 86 Stat. 770) requires that public notice be announced in the **Federal Register**.

DATE: January 6, 2000 from 8:00 am to 5:00 pm, and January 7, 2000 from 8:00 am to 1:00 pm. Phone: 800/689–6765 or 910/256–8696.

PLACE: Hyatt at Fisherman's Wharf, San Francisco, California.

FOR FURTHER INFORMATION CONTACT: William J. Raup, Office of Building Technology, State, and Community Programs, Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE), Washington, DC 20585, Telephone 202/586–2214.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for Energy Efficiency and Renewable Energy regarding goals and objectives and programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (P.L. 101–440).

Tentative Agenda:

- Theme development for the STEAB Eighth Annual Report.
- Panel discussion on the advantages of clean energy and technologies in California.
- STEAB Committee updates.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact William J. Raup at the address or telephone number listed above. Requests to make oral presentations must be received five days prior to the meeting; reasonable provision will be made to include the statements in the agenda. The Chair of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on December 14, 1999.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 99–32750 Filed 12–16–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–711–000]

Arizona Public Service Co.; Notice of Filing

December 13, 1999.

Take notice that on December 1, 1999, Arizona Public Service Company (APS),

tendered for filing notice that effective at midnight February 14, 2000, the Reciprocal Distribution Wheeling Service Agreement included in Rate Schedule FERC No. 178, effective date February 14, 2000 and filed with the Federal Energy Regulatory Commission by Arizona Public Service Company is to be canceled.

Notice of the proposed cancellation has been served upon Electrical District No. 2 and The Arizona Corporation Commission.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before December 23, 1999. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99–32716 Filed 12–16–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF00–4011–000, et al.]

Southwestern Power Administration, et al.;

Electric Rate and Corporate Regulation Filings

December 10, 1999.

Take notice that the following filings have been made with the Commission:

1. Southwestern Power Administration

[Docket No. EF00–4011–000]

Take notice that on December 7, 1999, the Deputy Secretary, U.S. Department of Energy submitted to the Federal Energy Regulatory Commission (FERC) for confirmation and approval on a final basis, pursuant to the authority vested in the FERC by Delegation Order No. 0204–108, as amended November 10, 1993, 58 FR 59717, the following Southwestern Power Administration (Southwestern) Integrated System rate schedules:

Rate Schedule P–98C, Wholesale Rates for Hydro Peaking Power

Rate Schedule NFTS–98C, Wholesale Non-Federal Transmission Service

The Integrated System rate schedules were confirmed and approved on an interim basis by the Deputy Secretary in Rate Order No. SWPA–42 for the period January 1, 2000, through September 30, 2001, and have been submitted to the FERC for confirmation and approval on a final basis for the same period. The FY 1999 Power Repayment has confirmed that revenues produced by currently-approved Rate Schedules P–98B, Wholesale Rates for Hydro Peaking Power, and NFTS–98B, Wholesale Rates for Non-Federal Transmission Service, are adequate to meet repayment criteria within the plus-or-minus two percent rate adjustment threshold. However, specific issues have arisen since the last rate approval that can be addressed through modified rate schedule language without impacting revenues.

Southwestern has expanded the terms and conditions for Real Power Losses by adding a provision that allows for the annual election to self-provide losses, and has broadened the application of rates for Spinning and Supplemental Operating Reserves to more accurately reflect actual regional operating conditions. The revenue requirement for these ancillary services will not change, but the rate will be reduced due to the increase in billing units.

Comment date: December 30, 1999, in accordance with Standard Paragraph E at the end of this notice.

2. PPL Susquehanna, LLC

[Docket No. EG00–43–000]

Take notice that on December 7, 1999, PPL Susquehanna, LLC (Applicant), having its principal place of business at Two North Ninth Street, Allentown, PA 18101, filed with the Federal Energy Regulatory Commission (Commission) an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

The Applicant is a Delaware limited liability company formed in connection with a proposed corporate realignment of PP&L Resources, Inc. for the purpose of owning PP&L, Inc.''s 90% undivided interest in the nuclear generating facility known as the Susquehanna Steam Electric Station (Susquehanna SES). The Applicant is an indirect subsidiary of PP&L Resources, Inc., a public utility holding company exempt from registration under section 3(a)(1) of the Public Utility Holding Company Act of 1935.

As a result of the corporate realignment of PP&L Resources, Inc., Applicant will own an undivided 90% interest in the Susquehanna SES, which includes two uranium-fueled boiling water reactors with a combined (winter) net electric nameplate capability of 2,317 MW.

Comment date: December 30, 1999, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

3. PPL Montour, LLC

[Docket No. EG00–44–000]

Take notice that on December 7, 1999, PPL Montour, LLC (Applicant), having its principal place of business at Two North Ninth Street, Allentown, PA 18101, filed with the Federal Energy Regulatory Commission (Commission) an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

The Applicant is a Delaware limited liability company formed in connection with a proposed corporate realignment of PP&L Resources, Inc. for the purpose of owning and operating the Montour Steam Electric Station (Montour SES), currently owned by its public utility affiliate, PP&L, Inc. (PP&L), and PP&L's undivided interest in the Keystone and Conemaugh Steam Electric Stations. The Applicant is an indirect subsidiary of PP&L Resources, Inc., a public utility holding company exempt from registration under section 3(a)(1) of the Public Utility Holding Company Act of 1935.

As a result of the corporate realignment, Applicant will own the following generating facilities: (1) Montour SES, which includes two coal-fired steam turbine generators with supplemental oil-firing and one oil-fired auxiliary turbine generator with a combined (winter) net electric capability of 1,555 MW; (2) An undivided interest in Conemaugh SES, which includes two coal and supplemental oil-fired steam turbine generators and four diesel-fired generators with a combined (winter) net electric capability of 1,712.4 MW; and (3) An undivided interest in Keystone SES, which includes two coal and supplemental oil-fired steam turbine generators and four diesel-fired generators with a combined (winter) net electric capability of 1,712.4 MW.

Comment date: December 30, 1999, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

4. Sithe Tamuin Energy Services, S. de R.L. de C.V.

[Docket No. EG00–45–000]

Take notice that on December 8, 1999 Sithe Tamuin Energy Services, S. de R.L. de C.V. (Applicant), c/o Sithe Energies, Inc., 335 Madison Avenue, 28th Floor, New York, NY 10017 filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Applicant is a company organized under the laws of Delaware, and will be engaged in the operation of a 230 MW Circulation Fluidised Bed Petroleum Coke Power Plant and auxiliary facilities located in Tamuin, San Luis Potosi, Mexico.

Comment date: December 30, 1999, in accordance with Standard Paragraph E at the end of this notice.

5. Choptank Electric Cooperative

[Docket No. EL00–23–000]

Take notice that on December 3, 1999, Choptank Electric Cooperative (Choptank) submitted for filing an Application for Waiver of the Requirements of Order Nos. 888 and 889, in accordance with § 35.28(d) of the rules of the Federal Energy Regulatory Commission (Commission), 18 CFR 35.28(d).

Choptank states that it owns, operates, or controls only limited and discrete transmission facilities that do not constitute an integrated grid. Choptank states that it thus qualifies for a waiver of application of the requirements of Order Nos. 888 and 889 to it, as more fully set forth in the application.

Comment date: December 30, 1999, in accordance with Standard Paragraph E at the end of this notice.

6. Central Power and Light Company; West Texas Utilities Company; Public Service Company of Oklahoma; Southwestern Electric Power Company

[Docket No. ER00–569–000]

Take notice that on December 3, 1999, Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company (collectively, the CSW Operating Companies), tendered for filing additional information requested by the Commission Staff in the above-captioned proceeding.

The CSW Operating Companies state that a copy of the filing was served on all customers taking service under part IV of the CSW Operating Companies' currently effective open access tariff, the Public Utility Commission of Texas, the Oklahoma Corporation Commission, the Louisiana Public Service Commission and the Arkansas Public Service Commission.

Comment date: December 23, 1999, in accordance with Standard Paragraph E at the end of this notice.

7. Southern Company Services, Inc.

[Docket No. ER00–682–000]

Take notice that on December 1,1999, Southern Company Services, Inc., as agent for Georgia Power Company (Georgia Power), tendered for filing the Interconnection Agreement by and between Tenaska Georgia Partners, L.P. (Tenaska Georgia) and Georgia Power (the Agreement). The Agreement permits Tenaska Georgia to interconnect and operate in parallel with the Georgia Power electric system. The Agreement is dated as of October 19, 1999 and shall terminate upon mutual written agreement of the parties.

Comment date: December 21, 1999, in accordance with Standard Paragraph E at the end of this notice.

8. Southwest Power Pool, Inc.

[Docket No. ER00–713–000]

Take notice that on December 1, 1999, Southwest Power Pool, Inc. (SPP), tendered for filing changes to its open access transmission tariff (SPP Tariff), intended to reflect the withdrawal of the Cleco Corporation (Cleco) as a Transmission Provider under the SPP Tariff. SPP states that as a result of this filing, Cleco's transmission facilities will no longer be used for service under the SPP Tariff. The filing will also result in rate decrease for certain services under the SPP Tariff.

SPP requests an effective date of November 17, 1999, for these changes.

Copies of this filing were served upon members and customers of SPP, and on all affected state commissions.

Comment date: December 21, 1999, in accordance with Standard Paragraph E at the end of this notice.

9. Central Hudson Gas & Electric Corporation

[Docket No. ER00–716–000]

Take notice that on December 2, 1999, Central Hudson Gas & Electric Corporation filed their quarterly report for the quarter ending September 30, 1999.

Comment date: December 30, 1999, in accordance with Standard Paragraph E at the end of this notice.

10. Rochester Gas and Electric Corporation

[Docket No. ER00–717–000]

Take notice that on December 2, 1999, Rochester Gas and Electric Corporation (RG&E), tendered for filing a Market Based Service Agreement between RG&E and Canadian Niagara Power Company, Ltd. (Customer). This Service Agreement specifies that the Customer has agreed to the rates, term and conditions of RG&E's FERC Electric Rate Schedule, Original Volume No. 3 (Power Sales Tariff) accepted by the Commission.

RG&E requests waiver of the Commission's sixty (60) day notice requirements and an effective date of November 11, 1999 for and Canadian Niagara Power Company, Ltd.''s Service Agreement.

RG&E has served copies of the filing on the New York State Public Service Commission and on the Customer.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

11. Tampa Electric Company

[Docket No. ER00–718–000]

Take notice that on December 2, 1999, Tampa Electric Company (Tampa Electric), tendered for filing an amendment to its contract for the sale and purchase of capacity and energy with the Reedy Creek Improvement District (RCID).

Tampa Electric proposes that the amendment be made effective on February 1, 2000.

Copies of the filing have been served on RCID and the Florida Public Service Commission.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

12. Southern California Edison Company

[Docket No. ER00–719–000]

Take notice that on December 2, 1999, Southern California Edison Company (SCE), tendered for filing the Amendment No. 2, to the Pasadena-Edison 230–KV Interconnection and Transmission Agreement.

The Amendment: (i) Enables Pasadena to schedule transmission service taken under the Agreement directly with the ISO; (ii) Provides that Pasadena pay the ISO GMC for the amount of energy scheduled under the Agreement; and (iii) Provides that

Pasadena pay for transmission losses to the ISO in accordance with the ISO Tariff.

Copies of this filing were served upon the Public Utilities Commission of the State of California and all interested parties.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

13. Florida Power & Light Company

[Docket No. ER00–720–000]

Take notice that on December 2, 1999, Florida Power & Light Company (FPL), tendered for filing a Service Agreement with South Carolina Electric & Gas Company for service pursuant to FPL's Market Based Rates Tariff.

FPL requests that the Service Agreement be made effective on November 11, 1999.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

14. Yankee Energy Marketing Company

[Docket No. ER00–721–000]

Take notice that on December 2, 1999, Yankee Energy Marketing Company tendered for filing a notice of cancellation of its FERC Rate Schedule No. 1, to be effective January 31, 2000.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

15. Delmarva Power & Light Company

[Docket No. ER00–722–000]

Take notice that on December 2, 1999, Delmarva Power & Light Company (Delmarva), tendered for filing a supplement to its Interconnection Agreement with Commonwealth Chesapeake Company, LLC providing for the recovery of interconnection costs, together with Exhibit B and C to that Agreement.

Delmarva requests an effective date of December 3, 1999, one day after the supplement was tendered for filing.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

16. California Power Exchange Corporation

[Docket No. ER00–723–000]

Take notice that on December 2, 1999, the California Power Exchange Corporation (CalPX), tendered for filing certain amendments to its bylaws. These amendments are proposed to take effect on January 1, 2000, together with amendments that CalPX previously filed on November 24, 1999 in Docket Nos. EC96–19–051, ER96–1663–053 and EL99–75–002.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

17. Allegheny Power Service Corporation, on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power)

[Docket No. ER00–724–000]

Take notice that on December 2, 1999, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), tendered for filing a second amended, fully executed Network Integration Transmission Service Agreement with the City of Hagerstown, Maryland. Allegheny Power states that this executed agreement replaces the previously filed agreement approved by the Commission on January 12, 1999 in Docket Nos. ER98–3926–000, ER98–4357–000 and ER99–895–000. The second amended agreement adds a delivery point for the City of Hagerstown and makes editorial and conforming changes to the agreement.

The proposed effective date under this amended service agreement is February 28, 2000, or such other date as it is permitted to become effective by the Commission.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: December 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

18. California Independent System Operator Corporation

[Docket No. ER00–726–000]

Take notice that on December 3, 1999, the California Independent System Operator Corporation (ISO), tendered for filing a Scheduling Coordinator Agreement between the ISO and Puget Sound Energy (Puget Sound) for acceptance by the Commission.

The ISO states that this filing has been served on Puget Sound and the California Public Utilities Commission.

The ISO is requesting waiver of the 60-day notice requirement to allow the Scheduling Coordinator Agreement to be made effective November 18, 1999.

Comment date: December 23, 1999, in accordance with Standard Paragraph E at the end of this notice.

19. Central Illinois Light Company

[Docket No. ER00–727–000]

Take notice that on December 3, 1999, Central Illinois Light Company (CILCO), 300 Liberty Street, Peoria, Illinois 61202, tendered for filing for approval by the Commission a Service Agreement under its Market Rate Power Sales Tariff with its affiliate, NewEnergy, Inc.

CILCO requested an effective date of December 6, 1999, and requested a waiver of the Commission's notice requirements.

Copies of the filing were served on the affected customer and the Illinois Commerce Commission.

Comment date: December 23, 1999, in accordance with Standard Paragraph E at the end of this notice.

20. Cleco Utility Group Inc.

[Docket No. ER00–728–000]

Take notice that on December 3, 1999, Cleco Utility Group Inc. (Cleco), tendered for filing proposed changes in its FERC Rate Schedule No. 64, which would amend the existing contract for the sale of energy and use of substation facilities between Cleco and the City of St. Martinville, Louisiana.

The first amendment amends Article I, Section 1.1 of the contract to reduce from two years to one year the time period required for advance written notice of termination following the initial term of the contract. The second amendment reflects the parties' election to extend the initial term of service under the agreement and implements other conforming changes to the contract to preserve the parties' mutual rights and obligations under the existing agreement during the extended initial term.

Cleco requests waiver of the Commission's regulations as may be necessary, so that the first and second amendments may become effective, as proposed.

Copies of the filing were served upon the City of St. Martinville and the Louisiana Public Service Commission.

Comment date: December 23, 1999, in accordance with Standard Paragraph E at the end of this notice.

21. Commonwealth Edison Company

[Docket No. ER00–729–000]

Take notice that on December 3, 1999, Commonwealth Edison Company (ComEd), tendered for filing an Interconnection Agreement with Cordova Energy Company LLC (Cordova).

ComEd requests an effective date of December 4, 1999 and accordingly seeks waiver of the Commission's notice requirements.

Copies of the filing were served on Cordova and the Illinois Commerce Commission.

Comment date: December 23, 1999, in accordance with Standard Paragraph E at the end of this notice.

22. Western Systems Power Pool

[Docket No. ER00–730–000]

Take notice that on December 3, 1999, the Western Systems Power Pool (WSPP), tendered for filing certain changes to the WSPP Agreement intended to better reflect common commercial practices, and to clarify or correct certain aspects of the existing Agreement.

WSPP seeks an effective date of February 1, 2000 for these changes.

WSPP states that copies of the filing were served on all WSPP members, and on all state commissions within the continental United States.

Comment date: December 23, 1999, in accordance with Standard Paragraph E at the end of this notice.

23. Arizona Public Service Company

[Docket No. ER00–731–000]

Take notice that on December 3, 1999, Arizona Public Service Company (APS) tendered for filing transmission agreement with APS Merchant Group.

A copy of this filing has been served on the Arizona Corporation Commission and the APS Merchant Group.

Comment date: December 23, 1999, in accordance with Standard Paragraph E at the end of this notice.

24. The Detroit Edison Company

[Docket No. OA97–690–001]

Take notice that on December 6, 1999, The Detroit Edison Company made a compliance filing in the above-referenced docket pursuant to the Federal Energy Regulatory Commission's Order, 88 FERC ¶ 61,070 (1999).

Comment date: January 10, 2000, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before 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 these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99–32715 Filed 12–16–99; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6249–2]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 OR www.epa.gov/oeca/ofa.

Weekly receipt of Environmental Impact Statements

Filed December 06, 1999 Through December 10, 1999

Pursuant to 40 CFR 1506.9.

EIS No. 990460, Draft EIS, NPS, MI, Sleeping Bear Dunes National Lakeshore, Historic Properties Management Plan, Implementation, MI, Due: February 14, 2000, Contact: Michael Duwe (231) 326–5134.

EIS No. 990461, Draft EIS, COE, NY, Fire Island Inlet to Montauk Point, Implementation, Reach 1—Fire Island Inlet to Moriches Inlet Interim Storm Damage Protection Project, Long Island, NY, Due: February 07, 2000, Contact: Pete Weppler (212) 264–0195.

EIS No. 990462, Draft EIS, FHW, TN, Interstate 40 (I–40) Transportation Improvements from I–75 to Cherry Street in Knoxville, Funding, NPDES and COE Section 404 Permits, Knox County, TN, Due: February 07, 2000, Contact: Charles Boyd (615) 781–5770.

EIS No. 990463, Draft EIS, BOP, SC, South Carolina—Federal Correctional Institution, Construct and Operate, Possible Sites: Andrew, Bennettsville, Oliver and Salters, SC, Due: February 07, 2000, Contact: David J. Dorworth (202) 514–6470.

EIS No. 990464, Draft EIS, FHW, VA, ''Hampton Roads'' Crossing Study, Improvements, I–164 Hampton Roads Bridge Tunnel and I–564 Interchange in Norfolk; VA–164 near Coast Guard Boulevard in Portsmouth; and the I–64, I–264, and I–664 Interchange in Chesapeake, Funding, Coast Guard Permit, COE Section 10 and 404 Permit, Isle of Wight and York Counties, VA, Due: February 07, 2000, Contact: Mr. J. Bruce Turner (804) 775–3320.

EIS No. 990465, Final EIS, COE, AR, Grand Prairie Area Demonstration Project, Implementation, Water Conservation, Groundwater Management and Irrigation Water Supply, Prairie, Arkansas, Monroe and Lonoke Counties, AR, Due: January 24, 2000, Contact: Edward P. Lambert (901) 544–0707.

EIS No. 990466, Draft EIS, FTA, CA, Cortina Integrated Solid Waste Management Project, Development and Operation, Approval of Land Lease Cortina Indian Rancheria of Wintin Indians, Colusa County, CA, Due: February 15, 2000, Contact: William Allen (916) 978–6043.

EIS No. 990467, Final EIS, FHW, IN, US 231 Transportation Project, New Construction from CR–200 N to CR–1150′1, Funding, Right-of-Way Permit and COE Section 404 Permit, Spencer and Dubois Counties, IN, Due: January 24, 2000, Contact: John R. Baxter (317) 226–7445.

EIS No. 990468, Final 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: January 24, 2000, Contact: Andy F. DeVito (202) 208–2701.

EIS No. 990469, Draft EIS, COE, TX, Programmatic EIS—Upper Trinity River Basin Feasibility Study, To Provide Flood Damage Reduction, Environmental Restoration, Water Quality Improvement and Recreational Enhancement, Trinity River, Dallas-Fort Worth Metroplex, Dallas, Denton and Tarrant Counties, TX, Due: February 07, 2000, Contact: Gene T. Rice, Jr (817) 987–2110.

EIS No. 990470, Draft EIS, TVA, TN, Addition of Electric Generation Peaking and Baseload Capacity at Greenfield Sites, Construction and Operation of Combustion Turbines (CTs), Haywood County, TN, Due: February 07, 2000, Contact: Gregory L. Askew, P.E. (865) 632–6418.

EIS No. 990471, Final EIS, FTA, WA, Everett-to-Seattle Communter Rail Project, Construction and Operation, To Link the Cities of Everett, Mukilteo, Edmonds, Shoreline, and the Seattle Waterfront, U.S. Coast Guard, COE Section 10 and 404 Permits, Snohomish County, WA,

Due: January 24, 2000, Contact: David Phillip Beal (206) 684–1883.

EIS No. 990472, Final EIS, COE, NJ, Barnegat Inlet to Little Egg Inlet Hurricane and Storm Damage Protection, Implementation, Long Beach Island, Ocean County, NJ, Due: January 24, 2000, Contact: Randy Piersol (215) 656–6577.

EIS No. 990473, Draft EIS, SFW, MT, WA, ID, Plum Creek Native Fish Habitat Conservation Plan, Issuance of an Incidental Take Permit for Federally Protected Native Fish Species, MT, ID and WA, Due: February 23, 2000, Contact: Ted Koch (208) 378–5293. The US Department of Interior's Fish and Wildlife Service and Department of Commerce's National Marine Fisheries Service are Lead for this project.

EIS No. 990474, Draft Supplement, NOA, Fishery Management Plan (FMP), Regulatory Impact Review, Snapper-Grouper Complex, South Atlantic Region, Due: February 07, 2000, Contact: William T. Hogarth (202) 482–5916.

Dated: December 14, 1999.

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 99–32764 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6249–1]

Notice of Public Hearing and Extension of the Public Comment Period

AGENCY: U.S. Environmental Protection Agency.

ACTION: The U.S. Department of Transportation (DOT), Research and Special Programs Administration, Office of Pipeline Safety, and the U.S. Environmental Protection Agency (EPA), Region 6, completed an Environmental Assessment (EA) and preliminary Finding of No Significant Impact (FNSI) on the proposed petroleum products pipeline to be operated by Longhorn Partners Pipeline, L.P. The purpose of this notice is to notify interested parties that EPA and DOT have scheduled a public meeting on the Longhorn Partners Pipeline EA/FNSI on Monday, January 10, 2000, at 6 P.M. at the City Coliseum, located at 101 Dawson Rd., in south Austin, TX. An information ''open house'' will be held from 4–6 P.M. This is a rescheduling of the November 16, 1999, meeting in Austin, TX, which was terminated early due to overcrowding of the meeting site. The Houston, TX; Fredericksburg, TX; Bastrop, TX; and El Paso, TX meetings were conducted as previously scheduled. Consistent with the rescheduling of the Austin public meeting, the comment period is extended until Friday, January 14, 2000. A copy of the EA/FNSI is available for public review at County Clerk Offices in counties along the pipeline route, EPA's regional office, DOT's Houston regional office, and at *www.epa.gov/earth1r6/6en/xp/longhorn.htm* on the EPA web site. There is also an electronic mailbox so that citizens can submit comments electronically to ''longhorn@epa.gov''. Address all comments to Robert D. Lawrence (6EN–XP), EPA, 1445 Ross Avenue, Dallas, TX, 75202–2733.

Dated: December 14, 1999.

Richard E. Sanderson,

Director, Office of Federal Activities, Environmental Protection Agency.

[FR Doc. 99–32765 Filed 12–16–99; 8:45 am]

BILLING CODE 6249–01–M

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–99–30–A (Auction No. 30); DA 99–2624]

Auction of Licenses For Fixed Point-to-Point Microwave Services in the 38.6 to 40.0 GHz (39 GHz) Band Scheduled for April 11, 2000

AGENCY: Federal Communications Commission.

ACTION: Notice; seeking comment.

SUMMARY: This Public Notice announces the auction of licenses for fixed point-to-point microwave services in the 38.6 to 40.0 GHz band (''39 GHz Auction''), scheduled to commence on April 11, 2000. As discussed in greater detail herein, the Bureau proposes that the 39 GHz Auction be composed of 2,450 licenses in the 38.6–40.0 GHz bands (''39 GHz band''). Fourteen 100 megahertz licenses (paired 50 megahertz channel blocks) will be offered in each of 172 Economic Areas (EAs) and 3 EA-like areas, covering the United States, the Northern Mariana Islands, Guam, American Samoa, the United States Virgin Islands and Puerto Rico.

DATES: Comments are due on or before December 8, 1999 and reply comments are due on or before December 20, 1999.[1]

ADDRESSES: To file formally, parties must submit an original and four copies to the Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, SW, Washington, D.C. 20554. In addition, parties must submit one copy to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 Twelfth Street, SW, Room No. 4–A760, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Kenneth Burnley, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0664.

SUPPLEMENTARY INFORMATION: This is a summary of a Public Notice released November 23, 1999. The complete text, including all attachments, of the public notice is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW, Washington, DC. It may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (ITS, Inc.) 1231 20th Street, NW, Washington, DC 20035, (202) 857–3800. It is also available on the Commission's website at http://www.fcc.gov/wtb/auctions.

I. Upfront Payments and Initial Maximum Eligibility for Each Bidder

1. The Wireless telecommunications Bureau (''Bureau'') has delegated authority and discretion to determine an appropriate upfront payment for each license being auctioned, taking into account such factors as the population in each geographic license area, and the value of similar spectrum. With these guidelines in mind, the following upfront payments are proposed for the 39 GHz Auction:

For licenses with populations of 1,000,000 or greater:

License population * $0.04 (the result rounded to the nearest thousand).

For licenses with populations of less than 1,000,000:

License population * $0.02 (the result rounded to the nearest hundred for levels below $10,000 and to the nearest thousand for levels above $10,000) with a minimum of no less than $2,500 per license. Comment is sought on this proposal. It is further proposed that the amount of the upfront payment submitted by a bidder will determine the initial maximum eligibility (as measured in bidding units) for each bidder. Upfront payments will not be attributed to specific licenses, but instead will be translated into bidding units to define a bidder's initial maximum eligibility, which cannot be

[1] **Editorial note:** This document was received by the Office of the Federal Register on December 14, 1999.

increased during the auction. Thus, in calculating the upfront payment amount, an applicant must determine the maximum number of bidding units it may wish to bid on (or hold high bids on) in any single round, and submit an upfront payment covering that number of bidding units. Comment is sought on this proposal.

II. Reserve Price or Minimum Opening Bid

2. The Balanced Budget Act of 1997 calls upon the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid established when FCC licenses are subject to auction (*i.e.*, because the Commission has accepted mutually exclusive applications for those licenses), unless the Commission determines that a reserve price or minimum bid is not in the public interest. Consistent with this mandate, the Commission has directed the Bureau to seek comment on the use of a minimum opening bid and/or reserve price prior to the start of each auction. More specifically, the Bureau was directed to seek comment on the methodology to be employed in establishing each of these mechanisms. Among other factors the Bureau should consider are the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that reasonably could have an impact on valuation of the spectrum being auctioned. The Commission concluded that the Bureau should have the discretion to employ either or both of these mechanisms for future auctions.

3. Normally, a reserve price is an absolute minimum price below which an item will not be sold in a given auction. Reserve prices can be either published or unpublished. A minimum opening bid, on the other hand, is the minimum bid price set at the beginning of the auction below which *no bids* are accepted. It is generally used to accelerate the competitive bidding process. Also, in a minimum opening bid scenario, the auctioneer generally has the discretion to lower the amount later in the auction. It is also possible for the minimum opening bid and the reserve price to be the same amount.

4. In anticipation of this auction and in light of the Budget Act, the Bureau proposes to establish minimum opening bids for the 39 GHz Auction.The Bureau believes a minimum opening bid, which has been utilized in other auctions, is an effective bidding tool. A minimum opening bid, rather than a reserve price, will help to regulate the pace of the auction and provides flexibility.

5. Specifically, for Auction No. 30, the Commission proposes the following license-by-license formulas for calculating minimum opening bids, based on the population (''pops'') of the EA:

For licenses with populations of 1,000,000 or greater:

License population * $0.08 (the result rounded to the nearest thousand).

For licenses with populations of less than 1,000,000:

License population * $0.04 (the result rounded to the nearest hundred for results less than $10,000 and to the nearest thousand for results greater than $10,000) with a minimum of no less than $2,500 per license.

Comment is sought on this proposal. If commenters believe the formula proposed above for minimum opening bids will result in substantial numbers of unsold licenses, or is not a reasonable amount, or should instead operate as a reserve price, they should explain why this is so, and comment on the desirability of an alternative approach. Commenters are advised to support their claims with valuation analyses and suggested reserve prices or minimum opening bid levels or formulas. In establishing the formula for minimum opening bids, comment is sought on such factors as the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands and any other relevant factors that could reasonably have an impact on valuation of the 39 GHz band. Alternatively, comment is sought on whether, consistent with the Budget Act, the public interest would be served by having no minimum opening bid or reserve price.

III. Other Auction Procedural Issues

a. Structure of Bidding Rounds, Activity Requirements, and Criteria for Determining Reductions in Eligibility

6. The Bureau proposes that the auction be divided into three stages: Stage One, Stage Two and Stage Three. The auction will start in Stage One. The Bureau proposes that the auction will generally advance to the next stage (*i.e.,* from Stage One to Stage Two, and from Stage Two to Stage Three) when the auction activity level, as measured by the percentage of bidding units receiving new high bids, is approximately ten percent or below for three consecutive rounds of bidding in Stages One and Two. However, the Bureau further proposes that it retain the discretion to change stages unilaterally by announcement during the auction. In exercising this discretion, the Bureau will consider a variety of measures of bidder activity including, but not limited to, the auction activity level, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. Comment is sought on these proposals.

7. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively on a percentage of their maximum bidding eligibility during each round of the auction rather than waiting until the end to participate. A bidder that does not satisfy the activity rule will either lose bidding eligibility in the next round or must use an activity rule waiver (if any remain).

8. For the 39 GHz Auction, we propose the following activity requirements:

Stage One: In each round of the first stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on licenses representing at least 80 percent of its current bidding eligibility. Failure to maintain the requisite activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage One, reduced eligibility for the next round will be calculated by multiplying the current round activity by five-fourths (5/4).

Stage Two: In each round of the second stage, a bidder desiring to maintain its current eligibility is required to be active on 90 percent of its current bidding eligibility. During Stage Two, reduced eligibility for the next round will be calculated by multiplying the current round activity by ten-ninths (10/9).

Stage Three: In each round of the third stage, a bidder desiring to maintain its current eligibility is required to be active on 98 percent of its current bidding eligibility. In this final stage, reduced eligibility for the next round will be calculated by multiplying the current round activity by fifty-fortyninths (50/49). Comment is sought on these proposals.

b. Minimum Accepted Bids

9. Once there is a standing high bid on a license, a bid increment will be applied to that license to establish a minimum acceptable bid for the following round. For the 39 GHz Auction, the Bureau proposes to use a smoothing methodology to calculate bid

increments, as we have done in several other auctions. The Bureau retains the discretion to change the minimum bid increment if it determines that circumstances so dictate. The Bureau will do so by announcement in the Automated Auction System. Comment is sought on these proposals.

10. The exponential smoothing formula calculates the bid increment for each license based on a weighted average of the activity received on each license in all previous rounds. This methodology will tailor the bid increment for each license based on activity, rather than setting a global increment for all licenses. For every license that receives a bid, the bid increment for the next round for that license will be established using the exponential smoothing formula.

11. The calculation of the percentage bid increment for each license in a given round is made at the end of the previous round. The computation is based on an activity index, which is calculated as the weighted average of the activity in that round and the activity index from the prior round. The activity index at the start of the auction (round 0) will be set at 0. The current activity index is equal to a weighting factor times the number of new bids received on the license in the most recent bidding round plus one minus the weighting factor times the activity index from the prior round. The activity index is then used to calculate a percentage increment by multiplying a minimum percentage increment by one plus the activity index with that result being subject to a maximum percentage increment. The Commission will initially set the weighting factor at 0.5, the minimum percentage increment at 0.1, and the maximum percentage increment at 0.2.

Equations

$A_i = (C * B_i) + ((1–C) * A_{i-1})$

I_{i+1} = smaller of $((1 + A_i) * N)$ and M

where,

A_i = activity index for the current round (round i)

C = activity weight factor

B_i = number of bids in the current round (round i)

A_{i-1} = activity index from previous round (round i − 1), A0 is 0

Ii+1 = percentage bid increment for the next round (round i+1)

N = minimum percentage increment or bid increment floor

M = maximum percentage increment or bid increment ceiling

Under the exponential smoothing methodology, once a bid has been received on a license, the minimum acceptable bid for that license in the following round will be the new high bid plus the dollar amount associated with the percentage increment (variable I_{i+1} from above times the high bid). This result will be rounded to the nearest thousand if it is over ten thousand or to the nearest hundred if it is under ten thousand.

Examples

License 1

C=0.5, N = 0.1, M = 0.2

Round 1 (2 new bids, high bid = $1,000,000)

a. Calculation of percentage increment for round 2 using exponential smoothing:

$A_1 = (0.5 * 2) + (0.5 * 0) = 1$

The smaller of $I_2 = (1 + 1) * 0.1 = 0.2$ or 0.2 (the maximum percentage increment)

b. Minimum bid increment for round 2 using the percentage increment (I_2 from above)

0.2 * $1,000,000 = $200,000

c. Minimum acceptable bid for round 2 = 1,200,000

Round 2 (3 new bids, high bid = 2,000,000)

a. Calculation of percentage increment for round 3 using exponential smoothing:

$A_2 = (0.5 * 3) + (0.5 * 1) = 2$

The smaller of $I_3 = (1 + 2) * 0.1 = 0.3$ or 0.2 (the maximum percentage increment)

b. Minimum bid increment for round 3 using the percentage increment (I_3 from above)

0.2 * $2,000,000 = $400,000

c. Minimum acceptable bid for round 3 = 2,400,000

Round 3 (1 new bid, high bid = 2,400,000)

a. Calculation of percentage increment for round 4 using exponential smoothing:

$A_3 = (0.5 * 1) + (0.5 * 2) = 1.5$

The smaller of $I_4 = (1 + 1.5) * 0.1 = 0.25$ or 0.2 (the maximum percentage increment)

b. Minimum bid increment for round 4 using the percentage increment (I_4 from above)

0.2 * $2,400,000 = $480,000

c. Minimum acceptable bid for round 4 = 2,880,000

c. Activity Rule Waivers and Reducing Eligibility

12. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round of bidding and not to a particular license. Activity waivers are principally a mechanism for auction participants to avoid the loss of auction.

13. The auction system assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver (known as an ''automatic waiver'') at the end of any bidding period where a bidder's activity level is below the minimum required unless: (1) There are no activity rule waivers available; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the minimum requirements.

14. A bidder with insufficient activity that wants to reduce its bidding eligibility, rather than use an activity rule waiver, must affirmatively override the automatic waiver mechanism during the bidding period by using the reduce eligibility function in the software. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described above. Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

15. A bidder may proactively apply an activity rule waiver as a means to keep the auction open without placing a bid. If a bidder submits a proactive waiver (using the proactive waiver function in the bidding software) during a bidding period in which no bids are submitted, the auction will remain open and the bidder's eligibility will be preserved. Note: an automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open.

The Bureau proposes that each bidder in the 39 GHz Auction be provided with five activity rule waivers that may be used in up to five separate rounds at the bidder's discretion during the course of the auction as set forth above. Comment is sought on this proposal.

d. Information Regarding Bid Withdrawal and Bid Removal

16. For the 39 GHz Auction, the Bureau proposes the following bid removal and bid withdrawal procedures. Before the close of a bidding period, a bidder has the option of removing any bids placed in that round. By using the remove bid function in the software, a bidder may effectively ''unsubmit'' any bid placed within that round. A bidder removing a bid placed in the same round is not subject to withdrawal payments, but will affect a bidder's activity for the round in which it is removed.

17. Once a round closes, a bidder may no longer remove a bid. However, in the next round, a bidder may withdraw standing high bids from previous rounds using the withdraw bid function.

A high bidder that withdraws its standing high bid from a previous round is subject to the bid withdrawal payment provisions. Comment is sought on these bid removal and bid withdrawal procedures.

18. In the *Part 1 Third Report and Order,* 63 FR 2315 (January 15, 1998), the Commission explained that allowing bid withdrawals facilitates efficient aggregation of licenses and the pursuit of efficient backup strategies as information becomes available during the course of an auction. The Commission noted, however, that, in some instances, bidders may seek to withdraw bids for improper reasons. The Bureau, therefore, has discretion, in managing the auction, to limit the number of withdrawals to prevent any bidding abuses. The Commission stated that the Bureau should assertively exercise its discretion, consider limiting the number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if the Bureau finds that a bidder is abusing the Commission's bid withdrawal procedures.

19. Applying this reasoning, the Bureau proposes to limit each bidder in the 39 GHz Auction to withdrawals in no more than two rounds during the course of the auction. To permit a bidder to withdraw bids in more than two rounds would likely encourage insincere bidding or the use of withdrawals for anti-competitive purposes. The two rounds in which withdrawals are utilized will be at the bidder's discretion; withdrawals otherwise must be in accordance with the Commission's rules. There is no limit on the number of standing high bids that may be withdrawn in either of the rounds in which withdrawals are utilized. Withdrawals will remain subject to the bid withdrawal payment provisions specified in the Commission's rules. Comment is sought on this proposal.

e. Stopping Rule

20. For the 39 GHz Auction, the Bureau proposes to employ a simultaneous stopping rule approach. The Bureau has discretion ''to establish stopping rules before or during multiple round auctions in order to terminate the auction within a reasonable time.'' A simultaneous stopping rule means that all licenses remain open until the first round in which no new acceptable bids, proactive waivers or withdrawals are received. After the first such round, bidding closes simultaneously on all licenses. Thus, unless circumstances dictate otherwise, bidding would remain open on all licenses until bidding stops on every license.

21. The Bureau seeks comment on a modified version of the simultaneous stopping rule. The modified stopping rule would close the auction for all licenses after the first round in which no bidder submits a proactive waiver, a withdrawal, or a new bid on any license on which it is not the standing high bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the standing high bidder would not keep the auction open under this modified stopping rule. The Bureau further seeks comment on whether this modified stopping rule should be used unilaterally or only in Stage Three of the auction.

22. The Bureau proposes that it retain the discretion to keep an auction open even if no new acceptable bids or proactive waivers are submitted and no previous high bids are withdrawn. In this event, the effect will be the same as if a bidder had submitted a proactive waiver. The activity rule, therefore, will apply as usual and a bidder with insufficient activity will either lose bidding eligibility or use a remaining activity rule waiver.

23. Finally, the Bureau proposes that it reserve the right to declare that the auction will end after a specified number of additional rounds (''special stopping rule''). If the Bureau invokes this special stopping rule, it will accept bids in the final round(s) only for licenses on which the high bid increased in at least one of the preceding specified number of rounds. The Bureau proposes to exercise this option only in certain circumstances, such as, for example, where the auction is proceeding very slowly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time. Before exercising this option, the Bureau is likely to attempt to increase the pace of the auction by, for example, moving the auction into the next stage (where bidders would be required to maintain a higher level of bidding activity), increasing the number of bidding rounds per day, and/or increasing the amount of the minimum bid increments for the limited number of licenses where there is still a high level of bidding activity. Comment is sought on these proposals.

f. Information Relating to Auction Delay, Suspension or Cancellation

24. For the 39 GHz Auction, the Bureau proposes that, by public notice or by announcement during the auction, the Bureau may delay, suspend or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and competitive conduct of competitive bidding. In such cases, the Bureau, in its sole discretion, may elect to: Resume the auction starting from the beginning of the current round; resume the auction starting from some previous round; or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. The Bureau emphasizes that exercise of this authority is solely within the discretion of the Bureau, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers. Comment is sought on this proposal.

Federal Communications Commission.

Louis Sigalos,

Deputy Chief, Auctions & Industry Analysis Division.

[FR Doc. 99–32826 Filed 12–16–99; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting; Notice of Change in Subject Matter of Agency Meeting

Pursuant to the provisions of subsection (e)(2) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(e)(2)), notice is hereby given that at its open meeting held at 10:04 a.m. on Tuesday, December 14, 1999, the Corporation's Board of Directors determined, on motion of Vice Chairman Andrew C. Hove, Jr., seconded by Director Ellen S. Seidman (Director, Office of Thrift Supervision), concurred in by Ms. Julie L. Williams, acting in the place and stead of Director John D. Hawke, Jr. (Comptroller of the Currency), and Chairman Donna Tanoue, that Corporation business required the withdrawal from the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matter.

Memorandum re: Proposed Amendment to Statement of Policy on Applications for Deposit Insurance

The Board further determined, by the same majority vote, that no earlier notice of the change in the subject matter of the meeting was practicable.

Dated: December 14, 1999.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 99–32927 Filed 12–15–99; 3:47 pm]

BILLING CODE 6714–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting; Notice of Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:46 a.m. on Tuesday, December 14, 1999, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider (1) matters relating to the Corporation's corporate and supervisory activities, (2) reports of the Office of Inspector General, and (3) personnel matters.

In calling the meeting, the Board determined, on motion of Vice Chairman Andrew C. Hove, Jr., seconded by Director Ellen S. Seidman (Director, Office of Thrift Supervision), concurred in by Ms. Julie L. Williams, acting in the place and stead of Director John D. Hawke, Jr. (Comptroller of the Currency), and Chairman Donna Tanoue, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b (c)(2), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW, Washington, DC.

Dated: December 14, 1999.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 99–32928 Filed 12–15–99 3:49 pm]

BILLING CODE 6714–01–M

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. The application also will 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 (12 U.S.C. 1843). 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 January 10, 2000.

A. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. Gold Banc Corporation, Inc., and Gold Banc Acquisition Corp. XII, Inc., both of Leawood, Kansas; to acquire up to 100 percent of the voting shares of CountryBanc Holding Company, Edmond, Oklahoma, and thereby indirectly acquire People First Bank, Hennessey, Oklahoma; People First Bank, Elkhart, Kansas; and American Heritage Bank, El Reno, Oklahoma.

In connection with this application, Gold bank Acquisition Corp., XII, Inc., has applied to become a bank holding company.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Bryan Family Management Trust, and Bryan Heritage Limited Partnership, both of Bryan, Texas; to acquire 37.60 percent of the voting shares of The First National Bank of Bryan, Bryan, Texas.

Board of Governors of the Federal Reserve System, December 13, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99–32707 Filed 12–16–99; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL TRADE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 64 F.R., Monday, November 29, 1999, Page No. 66637.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Tuesday, December 14, 1999.

CHANGES IN THE AGENDA: The Federal Trade Commission has canceled its previously scheduled Oral Argument meeting for December 14, 1999, at 10:00 a.m.

Donald S. Clark,

Secretary.

[FR Doc. 99–32845 Filed 12–15–99; 12:33 pm]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities: Proposed New Collection; Comment Request

AGENCY: Administration on Aging, HHS.

The Administration on Aging (AoA), Department of Health and Human Services, proposes to submit to the Office of Management and Budget (OMB) the following proposal for the collection of information in compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 96–511):

Title of Information Collection: Operation Restore Trust Grantee Reports.

Type of Request: New.

Use: To collect, on a one-time basis, data and information concerning best practices for recruiting, training, and maintaining staff and volunteers to build community coalitions, promote awareness and stimulate action designed to combat and prevent waste, fraud and abuse in the Medicare and Medicaid programs. As part of a nation-wide partnership of public and private agencies and organizations, AoA funds grants through two mechanisms, the Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. 104–191) and the Health Care Anti-Fraud Waste and Abuse Community Volunteer Program authorized in the Omnibus Consolidated Appropriation Act of 1997.

These two sets of projects provide education, training, and other services to build community coalitions, promote awareness, and stimulate action on the part of staff, volunteers, and beneficiaries to identify and report

potential cases of inappropriate billing and other improper activity in the nation's publicly financed health insurance programs.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the 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 the use of automated collection techniques or other forms of information technology.

Data will be from all of the AoA-funded sites receiving funding in Fiscal Year 1999 and later years. The analysis of the data will help to determine best practices for reducing health care waste, fraud, and abuse. The types of reporting forms, the number of respondents to each form and the hourly and cost burdens are detailed in the following table.

	Number of clients	Responses/ client	Hours/ response	Annual burden hours	Annual burden cost
Staff Interview	30	1	1	30	$750
Trainee Interview	100	1	0.5	50	$1500
Total	130			80	$2250

Frequency: One time.

Additional Information or Comments: The AoA announced reporting specifications for the proposed format in the **Federal Register** on February 23, 1999. There were no responses to the 60-day notice.

To request more information concerning the proposed projects, or to obtain a copy of the information collection plans, call Dr. Kenton Williams at (202) 619–3951. Written comments and recommendations regarding the proposed information collection requirements should be sent within 30 days of the publication of this notice to the following address: Office of Information and Regulatory Affairs, Attention: Allison Eydt, OMB Desk Officer, Office of Management and Budget, Washington, DC 20503.

Dated: December 2, 1999.

Jeanette C. Takamura,

Assistant Secretary for Aging.

[FR Doc. 99–32717 Filed 12–16–99; 8:45 am]

BILLING CODE 4154–01–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–00–13]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention is providing opportunity for public comment on proposed data collection projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 639–7090.

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 for other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Projects

STOP IT NOW!@ Public Awareness Campaign—New—It is estimated that one in five girls and one in ten boys have been sexually abused before the age of eighteen. The National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC) has recognized child sexual abuse as a public health problem for several years. As a result, CDC plans to evaluate the effectiveness of the STOP IT NOW! public awareness campaign in Philadelphia as an innovative approach to child sexual abuse prevention and modify the campaign for national use. Ultimately CDC will examine some of the more promising interventions implemented in communities across the nation to determine if these can be replicated. STOP IT NOW! is a non-profit organization founded to challenge and change sexual abuse behaviors toward children.

The goals of the proposed data collection are:

- To inform the implementation of the campaign.
- To inform the modification and expansion of the program to a national level.
- To collect baseline data that will later be compared to post-campaign data to evaluate the effectiveness of the campaign.

The total costs to respondents is $0.

Form	Type of respondents	Number of respondents per year	Number of responses per respondent	Avg. burden per response (in hrs.)	Total annual burden (in hrs.)
1	Philadelphia Residents	600	1	15/60	150
2	Legal Community	130 (65 intervention, 65 comparison)	1	15/60	32.5
3	Treatment Community	130 (65 intervention, 65 comparison)	1	15/60	32.5
4	Police	130 (65 intervention, 65 comparison)	1	15/60	32.5
5	Child Protective Services	130 (65 intervention, 65 comparison)	1	15/60	32.5
Total		1120			280

Dated: December 10, 1999.

Nancy Cheal,

Acting Associate Director for Policy, Planning, and Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99–32723 Filed 12–16–99; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 99N–5222]

Agency Information Collection Activities; Proposed Collection; Comment Request; Notice of a Claim for GRAS Exemption Based on a GRAS Determination

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing information collection, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the procedures used for submitting a Generally Recognized as Safe (GRAS) notice stating that a particular use of a substance is not subject to the premarket approval requirements of the Federal Food, Drug, and Cosmetic Act (the act).

DATES: Submit written comments on the collection of information by February 15, 2000.

ADDRESSES: Submit written comments on the collection of information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Peggy Schlosburg, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520) Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing information collection, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Notice of a Claim for GRAS Exemption Based on a GRAS Determination (OMB No. 0910–0342—Extension)

Section 409 of the act (21 U.S.C. 348) establishes a premarket approval requirement for ''food additives;'' section 201(s) of that act provides an exemption from the definition of ''food additive'' and thus from the premarket approval requirement, for uses of substances that are GRAS by qualified experts. FDA is proposing a voluntary procedure whereby members of the food industry who determine that use of a substance satisfies the statutory exemption may notify FDA of that determination. The notice would include a detailed summary of the data and information that support the GRAS determination, and the notifier would maintain a record of such data and information. FDA would make the information describing the GRAS claim, and the agency's response to the notice, available in a publicly accessible file; the entire GRAS notice would be publicly available consistent with the Freedom of Information Act and other Federal disclosure statutes.

Description of Respondents: Manufacturers of Substances Used in Food and Feed FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
170.36	50	1	50	150	7,500
570.36	10	1	10	150	1,500
Total					9,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency of Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
170.36(c)(v)	50	1	50	15	750
570.36(c)(v)	10	1	10	15	150
Total					900

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The reporting requirement is for a proposed rule that has not yet been issued as a final rule. In developing the proposed rule, FDA solicited input from representatives of the food industry on the reporting requirements, but could not fully discuss with those representatives the details of the proposed notification procedure. FDA received no comments on the agency's estimate of the hourly reporting requirements, and thus has no basis to revise that estimate at this time. During 1998, FDA received 12 notices that were submitted under the terms of the proposed rule; between January 1, 1999, and November 30, 1999, FDA received 23 notices. To date, the number of annual notices is less than FDA's estimate; however, the number of annual notices could increase when the proposed rule becomes final.

Dated: November 10, 1999.

William K. Hubbard,

Senior Associate Commissioner for Policy, Planning, and Legislation.

[FR Doc. 99–32681 Filed 12–16–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98F–1199]

Avecia, Inc.; Withdrawal of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the withdrawal, without prejudice to a future filing, of a food additive petition (FAP 7B4525) proposing that the food additive regulations be amended to provide for the safe use of 2-methyl-4,5-trimethylene-4-isothiazolin-3-one as a preservative for paper coatings intended for use in contact with aqueous food.

FOR FURTHER INFORMATION CONTACT: Mark A. Hepp, Center for Food Safety and Applied Nutrition (HFS–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3098.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of January 6, 1999 (64 FR 884), FDA announced that a food additive petition (FAP 7B4525) had been filed by Zeneca Biocides, Foulkstone 1405, 2d, 1800 Concord Pike, P.O. Box 15457, Wilmington, DE 19850–5457. The petition proposed to amend the food additive regulations in § 176.170 *Components of paper and paperboard in contact with aqueous and fatty foods* (21 CFR 176.170) to provide for the safe use of 2-methyl-4,5-trimethylene-4-isothiazolin-3-one as a preservative for paper coatings intended for use in contact with aqueous foods. Since publication of the filing notice, Zeneca Biocide's specialty chemicals group has been spun-off as Avecia, Inc., 1405 Foulk Rd., P.O. Box 15457, Wilmington, DE 19850–5457. Avecia, Inc., has now withdrawn the petition without prejudice to a future filing (21 CFR 171.7).

Dated: November 29, 1999.

Alan M. Rulis,

Director, Office of Premarket Approval, Center for Food Safety and Applied Nutrition.

[FR Doc. 99–32682 Filed 12–16–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98D–0969]

Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals (GFI #78); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a final guidance document entitled ''Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (GFI #78). After the agency considered public comments on a draft of this guidance, announced in the **Federal Register** of November 18, 1998, it determined that revision of the draft guidance was necessary. GFI #78 announces that FDA believes that it should consider the potential human health impact of the microbial effects associated with all uses of all classes of antimicrobial new animal drugs intended for use in food-producing animals when approving such drugs. For additional information regarding the subject matter dealt with in GFI #78, see the notice of availability of the document entitled ''FDA Response to Comments on a Proposed Framework for Evaluating and Assuring the Human Food Safety of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing

Animals'' that appears elsewhere in this issue of the **Federal Register**.

DATES: Submit comments at any time.

ADDRESSES: Submit written comments on GFI #78 to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1061, 5630 Fishers Lane, Rockville, MD 20852.

FDA will also accept electronic comments. Persons who wish to submit electronic comments should go to the FDA home page at www.fda.gov and select ''Dockets'' and follow the instructions.

Submit written requests for single copies of the document entitled ''Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (GFI #78) to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See section **III. Electronic Access** of this document for information on electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sharon Thompson, Center for Veterinary Medicine (HFV–1), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1798, e-mail: sthompso@cvm.fda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of November 18, 1998 (63 FR 64094), FDA announced the availability of a draft guidance entitled ''Guidance for Industry: Evaluation of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (GFI #78). This draft guidance announced that FDA believed that it should evaluate the human health impact of the microbial effects associated with all uses of all classes of antimicrobial new animal drugs intended for use in food-producing animals when approving such drugs. The publication of the draft of GFI #78 was the first step in the agency's consideration of the issues related to the use of antimicrobial new animal drugs in food-producing animals. The draft of GFI #78 laid out the agency's rationale for its current thinking about its authority under the Federal Food, Drug, and Cosmetic Act to consider the human health impact of the microbial effects associated with the use of antimicrobial new animal drugs in food-producing animals.

In the **Federal Register** of January 6, 1999 (64 FR 887), FDA announced the availability of a discussion paper entitled ''A Proposed Framework for Evaluating and Assuring the Human Safety of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (Framework Document). The Framework Document was the second step in the agency's consideration of issues related to the use of antimicrobial new animal drugs in food-producing animals. FDA made the Framework Document available to the public to initiate discussions with the scientific community and other interested parties on the agency's thinking about appropriate underlying concepts to be used to develop microbial safety policies protective of the public health. The Framework Document is related to GFI #78 in that it sets out a conceptual risk-based framework for evaluating the microbial safety (related to human health impact) of antimicrobial new animal drugs intended for use in food-producing animals.

After considering comments received by the public for both the draft of GFI #78 and the Framework Document, FDA determined that it was necessary to make some revisions to GFI #78. The revisions are intended to make GFI #78 more clearly reflect the agency's intentions regarding this issue. For example, the words ''evaluate'' and ''evaluation'' have been changed to ''consider'' and ''consideration,'' and other changes have been made to indicate that additional testing would not always be needed to determine the potential human health impact of the microbial effects associated with antimicrobial new animal drugs intended for use in food-producing animals.

GFI #78 represents the agency's current thinking that it should consider the potential human health impact of the microbial effects associated with all uses of all classes of antimicrobial new animal drugs intended for use in food-producing animals when approving such drugs. It does not create or confer any right 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.

II. Comments

Interested persons may, at any time, submit written or electronic comments on GFI #78 to the Dockets Management Branch (address above). Two copies of written comments are to be submitted, except that individuals may submit one copy. All comments are to be identified with the docket number found in brackets in the heading of this document. GFI #78 and written and electronic comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain copies of ''Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (GFI #78) at http://www.fda.gov/cvm.

Dated: December 8, 1999.

Margaret M. Dotzel,

Acting Associate Commissioner for Policy.

[FR Doc. 99–32313 Filed 12–14–99; 4:09 pm]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98D–0969]

Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals (GFI #78); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a final guidance document entitled ''Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (GFI #78). After the agency considered public comments on a draft of this guidance, announced in the **Federal Register** of November 18, 1998, it determined that revision of the draft guidance was necessary. GFI #78 addresses how under section 512 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360b) FDA intends to consider the potential human health impact of the microbial effects associated with all uses of all classes of antimicrobial new animal drugs intended for use in food-producing animals when approving such drugs. For additional information regarding the subject matter dealt with in GFI #78, see the notice of availability of the document entitled ''FDA Response to

Comments on a Proposed Framework for Evaluating and Assuring the Human Food Safety of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' that appears elsewhere in this issue of the **Federal Register**.

DATES: Submit comments at any time.

ADDRESSES: Submit written comments on GFI #78 to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1061, 5630 Fishers Lane, Rockville, MD 20852.

FDA will also accept electronic comments. Persons who wish to submit electronic comments should go to the FDA home page at www.fda.gov and select ''Dockets'' and follow the instructions.

Submit written requests for single copies of the document entitled ''Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (GFI #78) to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See section **III. Electronic Access** of this document for information on electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sharon Thompson, Center for Veterinary Medicine (HFV–1), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1798, e-mail: sthompso@cvm.fda.gov.

SUPPLEMENTARY INFORMATION:

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In the **Federal Register** of January 6, 1999 (64 FR 887), FDA announced the availability of a discussion paper entitled ''A Proposed Framework for Evaluating and Assuring the Human Safety of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (Framework Document). The Framework Document was the second step in the agency's consideration of issues related to the use of antimicrobial new animal drugs in food-producing animals. FDA made the Framework Document available to the public to initiate discussions with the scientific community and other interested parties on the agency's thinking about appropriate underlying concepts to be used to develop microbial safety policies protective of the public health. The Framework Document is related to GFI #78 in that it sets out a conceptual risk-based framework for evaluating the microbial safety (related to human health impact) of antimicrobial new animal drugs intended for use in food-producing animals.

After considering comments received by the public for both the draft of GFI #78 and the Framework Document, FDA determined that it was necessary to make some revisions to GFI #78. The revisions are intended to make GFI #78 more clearly reflect the agency's intentions regarding this issue. For example, the words ''evaluate'' and ''evaluation'' have been changed to ''consider'' and ''consideration,'' and other changes have been made to indicate that additional testing would not always be needed to determine the potential human health impact of the microbial effects associated with antimicrobial new animal drugs intended for use in food-producing animals.

GFI #78 represents the agency's current thinking on how under section 512 of the act it intends to consider the potential human health impact of the microbial effects associated with all uses of all classes of antimicrobial new animal drugs intended for use in food-producing animals when approving such drugs. It does not create or confer any right 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.

II. Comments

Interested persons may, at any time, submit written or electronic comments on GFI #78 to the Dockets Management Branch (address above). Two copies of written comments are to be submitted, except that individuals may submit one copy. All comments are to be identified with the docket number found in brackets in the heading of this document. GFI #78 and written and electronic comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain copies of ''Guidance for Industry: Consideration of the Human Health Impact of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (GFI #78) at http://www.fda.gov/cvm.

Dated: December 8, 1999.

Margaret M. Dotzel

Acting Associate Commissioner for Policy.

[FR Doc. 99–32324 Filed 12–14–99; 4:09 pm]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources And Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

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.

Proposed Project: Social Support for Homeless Mothers: Implications for Best Practices and Program Design—New

The Health Care for the Homeless Clinicians' Network (HCHCN) of the National Health Care for the Homeless Council, Inc., through a cooperative agreement with the Bureau of Primary Health Care, Health Resources and Services Administration, proposes to conduct a study on the social support available to homeless mothers, most of whom are parenting children alone. The study will be of adult homeless women and will be conducted by convening focus groups and administering a questionnaire to focus group members. The study is designed to look at clients' life events, histories of violence, medical and physical illness, social support, children's needs, and services use. The results will help to define best practices as they relate to social support processes and enable HCH programs to offer the appropriate mix of supports necessary to help mothers transition into permanent housing. The participants will be recruited from ten sites of the national Health Care for the Homeless program.

The estimated response burden is as follows:

Type of respondent	Number of respondents	Responses per respondent	Hours per response	Total hour burden
Patient	100	1	3	300
Total	100			300

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: December 2, 1999.

Jane Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 99–32755 Filed 12–16–99; 8:45 am]

BILLING CODE 4160–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Data Collection; Comment Request: American Stop Smoking Intervention Study for Cancer Prevention (ASSIST) Final Evaluation: ''Tobacco Use Supplement to the 1998–2000 Current Population Survey''

SUMMARY: Under the provisions of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the National Cancer Institute (NCI), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on September 14, 1999, pages 49814–49815 and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

PROPOSED COLLECTION:

Title: American Stop Smoking Intervention Study for Cancer Prevention (ASSIST) Final Evaluation: ''Tobacco Use Supplement to the 1998–2000 Current Population Survey.''

Type of Information Request: OMB No. 0925–0368, Exp. 12/31/99, REVISION.

Need and Use of Information Collection: The ''Tobacco Use'' supplement to the Current Population Survey conducted by the Bureau of the Census collected data in September 1998 and January and May 1999 from the civilian non-instititionalized population on tobacco use and smoking prevalence, smoking intervention dissemination of workplace smoking policies and cessation programs as well as medical and dental advice to stop smoking, and changes in smoking norms and attitudes. Due to an administrative error, in January and May 1999 data collection included a small set of incorrect questions which does not permit an accurate estimate of total tobacco use. The proposed information collection will ask the correct set of questions (comparable to the correctly fielded set in September 1998) for other tobacco usage (cigars, pipes, chewing tobacco and snuff), along with the standard cigarette smoking prevalence questions in order to estimate total tobacco usage. This survey will provide valuable information to Government agencies and to the general public necessary for tobacco control research. The data will be used by the National Cancer Institute to evaluate the effectiveness of the American Stop Smoking Intervention Study for Cancer Prevention (ASSIST), a large scale 17 state demonstration project. The survey will allow state specific estimates to be made. Data will be collected in January 2000 and May 2000 from approximately 170,000 respondents.

Frequency of Response: One-time study.

Affected Public: Individuals or households.

Type of Respondents: Persons 15 yrs of age or older. The annual reporting burden is as follows.

Estimated Number of Respondents: 170,000.

Estimated Number of Responses per Respondent: 1.

Average Burden Hours per Response: 0.0113; and

Estimated Total Annual Burden Hours Requested: 1921.

The annualized cost to respondents is estimated at: $19,210. There are no Operating or Maintenance Costs to report.

REQUEST FOR COMMNENTS: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) 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; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to 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 on information technology.

DIRECT COMMENTS TO OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Anne Hartman, Health Statisticiam, National Cancer Institute, Executive Plaza North, Room 313, Bethesda, Maryland 20892–7344, or call non-toll free number (301) 496–4970, or FAX your request to (301) 435–3710, or E-mail your request, including your address, to ah42t@nih.gov or Anne __Hartman@nih.gov.

COMMENTS DUE DATE: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: December 9, 1999.

Reesa Nichols,

OMB Project Liaison Officer.

[FR Doc. 99–32570 Filed 12–16–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of 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 a meeting of the National Advisory Research Resources Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Research Resources Council.

Date: January 27, 2000.

Open: 9 a.m. to 2 p.m.

Agenda: Report of Center Director and other issues related to Council business.

Place: National Institutes of Health, 9000 Rockville Pike, Conference Room 10, Building 31C, Bethesda, MD 20892.

Closed: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 9000 Rockville Pike, Conference Room 10, Building 31C, Bethesda, MD 20892.

Contact Person: Louise E. Ramm, Deputy Director, National Center for Research Resources, National Institutes of Health, Building 31, Room 3B11, Bethesda, MD 20892, 301–496–6023.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333; 93.371, Biomedical Technology; 93.389, Research Infrastructure, National Institutes of Health, HHS)

Dated: December 9, 1999.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 99–32564 Filed 12–16–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial 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 meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental Research Special Emphasis Panel, 0018, Review of R01 Grant.

Date: December 13, 1999.

Time: 1:30 PM to 2:30 PM.

Agenda: To review and evaluate grant applications.

Place: Natcher Building, Rm. 4AN44F, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: H. George Hausch, Chief, 4500 Center Drive, Natcher Building, Rm. 4AN44F, National Institutes of Health, Bethesda, MD 20892, (301) 594–2372.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Dental Research Special Emphasis Panel, 00–17, R01 Review.

Date: December 14, 1999.

Time: 10 AM to 11 AM.

Agenda: To review and evaluate grant applications.

Place: Natcher Building, Rm. 4AN44F, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Philip Washko, PhD, DMD, Scientific Review Administrator, 4500 Center Drive, Natcher Building, Rm. 4AN44F, National Institutes of Health, Bethesda, MD 20892, (301) 594–2372.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 9, 1999.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 99–32565 Filed 12–16–99; 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.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel.

Date: December 17, 1999.
Time: 11 AM to 12:30 PM.
Agenda: To review and evaluate grant applications.
Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Robert H. Stretch, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6150, MSC 9608, Bethesda, MD 20892–9608, 301–443–4728.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: December 9, 1999.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 99–32566 Filed 12–16–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 to the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)96), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel.
Date: December 16, 1999.
Time: 12:00 p.m. to 1:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Alan L. Willard, PhD, Scientific Review Administrator, Scientific Review Branch NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529 Bethesda, MD 20892–9529, 301–496–9223.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 8, 1999.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 99–32567 Filed 12–16–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel.
Date: December 20, 1999.
Time: 2:30 p.m. to 4:30 p.m.
Agenda: To review and evaluate contract proposals.
Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Phillip F. Wiethorn, Scientific Review Administrator Scientific Review Branch NINDS/NIH/DDHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 8, 1999.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 99–32568 Filed 12–16–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: December 14, 1999.
Time: 3:30 p.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: May Sue Krause, MED, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3168, MSC 7848, Bethesda, MD 20892, (301) 435–0681.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: December 15, 1999.
Time: 10 a.m. to 12 p.m.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: J. Scott Osborne; PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4114,

MSC 7816, Bethesda, MD 20892, (301) 435–1782.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: December 15, 1999.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: J. Scott Osborne PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4114, MSC 7816, Bethesda, MD 20892, (301) 435–1782.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: December 17, 1999.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: H. Mac Stiles, DDS, PHD, MPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4108, MSC 7816, Bethesda, MD 20892, (301) 435–1785.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.337, 93.393–93.396, 93.837–93,844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 8, 1999.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 99–32569 Filed 12–16–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4432–N–50]

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: Clifford Taffet, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708–1234; TTY number of the hearing- and speech-impaired (2020 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 accordance 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 Clifford Taffet 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 address: DOT: Mr. Rugene Spruill, Principal, Space Management, SVC–140, Transportation Administrative Service Center, Department of Transportation, 400 7th Street, SW, Room 2310, Washington, DC 20590; (202) 366–4246; ENERGY: Mr. Tom Knox, Department of Energy, Office of Contract and Resource Management, MA–23, Washington, DC 20585; (202) 586–8715; GSA: Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW, Washington, DC 20405; (202) 501–0052; NAVY: Mr. Charles C. Cocks, Department of the Navy, Director, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE, Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: December 10, 1999.

Fred Karnas, Jr.,

Deputy Assistant Secretary for Special Needs Assistance Programs.

Title V, Federal Surplus Property Program Federal Register Report for 12/17/99

Suitable/Available Properties

Buildings (by State)

Florida

Crooked River Lighthouse
Carrabelle Co: Franklin FL 32322–
Landholding Agency: GSA
Property Number: 54199940017
Status: Excess
Comment: Lighthouse on 1.29 acres, possible lead base paint, listed on National Register of Historic Places
GSA Number: 4–U–FL–1165

Unsuitable Properties

Buildings (by State)

Alabama

Mobile Point Light
Gulf Shores Co: Baldwin AL 36542–
Landholdingn Agency: GSA
Property Number: 54199940011
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material
GSA Number: 4–U–AL–767

Florida

Cape St. George Lighthouse
St. George Island Co: Franklin FL 32328–
Landholding Agency: GSA
Property Number: 54199940012
Status: Excess
Reasons: Floodway; Extensive deterioration
GSA Number: 4–U–FL–1167

Boca Grande Range
Rear Light
Gasparilla Island Co: Lee FL 33921–
Landholding Agency: GSA
Property Number: 54199940013
Status: Excess
Reason: Floodway
GSA Number: 4–U–FL–1169

Sanibel Island Light
Sanibel Co: Lee FL 33957–
Landholding Agency: GSA
Property Number: 54199940014
Status: Excess
Reason: Floodway
GSA Number: 4–U–FL–1162

Amelia Island Light
Fernandina Beach Co: Nassau FL 32034–
Landholding Agency: GSA
Property Number: 54199940016
Status: Excess
Reason: Secured Area
GSA Number: 4–U–FL–1171

Illinois

Navy Family Housing
18-units
Hanna City Co: Peoria IL 61536–
Landholding Agency: GSA
Property Number: 54199940018
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material
GSA Number: 1–N–IL–723

New Mexico

Bldg. 897X
Tech Area I, Kirtland AFB
Albuquerque Co: Bernalillo NM 87185–
Landholding Agency: Energy
Property Number: 41199940021
Status: Unutilized
Reason: Extensive deterioration

New York

Bldg. 577
Brookhaven National Lab
Upton Co: Suffolk NY 11973–
Landholding Agency: Energy
Property Number: 41199940022
Status: Excess
Reason: Extensive deterioration

North Carolina

Quarters 1
USCG Station
Hobucken Co: Pamlico NC 28537–
Landholding Agency: DOT
Property Number: 87199940003
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Virginia

Bldg. 3170
Marine Corps Base
Quantico Co: VA 22134–
Landholding Agency: Navy
Property Number: 77199940064
Status: Unutilized
Reason; Extensive deterioration

Bldgs. 1252, 1277
Marine Corps Base
Quantico Co: VA 22134–
Landholding Agency: Navy
Property Number: 77199940065
Status: Unutilized
Reason: Extensive deterioration

Florida

(P) Ponce de Leon Inlet
2999 N. Peninsula Ave
New Smyrna Beach Co: Volusia FL 32169–
Landholding Agency: GSA
Property Number: 54199940015
Status: Excess
Reason: Floodway
GSA Number: 4–U–FL–1170

[FR Doc. 99–32465 Filed 12–16–99; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*):

PRT–020174

Applicant: Henry Doorly Zoo, Omaha, NE

The applicant requests a permit to import biological samples from radiated tortoise (*Geochelone radiata*) and angulated tortoise (*Geochelone yniphora*). The samples will be collected from both wild and captive populations on Madagascar for the purpose of scientific research on population genetics for the conservation of the species. This notice covers activities conducted by the applicant for a period of five years.

PRT–006998

Applicant: Brigham Young University, Dept. of Zoo, Provo, UT

The applicant amends an initial request for a permit to import tissue samples and voucher specimens of wild giant Amazon river turtles (*Podocnemis expansa*) to include Yellow-spotted river turtles (*Podocnemis unifilis*) from Brazil for the purpose of scientific research. The original notification appeared in **Federal Register** Notice Vol. 64, No. 14. This notification covers activities conducted by the applicant over a five-year period.

PRT–020041

Applicant: The Lubee Foundation, Gainesville, FL

The applicant requests a permit to import biological samples from captive-born and captive-held Rodrigues Fruit Bat (*Pteropus rodricensis*) from the Jersey Wildlife Preservation Trust, Jersey, UK, for the purpose of scientific research to develop genetic markers for studies of population analysis. This notice covers activities conducted by the applicant for a period of five years.

PRT–020406

Applicant: Kenneth M. Schell, Klamath Falls, OR

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT–020438

Applicant: Frank Miceli, Dix Hills, NY

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203

and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, *subject to the requirements of the Privacy Act and Freedom of Information Act*, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203. Phone: (703/358-2104); FAX: (703/358–2281).

The public is invited to comment on the following application for a permit to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) and the regulations governing marine mammals (50 CFR 18).

PRT-777239

Applicant: Ronald J. Jameson, U.S.G.S., Western Ecological Research Center, Corvallis, OR

Permit Type: Take for scientific research.

Name and Number of Animals: Northern Sea Otter (*Enhydra lutris lutris*).

Summary of Activity to be Authorized: The applicant requests an amendment to his permit to take an additional 33 sea otters for the purpose of scientific research to continue his study of the animal's ability to reoccupy historical habitats and the possible impacts of greater contaminant loads.

Source of Marine Mammals: Wild sea otters along the northern coast of Washington State.

Period of Activity: Up to 5 years, if issued.

PRT-018196

Applicant: International Animal Consulting Group, Inc., Shadow Hills, CA

Permit Type: Take (from the wild) and export for public display.

Name and Number of Animals: Northern Sea Otter (*Enhydra lutris lutris*) 1.2.

Summary of Activity to be Authorized: The applicant requests a permit to live capture and export for public education and breeding 1.2 juvenile animals to the Toba Aquarium, Toba 3–3–6 MIE Pref., Japan.

Source of Marine Mammals: Wild sea otters along the coast of Alaska.

Period of Activity: Up to 5 years, if issued.

PRT–018197

Applicant: International Animal Consulting Group, Inc., Shadow Hills, CA

Permit Type: Take (from the wild) and export for public display.

Name and Number of Animals: Northern Sea Otter (*Enhydra lutris lutris*) 0.2.

Summary of Activity To Be Authorized: The applicant requests a permit to live capture and export for public education and breeding 0.2 juvenile animals to the IZU-MITO Sea Paradise, Numazu Shizuoka, Japan.

Source of Marine Mammals: Wild sea otters along the coast of Alaska.

Period of Activity: Up to 5 years, if issued.

PRT–020346

Applicant: Leviathan Legacy, Inc., 1318 SW 14th Street, Boca Raton, FL

Permit Type: Take for scientific research.

Name and Number of Animals: West Indian Manatee (*Trichechus manatus*).

Summary of Activity To Be Authorized: The applicant requests a permit to study the reactions of West Indian manatees to and possible impacts from controlled boat approaches, underwater acoustic projections of approaching boats, and narrow beam manatee alerting sounds.

Source of Marine Mammals: 50–100 wild manatees occurring in waters adjacent to Buzzard Island in Crystal River, Florida.

Period of Activity: Up to 5 years, if issued.

Concurrent with the publication of this notice in the **Federal Register**, the Office of Management Authority is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Written data or comments, requests for copies of the complete application, or requests for a public hearing on this application should be sent to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Room 700, Arlington, Virginia 22203, telephone 703/358–2104 or fax 703/358–2281 and must be received within 30 days of the date of publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Dated: December 13, 1999.

Pamela Hall,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 99–32718 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Emergency Exemption; Issuance

On December 7, 1999, the U.S. Fish and Wildlife Service (Service) issued a permit (PRT–020339) to the US Fish and Wildlife Service Jacksonville Florida Field Office, Jacksonville, Florida, to import a juvenile Kemp's Ridley Sea Turtle (*Lepidochelys kempii*). The 30-day public comment period required by section 10(c) of the Endangered Species Act was waived. The Service determined that an emergency affecting the health and life of this turtle existed and that no reasonable alternative was available to the applicant, for the following reasons:

a. This turtle was found stranded outside of its normal range on a beach in Wales, UK, on December 1, 1999, and was being housed at the Oceanarium, St. David's Sea Life Centre (Centre), Wales.

b. The Centre's facilities allow for water temperature to be maintained at a temperature of 14.5 Celsius (58.1 Fahrenheit). Optimal water temperature for this species is 24 Celsius (75 Fahrenheit). Therefore, the Centre was unable to adequately maintain this specimen.

c. The specimen is being housed for evaluation at Sea World of Orlando, Orlando, Florida. Sea World of Orlando is licensed by the State of Florida as a sea turtle rehabilitation center in accordance with the Florida Fish and Wildlife Conservation Commission's agreement with the Service under Section 6 of the Endangered Species Act.

d. Following a satisfactory health and evaluation period, this specimen will be released back into the marine environment.

Dated: December 13, 1999.

Pamela Hall,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 99–32719 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Amended Notice of Intent (NOI) To Prepare an Environmental Impact Statement To Protect Seabird Nesting Islands on Maine's Coast To Further Include a Comprehensive Conservation Plan for Petit Manan National Wildlife Refuge

SUMMARY: This NOI is an amendment to the previous notice published on 10/4/

95. The U.S. Fish and Wildlife Service (FWS) announces its intention to prepare an Environmental Impact Statement (EIS) pursuant to section 102 (2)(c) of the National Environmental Policy Act (NEPA) of 1969, in accordance with the Council on Environmental Quality (CEQ) regulations for implementing NEPA (40 CFR Parts 1500–1508). As originally announced, this EIS will continue to evaluate the FWS proposal to protect seabird nesting islands on Maine's coast, while also analyzing the development of a Comprehensive Conservation Plan (CCP) for Petit Manan National Wildlife Refuge (NWR).

We determined the need to amend the 1995 NOI once we braodened the scope of our analysis to incorporate a CCP for Petit Manan NWR. CCPs are required for all National Wildlife Refuges under the National Wildlife Refuge System Improvement Act of 1997. The CCP will not only evaluate protection of coastal islands, but will also evaluate alternatives to managing wildlife and habitat, public use, and protection of cultural resources on all lands within the Refuge. A Wilderness Review of Petit Manan NWR will also be completed concurrently in accordance with the Wilderness Act of 1964, as amended.

We have already received considerable public input through a series of workshops and hearings completed in 1995. Comments previously submitted during the scoping period do not need to be resubmitted and will be considered in developing this DEIS. At this time, we invite other Federal agencies, states, Indian tribes, local governments, and the general public to submit additional comments concerning the development of the DEIS/CCP, the proposal to protect Maine's seabird nesting islands, and the Wilderness Review. You are invited to participate in scoping activities by submitting written comments, attending a public meeting to be held in April 2000, or attending a public hearing which will coincide with the Fall 2000 release of the DEIS/CCP. We will consider oral and written comments equally in preparation of the DEIS/CCP.

We will make comments, including names and home addresses of respondents, available for public review if requested. Individual respondents may request that we withhold their home address from the rule-making record, which we will honor to the extent allowable by law. If you wish to have your name and/or address withheld, you must state this prominently at the beginning of your comment. We will not consider anonymous comments. We will make all submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. If you do not desire to submit comments or suggestions at this time, but would like to receive a copy of the DEIS for review, send a request to Mr. Stan Skutek, at the address given below.

DATES AND LOCATIONS: Written comments related to the scope and content of the DEIS/CCP should be submitted to us by May 12, 2000, to the address provided below. The public scoping meeting on the DEIS/CCP will be held on April 12, 2000, at the Comfort Inn in Augusta, Maine. A further notice announcing the time and location of the public hearing, to be held when the DEIS/CCP is released, will be published in local news media prior to the hearing date.

FOR FURTHER INFORMATION: If you wish to make comments or receive planning updates and a DEIS/CCP, contact Mr. Stan Skutek, Refuge Manager, Petit Manan National Wildlife Refuge, P.O. Box 279, Milbridge, Maine 04658–0279. (207) 546–2124. Comments may also be submitted electronically to the following address: R5RW__PMNWR@fws.gov.

SUPPLEMENTARY INFORMATION: Under the National Wildlife Refuge System Improvement Act of 1997, all lands within the National Wildlife Refuge System are to be managed in accordance with an approved CCP. The CCP developed for Petit Manan NWR will guide future Refuge management decisions by developing goals, long-range objectives, and strategies for achieving Refuge purposes. The CCP will consider a wide range of issues on Petit Manan NWR, including habitat and wildlife management, land acquisition, public use, and protection of cultural resources.

Petit Manan NWR is recognized internationally as important nesting habitat for seabirds, bald eagles, shorebirds, and wading birds. The Refuge consists of three mainland tracts and 38 coastal islands. The 6,954 acre complex includes such diverse habitats as forest, grasslands, freshwater and saltwater marshes, and peat lands. The coastal islands, which range in size from 1 acre to 1,650 acres, consist of forest, shrub lands, or grassland habitats. In addition, Refuge staff and the Service's Gulf of Maine Program Office have been providing technical assistance to private and public organizations seeking to protect Maine's coastal islands and are active in promoting partnerships with private landowners, non-governmental organizations, and state agencies.

We will conduct a Wilderness Review, evaluating the wilderness potential of Petit Manan NWR, using the 6 criteria established by the Wilderness Act of 1964, as amended, and using additional considerations established in Service policy. Based on our findings, we may recommend to the Secretary of the Interior that all or some of the Refuge be designated National Wilderness Area(s). You will be able to comment on our proposed wilderness recommendations during the public hearing to be scheduled to coincide with the release of the DEIS/CCP.

We expect to release the DEIS/CCP by Fall 2000. Public comments will be welcome for a 60 day period following its release. We expect to publish the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) in Spring 2001. The ROD will present my decision and the supporting reasons for selecting the management actions to be implemented, including whether or not a wilderness area is recommended. I will make my final decision after considering public comments and the environmental consequences of the proposed actions as presented in the FEIS. All other applicable laws, regulations and policies will also be considered.

Dated: December 8, 1999.

Ronald E. Lambertson,

Regional Director.

[FR Doc. 99–32745 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Service Regulations Committee Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The Fish and Wildlife Service (hereinafter Service) will conduct an open meeting on January 26, 2000, to identify and discuss preliminary issues concerning the 2000–01 migratory bird hunting regulations.

DATES: January 26, 2000.

ADDRESSES: The Service Regulations Committee will meet at the National Rural Electric Cooperative Association Building, 4301 Wilson Boulevard, Room CC2, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Jonathan Andrew, 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, (703) 358–1714.

SUPPLEMENTARY INFORMATION: Representatives from the Service, the Service's Migratory Bird Regulations Committee, and Flyway Council Consultants will meet on January 26, 2000, at 8:30 a.m. to identify preliminary issues concerning the 2000–01 migratory bird hunting regulations for discussion and review by the Flyway Councils at their March meetings.

In accordance with Departmental policy regarding meetings of the Service Regulations Committee attended by any person outside the Department, these meetings are open to public observation. Members of the public may submit written comments on the matters discussed to the Director.

Dated: December 9, 1999.

John G. Rogers,

Deputy Director, U.S. Fish and Wildlife Service.

[FR Doc. 99–32683 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Information Collection for Part 13, Tribal Reassumption of Jurisdiction Over Child Custody Proceedings

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of submission to OMB.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) this notice announces that the Bureau of Indian Affairs is submitting an information collection request to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs for clearance and extension. The information collection, Tribal Reassumption of Jurisdiction over Child Custody Proceedings, is cleared under OMB Control Number 1076–0112 through December 31, 1999.

DATES: Submit comments on or before January 18, 2000.

ADDRESSES: Written comments should be sent directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of Interior, Room 10102, 725 17th Street NW, Washington, DC 20503. Send a copy of your comments to Larry Blair, Bureau of Indian Affairs, Division of Social Services, 1849 C Street NW, MS RM 4660–MIB, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Interested persons may obtain copies of the information collection requests without charge by contacting Mr. Larry Blair, (202) 208–2479, Facsimile number (202) 208–5113.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Department has issued regulations prescribing procedures by which an Indian tribe may reassume jurisdiction over Indian child proceedings when a state asserts any jurisdiction. Tribes have the right to pursue this alternative because this action is authorized by the Indian Child Welfare Act, Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. 1918. We sought comments from interested parties to renew the clearance, but did not receive any.

II. Request for Comments

The Department invited comments on:

(1) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility;

(2) The accuracy of the Bureau's estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and,

(4) Ways to minimize the burden of the information collection on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other collection techniques or forms of information technology.

Please note, any comments, names and addresses concerning this submission will be available for public review during regular business hours (8 a.m. to 4:30 p.m.). If you wish your name and address withheld, you must state this prominently at the beginning of your comment. We will honor your request to the extent allowable by law. 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.

III. Data

Title of the Information Collection: Tribal Reassumption of Jurisdiction Over Child Custody Proceedings.

Summary of Collection of Information: The collection of information will ensure that the provisions of Public Law 95–608 are met.

Affected Entities: Federally recognized tribes who submit tribal reassumption petitions for review and approval by the Secretary of the Interior.

Frequency of Response: Annually.

Estimated Number of Annual Responses: 2.

Estimated Time Per Application: 8 hours.

Estimated Total Annual Burden Hours: 16 hours.

BIA Information Collection Clearance Officer: Ruth Bajema, 202–208–2574.

Dated: December 3, 1999.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 99–32713 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–030–00–1220–AB: GPO–0053]

Notice of Public Meeting and Comment Period for Vegetation Environmental Assessment for the National Historic Oregon Trail Interpretive Center

AGENCY: National Historic Oregon Trail Interpretive Center, Vale District, Bureau of Land Management, Interior.

ACTION: Public meeting, January 18, 2000, and Public Comment Period, January 3–February 2, 2000, for Vegetation Environmental Assessment for the National Historic Oregon Trail Interpretive Center.

SUMMARY: A public comment period for the Vegetation Environmental Assessment for the National Historic Oregon Trail Interpretive Center (NHOTIC) will begin January 3, 2000 and end February 2, 2000. A public meeting to discuss the plan with BLM officials will be held on January 18, 2000 from 7 p.m. to 9 p.m. at the BLM—U.S. Forest Service Office, 3165 10th Street, Baker City, Oregon. Copies of the Vegetation Environmental Assessment for NHOTIC can be obtained by contacting Shirley Baxter, Interpretive Specialist, at (541) 523–1845 or by writing P.O. Box 987, Baker City, OR 97814, or at *www.or.blm.gov/Vale.*

DATES: The meeting will begin at 7 p.m. and run to 9 p.m. January 18, 2000. The public comment period will begin January 2, 2000 and will end February 3, 2000.

FOR FURTHER INFORMATION CONTACT: Shirley Baxter, Bureau of Land Management, National Historic Oregon

Trail, Interpretive Center, P.O. Box 987, Baker City, OR 98714. (Telephone 541–523–1845).

Roy Masinton,

Field Office Manager.

[FR Doc. 99–32674 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–33–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–030–00–1220–PA: GPO–0052]

Notice of Meeting of the Oregon Trail Interpretive Center Advisory Board

AGENCY: National Historic Oregon Trail Interpretive Center, Vale District, Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is given that a meeting of the Advisory Board for the National Historic Oregon Trail Interpretive Center will be held on Thursday, January 6, 2000 from 8 a.m. to 4 p.m. at the Best Western Sunridge Inn, One Sunridge Lane, Baker City, Oregon. At an appropriate time, the Board will recess for approximately one hour for lunch. Public comments will be received from 12 p.m. to 12:15 p.m., January 6, 2000. Topics to be discussed are the Fee Demonstration Program and its Structure, Strategy Planning and reports from Coordinators of Subcommittees.

DATES: The meeting will begin at 8 a.m. and run to 4 p.m. January 6, 2000.

FOR FURTHER INFORMATION CONTACT: David B. Hunsaker, Bureau of Land Management, National Historic Oregon Trail, Interpretive Center, P.O. Box 987, Baker City, OR 97814. (Telephone 541–523–1845).

Roy Masinton,

Field Office Manager.

[FR Doc. 99–32675 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–33–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–930–5410–00–ZBKD; CACA 41153]

Conveyance of Mineral Interests in California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of segregation.

SUMMARY: The private land described in this notice, aggregating 40.00 acres, is segregated and made unavailable for filings under the general mining laws and the mineral leasing laws to determine its suitability for conveyance of the reserved mineral interest pursuant to section 209 of the Federal Land Policy and Management Act of October 21, 1976. The mineral interests will be conveyed in whole or in part upon favorable mineral examination. The purpose is to allow consolidation of surface and subsurface of minerals ownership where there are no known mineral values or in those instances where the reservation interferes with or precludes appropriate nonmineral development and such development is a more beneficial use of the land than the mineral development.

FOR FURTHER INFORMATION CONTACT: Kathy Gary, California State Office, Federal Office Building, 2800 Cottage Way, Room E–1928, Sacramento, California 95825, (916) 978–4677.

Mount Diablo Meridian

T. 22S., R. 5E.,
Sec. 31, SW¼SE¼

Monterey—County

Minerals Reservation—All coal and other minerals.

Upon publication of this Notice of Segregation in the **Federal Register** as provided in 43 CFR 2720.1–1(b), the mineral interests owned by the United States in the private lands covered by the application shall be segregated to the extent that they will not be subject to appropriation under the mining and mineral leasing laws. The segregative effect of the application shall terminate by publication of an opening order in the **Federal Register** specifying the date and time of opening; upon issuance of a patent or other document of conveyance to such mineral interest; or two years from the date of publication of this notice, whichever occurs first.

Dated: December 7, 1999.

David McIlnay,

Chief, Branch of Lands.

[FR Doc. 99–32746 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF INTERIOR

National Park Service

60-Day Notice of Intention to Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: National Park Service, Department of Interior.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the National Park Service (NPS) intention to request an extension for a currently approved information collection used in the Historic Preservation Tax Incentives Program administered by the NPS.

DATES: Public comments on this notice will be accepted on or before February 15, 2000.

SEND COMMENTS TO: Sharon C. Park, Heritage Preservation Services, National Park Service, 1849 C St., NW, NC 200, Washington, DC 20240.

All responses to this notice will be summarized and included in the request for OMB approval.

All comments will also become a matter of public record. Copies of the information collection can be obtained from Sharon C. Park, Chief, Technical Preservation Services, National Park Service, 1849 C St., NW, NC 200, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sharon C. Park, (202)–343–9578.

SUPPLEMENTARY INFORMATION:

Title: Historic Preservation Certification Application.

OMB Number: 1024–0009.

Expiration Date of Approval: March 31, 2000.

Type of Request: Extension of a currently approved information collection.

Abstract: Section 47 of the Internal Revenue Code requires that the Secretary of the Interior certify to the Secretary of the Treasury, upon application by owners of historic properties for Federal tax benefits: (a) The historic character of the property; and (b) that the rehabilitation work is consistent with that historic character. The NPS administers the program in partnership with the Internal Revenue Service. The Historic Preservation Certification Application is used by the NPS to evaluate the condition and historic significance of buildings undergoing rehabilitation for continued use, and to evaluate whether the rehabilitation work meets the Secretary of the Interior's Standards for Rehabilitation.

Respondents: Individuals or households, businesses or other for-profit entities.

Estimated Annual Burden on Respondents: 7,500 hours.

Estimated average burden hours per response: 2.5 hours.

Estimated average number of respondents: 3,000 annually.

Estimate frequency of response: 3,000 annually.

Leonard Stowe,

Information Collection Clearance Officer, National Park Service, WAPC.

[FR Doc. 99–32714 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items in the Possession of the Augusta Richmond County Museum, Augusta, GA

AGENCY: National Park Service, Interior.

ACTION: Notice

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate cultural items in the possession of the August Richmond County Museum, Augusta, GA which meet the definition of ''unassociated funerary object'' under Section 2 of the Act.

The 50 cultural items are white and red porcelain beads.

During the 1930s, these cultural items were donated to the Augusta Richmond County Museum by Mr. C.E. Storey. Prior to 1932, these cultural items were bought by Mr. Storey from Mr. T.O. Young. Donor information indicates these cultural items came from Cayuga, NY.

Based on appearance and accession information indicating that most of the material from this donatation came from graves, these cultural items have been determined to come from a burial during post-contact times. The Cayuga Nation of New York lived in the area of Cayuga, NY during the post-contact period.

Based on the above-mentioned information, officials of the Augusta Richmond County Museum have determined that, pursuant to 43 CFR 10.2 (d)(2)(ii), these 50 cultural items are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of an Native American individual. Officials of the Augusta Richmond County Museum have also determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these items and the Cayuga Nation of New York.

This notice has been sent to officials of the Cayuga Nation of New York and the Seneca-Cayuga Tribe of Oklahoma. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these objects should contact Gordon Blaker, Curator, Augusta Richmond County Museum, 560 Reynolds Street, Augusta, GA 30901; telephone: (706) 722–8454 before January 18, 2000. Repatriation of these objects to the Cayuga Nation of New York may begin after that date if no additional claimants come forward.

The National Park Service is not responsible for the determinations within this notice.

Dated: December 7, 1999.

Francis P. McManamon,

Departmental Consulting Archeologist, Manager, Archeology and Ethnography Program.

[FR Doc. 99–32724 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Valid Existing Rights Final Environmental Impact Statement, OSM–EIS–29

ACTION: Notice of availability of Final Environmental Impact Statement.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (''we'' or OSM) is making available the final environmental impact statement for revisions to its permanent program regulations implementing section 522(e) of the Surface Mining Control and Reclamation Act of 1977 and an interpretive rule concerning the applicability of the section 522(e) prohibitions to subsidence resulting from underground coal mining.

ADDRESSES: The final environmental impact statement (FEIS) is available for inspection at the Office of Surface Mining, Administrative Record-Room 101, 1951 Constitution Avenue, NW, Washington, DC 20240. You may obtain a single copy by writing us at that address or calling 202–208–2847. You also may request a copy via the Internet at osmrules@osmre.gov.

FOR FURTHER INFORMATION CONTACT: Andy DeVito, Office of Surface Mining (MS 210), 1951 Constitution Avenue, NW, Washington, DC 20240; Telephone: 202–208–2701; E-Mail: adevito@osmre.gov.

SUPPLEMENTARY INFORMATION: We are making available the FEIS for revisions to OSM's permanent program regulations implementing section 552(e) of the Surface Mining Control and Reclamation Act of 1977 and an interpretive rule concerning the applicability of the section 522(e) prohibitions to subsidence resulting from underground coal mining.

The FEIS describes the environmental impacts that would result from amending OSM's permanent program regulations that address the issue of valid existing rights and the application of the prohibitions of section 522(e) to the subsidence effects of underground coal mining. Two final rules and the Records of Decision dealing with these issues are being published in this issued of the **Federal Register**.

Dated: December 12, 1999.

Mary Josie Blanchard,

Assistant Director, Program Support.

[FR Doc. 99–32209 Filed 12–16–99; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Agency Information Collection Activities: New Collection; Comment Request

ACTION: Notice of information collection under review; emergency law enforcement services vulnerability; new collection.

The Department of Justice, Federal Bureau of Investigation, has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until February 15, 2000.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) 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;

(2) 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) 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 submission of responses.

Overview of this information collection:

(1) Type of Information Collection: New collection.

(2) Title of the Form/Collection: Emergency Law Enforcement Services Vulnerability.

(3) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number 2–240. Federal Bureau of Investigation, FBI Academy.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: State and Local Law Enforcement Agencies. This form is used to collect feedback from state and local law enforcement regarding their infrastructure vulnerabilities.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 3200 responses at 30 minutes (0.50) per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 1,600.00 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact James Delaverson (703) 632–3220, Program Manager, Office of Information and Learning Resources, Research and Analysis Center, FBI Academy, Quantico, Virginia 22135. Additionally, comments and/or suggestions regarding the item contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. James Delaverson.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, suite 1220, National Place Building, 1331 Pennsylvania Avenue, NW, Washington, DC 20530.

Dated: December 14, 1999.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 99–32727 Filed 12–16–99; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF JUSTICE

Federal Bureau of Prisons

Notice of Public Hearing and Publication of the Draft Environmental Impact Statement

The Federal Bureau of Prisons announces the publication of a Draft Environmental Impact Statement (DEIS) regarding the proposed medium-security Federal correctional facility in South Carolina, and public hearings to which all interested persons are invited to attend.

The public hearings are being held to provide for timely public comment and understanding of Federal plans and programs with possible environmental consequences as required by the National Environmental Policy Act of 1969, as amended.

The purpose of the meetings is to afford the public and local officials an opportunity to learn of the Bureau's proposed planning, construction and operation of a medium-security correctional facility in South Carolina.

Public hearings on the document are scheduled for the week of January 3, 2000, at the locations listed below. Information on the specific locations, dates, and times will be published in local newspapers in advance of the meetings.

Georgetown County—Andrews, South Carolina

Williamsburg County—Greeleyville, South Carolina

Marlboro County—Bennettsville, South Carolina

Items addressed in the DEIS include, but are not limited to: Utilities, Traffic, Noise, Cultural Resources and Socio-economic impacts.

A time limit may be invoked to accommodate all persons who may wish to comment on the DEIS. Written statements may be submitted at the meeting, and will be accepted until February 1, 2000.

Written comments may be directed to: David J. Dorworth, Chief, Site Selection and Environmental Review Branch, Federal Bureau of Prisons, 320 First Street, NW, Washington, D.C. 20534, Telephone (202) 514–6470, Telefacsimile (202) 616–6024, SiteSelection@BOP.gov.

Dated: December 3, 1999.

David J. Dorworth,

Chief, Site Selection and Environmental Review Branch.

[FR Doc. 99–32099 Filed 12–16–99; 8:45 am]

BILLING CODE 4410–05–P

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) document 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, NW, Room S–3014, Washington, DC 20210.

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
CT990001 (Mar. 12, 1999)
New Hampshire:
NH990001 (Mar. 12, 1999)
NH990002 (Mar. 12, 1999)
NH990003 (Mar. 12, 1999)
NH990005 (Mar. 12, 1999)
NH990007 (Mar. 12, 1999)
NH990008 (Mar. 12, 1999)
New York
NY990020 (Mar. 12, 1999)

Volume II

Pennsylvania
PA990006 (Mar. 12, 1999)
PA990026 (Mar. 12, 1999)
PA990030 (Mar. 12, 1999)
PA990031 (Mar. 12, 1999)
PA990032 (Mar. 12, 1999)
PA990033 (Mar. 12, 1999)
Virginia
VA990003 (Mar. 12, 1999)
VA990015 (Mar. 12, 1999)
VA990084 (Mar. 12, 1999)
West Virginia
WV990002 (Mar. 12, 1999)
WV990003 (Mar. 12, 1999)
WV990009 (Mar. 12, 1999)
WV990011 (Mar. 12, 1999)

Volume III

Alabama
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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.

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Signed at Washington, DC, This 10th day of December 1999.

Margaret J. Washington,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 99–32470 Filed 12–16–99; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Summary of Decisions Granting in Whole or in Part Petitions for Modification

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of affirmative decisions issued by the administrators for coal mine safety and health and metal and nonmetal mine safety and health on petitions for modification of the application of mandatory safety standards.

SUMMARY: Under section 101 of the Federal Mine Safety and Health Act of 1977, the Secretary of Labor (Secretary) may allow the modification of the application of a mandatory safety standard to a mine if the Secretary determines either that an alternate method exists at a specific mine that will guarantee no less protection for the miners affected than that provided by the standard, or that the application of the standard at a specific mine will result in a diminution of safety to the affected miners.

Final decisions on these petitions are based upon the petitioner's statements, comments and information submitted by interested persons, and a field investigation of the conditions at the mine. MSHA, as designee of the Secretary, has granted or partially granted the requests for modification listed below. In some instances, the decisions are conditioned upon compliance with stipulations stated in the decision. The term ''FR Notice'' appears in the list of affirmative decisions below. The term refers to the **Federal Register** volume and page where MSHA published a notice of the filing of the petition for modification.

FOR FURTHER INFORMATION: Petitions and copies of the final decisions are available for examination by the public in the Office of Standards, Regulations, and Variances, MSHA, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. Contact Barbara Barron at 703–235–1910.

Dated: December 9, 1999.

Carol J. Jones,

Acting Director, Office of Standards, Regulations and Variances.

Affirmative Decisions on Petitions for Modification.

Docket No.: M–1999–020–C.
FR Notice: 64 FR 23874.
Petitioner: Webster County Coal Corporation.
Regulation Affected: 30 CFR 75.701.
Summary of Findings: Petitioner's proposal is to use a, 480-volt, three phase, 200KW diesel generator system for moving equipment in and out of the Dotiki Mine and performing rehab work outby section loading points. This is considered an acceptable alternative method for the Dotiki Mine. MSHA grants the petition for modification for the Dotiki Mine with conditions.

Docket No.: M–1999–041–C.
FR Notice: 64 FR 32553.
Petitioner: Five Star Mining, Inc.
Regulation Affected: 30 CFR 75.1700.
Summary of Findings: Petitioner's proposal is to plug oil and gas wells and then mine through or near the plugged wells whenever the safety barrier diameter is reduced to a distance less than the District Manager will approve under 30 CFR 75.1700. This is considered an acceptable alternative method for the Prosperity Mine. MSHA grants the petition for modification for the Prosperity Mine with conditions.

Docket No.: M–1999–054–C.
FR Notice: 64 FR 41139.
Petitioner: Consolidation Coal Company.
Regulation Affected: 30 CFR 75.1909(b)(6).
Summary of Findings: Petitioner's proposal is to operate the diesel grader without individual service brakes on all grader drive wheels. This is considered an acceptable alternative method for the Rend Lake Mine. MSHA grants the petition for modification for the Rend Lake Mine with conditions.

Docket No.: M–1999–060–C.
FR Notice: 64 FR 41140.
Petitioner: Peabody Coal Company.
Regulation Affected: 30 CFR 75.1909(b)(6).
Summary of Findings: Petitioner's proposal is to use its diesel grader underground with only rear wheel brakes instead of using front wheel brakes, limit the grader speed to a maximum of 10 miles per hour, and train grader operators to drop the grader blade in the event the brakes fail. This is considered an acceptable alternative method for the Marissa Mine. MSHA grants the petition for modification for the Marissa Mine with conditions.

Docket No.: M–1999–061–C.
FR Notice: 64 FR 41140.
Petitioner: Performance Coal Company.
Regulation Affected: 30 CFR 75.1002.
Summary of Findings: Petitioner's proposal is to use a nominal voltage of power circuits not to exceed 2,400 volts to supply power to high-voltage continuous miner located inby the last open crosscut or within 150 feet from pillar workings. This is considered an acceptable alternative method for the Upper Big Branch Mine-South. MSHA grants the petition for modification for the Upper Big Branch Mine-South with conditions.

Docket No.: M–1999–063–C.
FR Notice: 64 FR 49246.
Petitioner: Bowie Resources Limited.
Regulation Affected: 30 CFR 75.1002.
Summary of Findings: Petitioner's proposal is to use a nominal voltage of longwall power circuits not to exceed 2,400 volts to supply power to the permissible high-voltage longwall mining equipment inby the last open crosscut. This is considered an acceptable alternative method for the Bowie Mine No. 2. MSHA grants the petition for modification for the Bowie Mine No. 2 with conditions.

Docket No.: M–1999–068–C.
FR Notice: 64 FR 49247.
Petitioner: Peabody Coal Company.
Regulation Affected: 30 CFR 75.1909(b)(6).
Summary of Findings: Petitioner's proposal is to use its diesel grader underground with only rear wheel brakes instead of brake on each wheel, limit the grader speed to 10 miles per hour maximum and train grader operators to drop the grader blade if the brakes fail. This is considered an acceptable alternative method for the Camp No. 11 Mine. MSHA grants the petition for modification for the Camp No. 11 Mine with conditions.

Docket No.: M–1999–069–C.
FR Notice: 64 FR 49247.
Petitioner: The American Coal Company.
Regulation Affected: 30 CFR 75.1909(b)(6).
Summary of Findings: Petitioner's proposal is to operate its Getman Roadbuilders diesel graders, serial number 6187 and 6547, without front brakes but instead use the factory installed brake system on only the rear wheels because using front wheel brakes will result in a diminution of safety. This is considered an acceptable alternative method for the Galatia Mine. MSHA grants the petition for modification for the Galatia Mine with conditions.

Docket No.: M–1999–071–C.
FR Notice: 64 FR 49247.
Petitioner: Turris Coal Company.
Regulation Affected: 30 CFR 75.1909(b)(6).
Summary of Findings: Petitioner's proposal is to use an alternative method of installing front brakes on its six wheeled grader, limit the maximum speed of the grader to less than 10 miles per hour, provide training for grader operator on lowering the moldboard for additional stopping capability in emergencies, train grader operators on the appropriate speeds to use on different roadway conditions and slopes. This is considered an acceptable alternative method for the Elkhart Mine. MSHA grants the petition for modification for the Elkhart Mine with conditions.

Docket No.: M–98–103–C.
FR Notice: 64 FR 2520.
Petitioner: Consol of Kentucky, Incorporated.
Regulation Affected: 30 CFR 75.701.
Summary of Findings: Petitioner's proposal is to use a low- and medium voltage, three-phase, alternating current from a portable, 188KW diesel-driven generator and to connect the neutral of the generator's transformer secondary through a suitable resistor to the frame of the diesel generator. This is considered an acceptable alternative method for the Mill Creek E–3 Mine, Loves Branch-h4 Mine, E3RF Mine, Big Springs #17 Mine, Motts Branch Mine, and Big Springs E–1 Mine. MSHA grants the petition for modification with conditions.

Docket No.: M–98–084–C.
FR Notice: 63 FR 58430.
Petitioner: Consol of Kentucky, Incorporated.
Regulation Affected: 30 CFR 75.901(a).
Summary of Findings: Petitioner's proposal is to derive a low- and medium voltage three-phase, alternating current for use underground from a portable, diesel-driven generator and to connect the neutral of the generator's transformer secondary through a suitable resistor to the frame of the diesel generator and the frame of the generator solidly connected to a borehole casing, metal waterline, or a grounding conductor with a low resistance to earth. This is considered an acceptable alternative method for the Mill Creek E–3 Mine, Loves Branch-h4 Mine, E3RF Mine, Big Springs #17 Mine, Motts Branch Mine, and Big Springs E–1 Mine. MSHA grants the petition for modification with conditions.

Docket No.: M–98–078–C.
FR Notice: 63 FR 48766.
Petitioner: Webster County Coal Corporation.
Regulation Affected: 30 CFR 75.901(a).
Summary of Findings: Petitioner's proposal is to use an alternative method for its 480 volt, three-phase, 200KW diesel powered generator that will provide low- and medium voltage three-phase circuits and grounding protection. This is considered an acceptable alternative method for the Dotiki Mine. MSHA grants the petition for modification for the Dotiki Mine with conditions.

Docket No.: M–1999–002–M.
FR Notice: 64 FR 23874.
Petitioner: ASARCO, Inc.
Regulation Affected: 30 CFR 57.14100(a).
Summary of Findings: Petitioner's request is to modify the standard to permit continued use of its preshift procedures already in place. The petitioner's proposal is to have a qualified and competent driver preshift inspect its buses for the oncoming shift and have the operator drive the bus to the fuel island after the bus is thoroughly inspected, fuel the bus, drive it back to the pit office, and report any defects to the maintenance department for repair before the bus is placed into service instead of having individual drivers conduct inspections for their prospective bus. This is considered an acceptable alternative method for the Ray Complex Mine. MSHA grants the petition for modification for the Ray Complex Mine with conditions.

Docket No.: M–91–05–M.
FR Notice: 56 FR.
Petitioner: Solvey Minerals, Inc.
Regulation Affected: 30 CFR 57.22305.
Summary of Findings: Petitioner's proposal is to amend its previously granted petition for modification, docket number M–91–05–M to use specific non-permissible tools or their equivalent in or beyond the last open crosscut. The petitioner proposes to add another non-permissible tool to condition No. 1 of the granted petition for modification and update the list of approved methane monitors that can be used at the mine. This amendment to the petition will allow flexibility as to which approved methane monitors can be used. This is considered an acceptable alternative method for the Solvay Minerals, Inc. Mine. MSHA grants amendment to the previously granted petition for the Solvay Minerals, Inc. Mine with conditions.

[FR Doc. 99–32748 Filed 12–16–99; 8:45 am].
BILLING CODE 4510–43–U.

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of mandatory safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Long Branch Energy

[Docket No. M–1999–121–C]

Long Branch Energy, P.O. Box 776, Danville, West Virginia 25033 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its #18 Mine (I.D. No. 46–08305) located in Boone County, West Virginia. The petitioner proposes to replace a padlock on battery plug connectors on mobile battery-powered machines with a threaded ring and a spring loaded device to prevent the plug connector from accidently disengaging while under load. The petitioner asserts that application of the standard will result in a diminution of safety to the miners. In addition, the petitioner asserts that the

proposed alternative method will provide at least the same measure of protection as the mandatory standard.

2. McElroy Coal Company

[Docket No. M–1999–122–C]

McElroy Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, Pennsylvania 15241–1421 has filed a petition to modify the application of 30 CFR 75.364(b)(1) and (2) (weekly examination) to its McElroy Mine (I.D. No. 46–01437) located in Marshall County, West Virginia. The petitioner requests a modification of the standard to permit weekly examinations of designated monitoring stations instead of traveling and conducting weekly examinations in certain intake and return entries of the mine. The petitioner states that the area of the mine affected by this petition is subject to previously granted petitions, docket numbers M–91–78–C, M–92–142–C, and M–93–007–C, which established the monitoring stations (''PCS'') to be used instead of traveling the affected return air courses and granted the district manager discretion to relocate the PCS. The petitioner requests that the three existing petitions be withdrawn and consolidated into one petition. The petitioner proposes to: (i) conduct a weekly examination at each monitoring station for methane and to verify direction of air flow; (ii) instruct the person making the examinations and tests to place his/her initials, the date, and time the monitoring station and record the results in a book on the surface and made available for inspection by interested parties; (iii) maintain each monitoring station in a safe condition at all times; and (iv) have the monitoring stations shown on the ventilation and part of the approved ventilation plan. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

3. Blue Mountain Energy, Inc.

[Docket No. M–1999–123–C]

Blue Mountain Energy, Inc., 3607 County Road #65, Rangely, Colorado 81648 has filed a petition to modify the application of 30 CFR 75.500(d) (permissible electric equipment) to its Deserado Mine (I.D. No. 05–03505) located in Rio Blanco County, Colorado. The petitioner requests a modification of the standard to permit the use of low-voltage and nonpermissible diagnostic equipment within 150 feet of pillar workings in its continuous miners development sections. The petitioner proposes to use the nonpermissible electronic testing or diagnostic equipment in or by the last open crosscut. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

4. Independence Coal Company, Inc.

[Docket No. M–1999–124–C]

Independence Coal Company, Inc., HC 78 Box 1800, Madison, West Virginia 25130 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Justice No. 1 Mine (I.D. No. 46–07273) located in Boone County, West Virginia. The petitioner proposes to use belt air to ventilate active working places. The petitioner proposes to install a low-level carbon monoxide detection system as an early warning fire detection system in all belt entries used as intake air courses. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

5. Genwal Resources, Inc.

[Docket No. M–1999–125–C]

Genwal Resources, Inc., P.O. Box 1420, 195 North 100 West, Huntington, Utah 84528 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Crandall Canyon Mine (I.D. No. 42–01715) located in Emery County, Utah. The petitioner requests that some of the language in the Decision and Order (D&O) for its previously granted petition, docket number M–96–71–C, be amended because the petitioner states that certain product availability for the exhaust systems have become limited and require an extensive lead time and to replace these products at frequent intervals would be substantially costly since durability is limited in the mining atmosphere. The petitioner proposes that diesel equipment include a means to prevent spray from ruptured fuel and oil lines from being ignited by contact with engine exhaust systems. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the granted D&O and will not result in a diminution of safety provided by the existing standard.

6. Mingo Logan Coal Company

[Docket No. M–1999–126–C]

Mingo Logan Coal Company, 1000 Mingo Logan Avenue, Wharncliffe, West Virginia 25651 has filed a petition to modify the application of 30 CFR 75.1002 (location of feeder wires, trolley feeder wires, high-voltage cables and transformers) to its Mountaineer Alma-A Mine (I.D. No. 46–08730) located in Mingo County, West Virginia. The petitioner proposes to use a high-voltage cable within 150 feet of pillar workings to power a 2400 VAC longwall mining machine. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via e-mail to ''comments@msha.gov,'' or on a computer disk along with an original hard copy to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 18, 2000. Copies of these petitions are available for inspection at that address.

Dated: December 9, 1999

Carol J. Jones

Acting Director, Office of Standards, Regulations, and Variances.

[FR Doc. 99–32747 Filed 12–16–99; 8:45 am]

BILLING CODE 4510–43–U

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10542, et al.]

Proposed Exemptions; Business Men's Assurance Company of America (BMA)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the

person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, NW, Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Business Men's Assurance Company of America (BMA) Located in Kansas City, MO

[Application No. D–10542]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).[1]

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The sales and transfers of assets of an employee benefit plan (the Plan) to BMA pursuant to the terms of a benefit-responsive or a non-benefit responsive synthetic guaranteed investment contract (the Benefit-Responsive BMA Synthetic GIC or the Non-Benefit Responsive BMA Synthetic GIC) entered into by the Plan sponsor with BMA;[2] (2) advances (the Advances) made by BMA to a Plan in order to make unanticipated benefit payments, if applicable, under a Benefit-Responsive BMA Synthetic GIC; and (3) the sweeping of interest and other proceeds (the Plan Interest Proceeds) to BMA from a Plan's Contractholder Custodial Account established under either a Benefit-Responsive BMA Synthetic GIC or a Non-Benefit Responsive BMA Synthetic GIC.

This proposed exemption is subject to the general conditions set forth below in Section II.

Section II. General Conditions

(a) The decision to enter into a BMA Synthetic GIC is made on behalf of a participating Plan in writing by a fiduciary of such Plan which is independent of BMA.

(b) Only Plans with total assets having an aggregate market value of at least $50 million are permitted to purchase BMA Synthetic GICs; provided however that—

(1) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are ''plan assets'' under 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity has purchased a BMA Synthetic GIC, the foregoing $50 million requirement is deemed satisfied if such trust or other entity has aggregate assets which are in excess of $50 million; provided that, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million, or

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are ''plan assets'' under the Plan Asset Regulation, which entity has purchased a BMA Synthetic GIC, the foregoing $50 million requirement is deemed satisfied if such trust or other entity has aggregate assets which are in excess of $50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(i) Has full investment responsibility with respect to Plan assets invested therein, and

(ii) Has total assets under its management and control, exclusive of the $50 million threshold amount attributable to Plan investment in the commingled entity, which are in excess of $100 million;

(c) Prior to the execution of a BMA Synthetic GIC, the Plan fiduciary receives a full and detailed written disclosure of all material features concerning the BMA Synthetic GIC, including—

(1) A copy of the underlying agreement for the BMA Synthetic GIC (the BMA Synthetic GIC Contract or Contract) and accompanying

[1] For purposes of this proposed exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[2] Unless specifically noted, references to the BMA Synthetic GIC refer to both types of Synthetic GIC products that are offered to Plan investors by BMA.

application, which stipulate the relevant provisions of the Contract, the applicable fees, if any, and the rights and obligations of the parties;

(2) Investment Guidelines defining the manner in which BMA will manage the assets in the Contractholder Custodial Account;

(3) A copy of the Custodial Agreement between BMA, the Plan fiduciary and the custodian (the Custodian);

(4) If granted, copies of the proposed exemption and grant notice with respect to the exemptive relief provided herein.

(d) Upon the selection by a Plan fiduciary of a BMA Synthetic GIC, BMA will supply the Plan fiduciary of a Plan (including a Plan that provides for participant investment selection (the Section 404(c) Plan)), a summary of the pertinent features of the documents listed above in paragraphs (c)(1) through (c)(3) of this Section II which the Plan fiduciary, in its discretion, deems appropriate for distribution to such participant, to the extent necessary to satisfy the requirements of section 404(c) of the Act.

(e) Subsequent to a Plan's investment in a BMA Synthetic GIC, the Plan fiduciary will receive the following ongoing disclosures regarding such investment:

(1) A periodic report consisting of a Contract Value Record Report, which specifies the affected Plan's BMA Synthetic GIC Contract Value Record balance for the prior period, contributions, withdrawals (*i.e.*, Scheduled Withdrawals (the Scheduled Withdrawals) and, if applicable, Unscheduled Withdrawals (the Unscheduled Withdrawals)), interest earned, and the current period's ending Contract Value Record balance. (The time periods covered by the Contract Value Record Report will be selected in advance by the independent Plan fiduciary and may be sent monthly, quarterly or annually.);

(2) A periodic Market Value Statement, which is supplied by the Custodian on a quarterly basis, that specifies the prior period's ending market value for the assets in the Contractholder Custodial Account, contributions made by the Plan sponsor to the BMA Synthetic GIC after the initial deposit, Scheduled Withdrawals and, if applicable, Unscheduled Withdrawals, any fees paid to BMA, investment income, realized capital gains and/or losses from sales, changes in unrealized appreciation of assets, the current period's ending market value and rate of return, and a summary of transactions; and

(3) Upon request from the Custodian (*i.e.*, not more often than quarterly), a portfolio listing.

(The reports referred to in paragraphs (e)(1)–(e)(3) of this Section II will be made available to the Plan fiduciary, which, in turn, will provide copies to participants in a Section 404(c) Plan upon request, to the extent the Plan fiduciary deems it necessary.)

(f) Each BMA Synthetic GIC specifically provides an objective method for determining the fair market value of the securities owned by the Plan pursuant to such GIC.

(g) Each BMA Synthetic GIC has a predefined, fixed maturity date selected by the Plan fiduciary and agreed to by BMA.

(h) In the event BMA sells assets from a Plan's Contractholder Custodial Account to BMA's general account or to an affiliate during the term of the BMA Synthetic GIC or at such GIC's maturity, the transaction is—

(1) Effected for cash;

(2) The sales price of the security is equal to the fair market value of such asset as of the close of business on the date of the sale, as determined by independent sources; and

(3) The Plan incurs no brokerage or transaction costs in connection with the transaction.

(i) BMA maintains books and records of each BMA Synthetic GIC transaction for a period of six years. Such books and records are subject to annual audit by independent, certified public accountants.

Summary of Facts and Representations

1. The parties involved in the proposed transactions are described as follows:

(a) *BMA* is a stock life insurance company organized under Missouri law. As of December 31, 1998, BMA had total admitted assets of $2.689 billion and $71.6 billion of in force insurance policies. BMA is currently rated as follows: A.M. Best—A; Standard & Poor's—AA; Duff & Phelps—AA; and Moody's—A1.

BMA is a wholly owned subsidiary of Generali-Midi Expansion B.V., which is a wholly owned subsidiary of Assicurazioni Generali S.p.A. In addition, BMA owns 100 percent of BMA Financial Services, Inc. and Jones & Babson, Inc. (J&B). Although a significant portion of BMA's business consists of writing insurance and annuity contracts and guaranteed investment contracts for numerous Title I pension plans, BMA intends to become an investment adviser registered under the Investment Advisers Act of 1940 (the 1940 Act).

(b) *J&B* is an investment management company registered as an investment adviser under the 1940 Act. As of April 30, 1999, J&B had total assets under management of $4.2 billion. J&B proposes to manage the underlying assets of BMA Synthetic GICs to the extent any BMA Synthetic GICs are sold prior to the time BMA becomes a registered investment adviser.[3]

(c) *The Plans* that BMA expects will purchase the BMA Synthetic GIC will be plans (both defined contribution and defined benefit) that are qualified under section 401(a) of the Code and/or subject to applicable provisions of the Act. BMA states that it is possible that Plans which are subject to section 457 of the Code (*i.e.*, deferred compensation plans of state and local government and tax exempt organizations) and section 414(d) of the Code (*i.e.*, governmental plans) may also purchase the BMA Synthetic GIC as well as commingled investment entities holding plan assets. The Plans will not consist of any plans that are maintained or sponsored by BMA. As a precondition to investing, each Plan or commingled investment vehicle must have total assets of at least $50 million.

(d) *The Custodian* of the underlying assets of a BMA Synthetic GIC will be a bank, trust company or ''other duly licensed provider of custodial services''[4] approved by BMA and specified in the BMA Synthetic GIC application. The Custodian will be selected by the independent Plan fiduciary that decides to invest in a BMA Synthetic GIC and will be an entity that is unrelated to BMA.

2. Since 1992, BMA has been offering a standard guaranteed investment contract (the Standard GIC) for sale to section 401(k) plans. A Standard GIC is a type of contract under which an insurance company, in exchange for a sum of money, which is deposited in the insurance company's general account, guarantees that it will return that sum to the contractholder on a specified maturity date with interest at a specified rate. In anticipation of its obligation to the contractholder, the insurance company invests the funds received from the contractholder primarily in fixed-income investments in order to achieve an investment return

[3] All references to BMA throughout this proposed exemption are intended to include J&B where it acts as the investment manager of the assets held in any BMA Synthetic GIC product.

[4] BMA represents that entities that are licensed under state law to provide custodial services may vary from state to state. So as not to limit a Plan fiduciary's choice of prospective custodians to banks or trust companies, BMA has decided to permit appropriately licensed entities to serve in this capacity.

that will enable the insurance company to meet its guarantee at maturity, pay its expenses and realize a reasonable profit margin. In the Standard GIC, the fixed-income investments purchased with the contractholder's deposit are held in the insurance company's general account and are available to meet the claims of any of its policyholders. Because the underlying fixed-income investments are not plan assets, BMA states that the insurance company is not a fiduciary of the plan as a result of issuing the Standard GIC.

According to BMA, Standard GICs have proven to be well-suited to meet the investment and liquidity needs of a pension plan because a plan achieves a predictable yield and a fixed maturity on its deposits. The insurance company bears all of the investment and market fluctuation risk. Therefore, Standard GICs perform an important role in the investment portfolios of both defined benefit and defined contribution plans.

Since the early 1990's fiduciaries of plans have become concerned that Standard GICs might be subject to losses if the insurance company becomes insolvent. In response to these concerns, ''synthetic'' GICs were created.

Under a synthetic GIC, instead of paying a premium to the insurance company on the effective date of the contract, the plan places assets in a custodial bank account owned by the plan. The assets are held in that account by the bank custodian and are managed exclusively by the insurance company, an affiliate, or other money manager until the contract's maturity. The pension plan bears all of the credit and market value fluctuation risk of the securities in the account. The yield achieved is not fixed but varies depending on the skill of the asset manager and market conditions. Because the underlying assets of the synthetic GIC are not owned by the insurance company, the plan's investment is not affected by risks to which the insurer's own general account assets may be subject.

3. BMA requests an administrative exemption from the Department in order to offer a ''buy & hold'' synthetic GIC to Plan investors. The aspects of the BMA Synthetic GIC for which BMA believes prohibited transaction relief may be necessary are (a) BMA's implementation of its Guarantee on Scheduled Withdrawal dates and the maturity date (the Maturity Date) by (i) sales of assets in the Contractholder's Custodial Account to BMA and the subsequent transfer of such assets to BMA, and (ii) transfers of assets remaining in the Contractholder Custodial Account to BMA at the Maturity Date of the BMA Synthetic GIC when BMA pays the Plan the value of the Contract Value Record; (b) BMA's Advances to a Plan in order to make unanticipated benefit payments; and (c) the sweeping of interest and other proceeds (*i.e.*, the Plan Interest Proceeds) from a Plan's Contractholder Custodial Account to BMA. BMA represents that it would be a service provider to a Plan and, therefore, a party in interest with respect to such plan within the meaning of section 3(14)(B) of the Act. On the assumption that the assets in each Plan's Contractholder Custodial Account are ''plan assets'' within the meaning of 29 CFR 2510.3–101, BMA states that transfers or sales of securities held in a Contractholder Custodial Account under the terms of the BMA Synthetic GIC on Scheduled Withdrawal Dates and the Maturity Date could be viewed as a sale of property between a plan and a party in interest in violation of section 406(a)(1)(A) of the Act or a transfer to a party in interest in violation of section 406(a)(1)(D) of the Act. Similarly, BMA represents that its guarantee as to principal and interest as well as its making of Advances to a Plan in the case of a benefit-responsive BMA Synthetic GIC, could be construed as the execution of loans between a Plan and a party in interest in violation of section 406(a)(1)(B) and possibly, section 406(b)(1) and (b)(2) of the Act. BMA further represents that the sweeping of Plan Interest Proceeds from a Plan's Contractholder Custodial Account to its general account during the term of a BMA Synthetic GIC could be viewed as a transfer of plan assets to a party in interest in violation of section 406(a)(1)(D) of the Act and possibly, section 406(b)(1) and (b)(2) of the Act.

BMA notes that as a fiduciary with respect to the assets in a Plan's Contractholder Custodial Account, it would have discretion as to which assets in such Account to transfer or sell to BMA. Under such circumstances, BMA represents that it could be viewed as acting in its own interest or for its own account in selecting assets to sell or transfer to BMA on Scheduled Withdrawal Dates or the Maturity Date in violation of section 406(b)(1) and (b)(2) of the Act.

4. The BMA Synthetic GIC will offer the Plan a guaranteed fixed rate of return, a final, fixed maturity date ranging between 3–7 years and a liquidity provision. The fixed interest rate, which will approximate what is available for traditional GICs being offered in the marketplace at the time the BMA Synthetic GIC is purchased by the Plan, will apply at all times until the final Maturity Date of such BMA Synthetic GIC.[5] In other words, at no time throughout the duration of the BMA Synthetic GIC will the fixed interest rate float or be reset. However, the fixed interest rate on BMA Synthetic GICs that are issued at different times may vary from one another.

To provide additional security to the Plan against the risk of BMA's insolvency, the cash deposited by the Plan will be placed in a separate Contractholder Custodial Account that will be registered in the name of the Plan trustees. Only high quality securities will be purchased by BMA to minimize the risk of loss. During the term of the contract, BMA will use funds in its general account to make interest payments to the Plan and to fund unanticipated payments. At maturity, the securities in the Contractholder Custodial Account will be delivered to BMA in exchange for a cash payment of principal and all accrued but unpaid interest to the Plan.

BMA notes that, under certain circumstances, a Plan fiduciary, such as the fiduciary of a defined benefit plan, may not desire the features of the Benefit-Responsive BMA Synthetic GIC that is described herein in order to utilize book value accounting methodology. Instead, BMA represents that a Plan fiduciary may prefer to invest in a BMA Synthetic GIC having a higher interest rate because BMA would not be taking the benefit-responsive risk. Therefore, BMA proposes to offer a Non-Benefit Responsive BMA Synthetic GIC to Plan investors in addition to the Benefit-Responsive BMA Synthetic GIC. Because there are very few differences between both types of investment vehicles, as previously stated, the Non-Benefit Responsive BMA Synthetic GIC and the Benefit-Responsive BMA Synthetic are both referred to as ''the BMA Synthetic GIC.''

5. The BMA Synthetic GIC will consist of a Contract under which BMA will manage Plan assets which have been placed with a Custodian selected by the Plan and which is subject to BMA's approval. BMA will guarantee that amounts placed in the Contractholder Custodial Account for management by BMA will be repaid to the Plan with interest at a specified rate

[5] In determining the interest rate that it will offer, BMA will consider the yields available to it in the market on securities suitable for the Contractholder Custodial Account, its likely expenses, and a reasonable premium for the risks that are being assumed by BMA in making its rate guarantee. Ultimately, the fixed interest rate for a BMA Synthetic GIC will be determined by market forces.

on certain specified dates.[6] BMA will bear investment risk-related to assets in the Contractholder Custodial Account except in certain limited circumstances that are described below. At all times, the Plan will remain the legal owner of the Contractholder Custodial Account.

6. BMA will acknowledge its fiduciary status to the independent Plan fiduciary. The general investment objectives of the Contractholder Custodial Account will be current income with stability of principal. The Contract governing each BMA Synthetic GIC will instruct BMA to manage the Contractholder Custodial Account to achieve a total return over the holding period to maturity which will be sufficient to provide the BMA Synthetic GIC's guaranteed rate of interest. In other words, BMA will not be required to maximize the Contractholder Custodial Account's return. Rather, it will manage the assets in a manner calculated to reach the guaranteed rate of interest and an interest spread over this rate. Thus, BMA will not be required to consider or acquire investments with a greater level of risk than would be normally associated with a BMA Synthetic GIC and it will be restricted to considering only fixed income securities of very high quality.

7. BMA's duties and obligations with respect to the BMA Synthetic GIC will be governed by the terms of an insurance contract between the Plan and BMA. The BMA Synthetic GIC will be submitted to the Missouri Department of Insurance, as well as the state departments of insurance in all other states BMA does business and it must be approved by these state agencies prior to BMA's selling this contract to investors. Once the BMA Synthetic GIC is executed, BMA will have no discretion over any of its terms.

8. BMA Synthetic GICs will be offered only to trustees of large pension plans that are sponsored by Fortune 500 companies (or companies of comparable size) or to fiduciaries of pooled investment vehicles having assets of $50 million or more. However, as stated above, the BMA Synthetic GIC will not be offered to Plans that are sponsored by BMA or its affiliates. In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (i.e., the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are ''plan assets'' under the Plan Asset Regulation, which entity has purchased a BMA Synthetic GIC, the foregoing $50 million requirement will be considered satisfied if such trust or other entity has aggregate assets which are in excess of $50 million. However, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary will be required to have total assets under its management and control, exclusive of the $50 million threshold amount attributable to Plan investment in the commingled entity, which are in excess of $100 million.

In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (*i.e.*, the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are ''plan assets'' under the Plan Asset Regulation, which entity has purchased a BMA Synthetic GIC, the foregoing $50 million requirement will be considered satisfied if such trust or other entity has aggregate assets which are in excess of $50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity must have (a) full investment responsibility with respect to Plan assets invested therein; and (b) total assets under its management and control, exclusive of the $50 million threshold amount attributable to Plan investment in the commingled entity, which are in excess of $100 million.

9. The decision by a Plan to enter into a BMA Synthetic GIC will be made by a Plan fiduciary which is independent of BMA. Such Plan fiduciary will receive full and detailed disclosure of all features regarding the BMA Synthetic GIC, including all applicable fees and charges. In this regard, prior to the execution of a BMA Synthetic GIC, each Plan fiduciary will receive (a) a copy of the BMA Synthetic GIC Contract and accompanying application, which stipulate the relevant provisions of the BMA Synthetic GIC Contract, the applicable fees, if any, and the rights and obligations of the parties; (b) Investment Guidelines defining the manner in which BMA will manage the assets in the Contractholder Custodial Account; (c) a copy of the Custodial Agreement between BMA, the Plan fiduciary and the Custodian; and (d) if granted, copies of the proposed exemption and grant notice with respect to the exemptive relief provided herein.

10. Upon the selection by a Plan fiduciary of a BMA Synthetic GIC, BMA will supply the fiduciary of a Plan (including a Section 404(c) Plan), certain information, which the Plan fiduciary, in its discretion, may pass on to Plan participants, to the extent required to satisfy the requirements of section 404(c) of the Act. This information will consist of a summary of the pertinent features of the BMA Synthetic GIC Contract, the Investment Guidelines and a copy of the Custodial Agreement.

Subsequent to a Plan's investment in a BMA Synthetic GIC, the Plan fiduciary will receive the following ongoing disclosures regarding such investment: (a) A periodic report consisting of a Contract Value Record Report, which specifies the affected Plan's BMA Synthetic GIC Contract Value Record balance for the prior period, contributions, Scheduled Withdrawals and, if applicable, Unscheduled Withdrawals, interest earned, the current period's ending Contract Value Record balance. (The time periods covered by the Contract Value Record Report will be selected by the independent Plan fiduciary and may be sent monthly, quarterly or annually.); (b) a periodic Market Value Statement, which is supplied by the Custodian to the Plan fiduciary on a quarterly basis, that specifies the prior period's ending market value for the assets in the Contractholder Custodian Account, contributions, Scheduled Withdrawals, and if applicable, Unscheduled Withdrawals, any fees paid to BMA, investment income, realized capital gains and/or losses from sales, changes in unrealized appreciation of assets, the current period's ending market value and rate of return, and a summary of transactions; and (c) upon request from the Custodian (i.e., not more often than quarterly), a portfolio listing. The foregoing reports will be made available to the Plan fiduciary, which, in turn, will provide copies to participants upon their request, to the extent the Plan fiduciary deems such information is necessary for participants of a Section 404(c) Plan.

11. When a Plan enters into a BMA Synthetic GIC Contract with BMA, a Contractholder Custodial Account will be established on behalf of the Plan.

[6] While there is no minimum interest rate that can be specified, BMA represents that the actual guaranteed fixed interest rate is unlikely ever to deviate significantly from yields available on comparable U.S. Treasury securities.

Contributions made by the Plan on the effective date of the BMA Synthetic GIC, as well as on any subsequent dates, will be delivered to the Custodian and credited to the Contractholder Custodial Account. These contributions will be credited by BMA to the Contract Value Record. The assets in the Contractholder Custodial Account will be subject to BMA's management and the assets will be maintained by the Custodian in the name of the Plan.

12. Under the Investment Guidelines established for the BMA Synthetic GIC, the Contractholder Custodial Account will be required to invest in fixed income and money market securities that have been purchased by the Custodian as directed by BMA. Only high credit quality securities will be purchased for a Contractholder Custodial Account. In this regard, covered puts and calls will not be used in the Contractholder Custodial Account. Treasury futures contracts will be used only for hedging and risk management purposes but will not be used for leveraging. Currently, BMA's minimum quality rating at the time of purchase is ''Aa3/AA–.''

The Investment Guidelines will be specifically disclosed to, negotiated with and agreed to by the independent Plan fiduciary. BMA notes that it is possible that other classes of securities may be included in the Investment Guidelines based on a Plan's needs. However, in the event the Plan fiduciary requests that other classes of securities be included in the Investment Guidelines, BMA will require that such securities be ''investment grade'' or better.

13. BMA's guarantee of principal and interest under the BMA Synthetic GIC will come into play on certain specified ''Maturity Dates,'' any ''Interest Payment Dates'' specified in the BMA Synthetic GIC Contract prior to a Maturity Date and, with the exception of the non-benefit responsive BMA Synthetic GIC, on any dates on which BMA is required to provide funds for unanticipated benefit payments. On the Maturity Date, the Plan will be entitled to a distribution in cash, by BMA, of the Contract Value Record. In addition, Scheduled Withdrawals and Unscheduled Withdrawals will be made by BMA with corresponding book value adjustments to the Contract Value Record. (In the case of the non-benefit responsive BMA Synthetic GIC, no Unscheduled Withdrawals will be permitted.) The Contract Value Record will be equal to the amount of cash deposited by the Plan in the Contractholder Custodial Account on the effective date of the BMA Synthetic GIC Contract. Subsequent to the effective date (i.e., the date of execution of the BMA Synthetic GIC Contract), the Contract Value Record will be increased by any accrued but unpaid interest owed by BMA to the Plan and will be further adjusted by subtracting the following: (a) All payments made by BMA to provide for Scheduled Withdrawals and/or if applicable, Unscheduled Withdrawals; (b) all contract expense charges, if any, if these have not been paid to BMA directly by the Plan; (c) a Market Value Adjustment Charge due to a Plan's discontinuance of a BMA Synthetic GIC before the Maturity Date under certain circumstances; (d) any prepayments on securities which have been made to the Plan; and (e) the difference between the proceeds from the sale of an impaired asset and its book value.[7] In other words, BMA will guarantee that on the Maturity Date, distributions will be made to the Plan in amounts at least equal to contributions previously made to the Account plus interest at the guaranteed rate of interest (with appropriate adjustments for Scheduled and Unscheduled Withdrawals).[8] Any appreciation on securities that are liquidated will be retained by the Contractholder Custodial Account to the extent the appreciation is not used to meet withdrawal requests or to repay Advances.

14. Scheduled Withdrawals (*i.e.,* distributions prior to the Maturity Date which are subject to BMA's guarantee as to principal and interest, will occur on dates (i.e., Principal Distribution Dates) and in amounts that will be agreed upon between the Plan and BMA prior to execution of a BMA Synthetic GIC. In addition, Scheduled Withdrawals will be specified in writing. On each Principal Distribution Date, BMA will make a withdrawal from the Contractholder Custodial Account in an amount sufficient to fund such withdrawal. In this regard, BMA will pay the withdrawal amount to the Plan from BMA's own assets prior to any assets being transferred from the Contractholder Custodial Account to BMA. If sufficient cash is not available, BMA will direct the Custodian to sell securities designated by BMA that are held in the Contractholder Custodial Account[9] for a price reflecting the fair market value of the securities.[10] The cash proceeds from such sales will be added to the available cash in the Contractholder Custodial Account sufficient to make a payment to BMA of an amount equal to the Scheduled Withdrawal. However prior to receiving any transfer of assets from the Contractholder Custodial Account, BMA will first make a payment to the Plan in amount of the Scheduled Withdrawal. Any capital loss from such liquidation will be borne by BMA and not by the Plan.

The Contract Value Record of the Account will be reduced by the amount of such Scheduled Withdrawal. In addition, BMA will pay interest to the Plan equal to the unpaid accrual of the guaranteed rate of interest on the amount of the Scheduled Withdrawal.

15. Under certain limited circumstances, a Plan holding a Benefit-

[7] Section 1.19 of the BMA's sample Synthetic GIC Contract defines the term ''impaired security'' (except where bonds are called or assets or mortgage-backed securities are prepaid according to their terms) as: (a) any security, which since purchase, has been downgraded by Standard & Poor's, Moody's, or Duff & Phelps two or more levels; (b) any security for which the occurrence or existence of an event or condition results in an acceleration of payment; (c) any security for which the issuer fails to make one or more payments of principal or interest when due, after giving effect to any grace period; or (d) any security upon which interest is accruing on a principal balance less than the original par or face amount of such security, or upon which the rate of interest has been reset other than pursuant to the security's original terms.

If a security becomes ''impaired,'' BMA will notify the Plan and give the Plan fiduciary the option of removing the security from the Contractholder Custodial Account or having BMA replace the impaired security. If the security is removed, the Contract Value Record will be reduced by the book value of the security. However, if the Plan fiduciary requests a replacement security, BMA will sell the security and purchase another one meeting the criteria of the BMA Synthetic GIC. The Contract Value Record will then be reduced by the difference between the sale price of the impaired security and the book value of the impaired security.

The Plan fiduciary may opt to retain an impaired security based on his or her assessment of the recovery potential of the security's market value. If the Plan fiduciary retains the impaired security, it will be removed from the Contractholder Custodial Account and the Contract Value Record will be debited by the book value of the impaired security.

Section 2.05 of the BMA Synthetic GIC Contract provides that if a security is downgraded one level by a credit rating agency, BMA will notify the Plan fiduciary and attempt to effect the sale of the security as soon as reasonably possible. The sale proceeds will then be used to purchase another security that meets the investment criteria of the BMA Synthetic GIC. In addition, BMA will bear any risk of loss from the sale of a downgraded security.

[8] Again, in the case of the non-benefit responsive BMA Synthetic GIC, there will be no adjustments for Unscheduled Withdrawals since such withdrawals are not permitted.

[9] BMA will determine the appropriate security to be sold based upon such factors as (a) the amount of cash needed by the Plan fiduciary; (b) the relative investment returns of the securities available; and (c) market factors affecting the price of the security.

[10] If the purchaser of the securities is BMA, fair market value will be determined in the manner described in Representation 21 under the discussion of illiquid assets. If the purchaser is an unrelated party, the fair market value will be the price established by the marketplace in an arm's length transaction between the buyer and the seller (*i.e.,* the Contractholder Custodial account).

Responsive BMA Synthetic GIC will be permitted to make an Unscheduled Withdrawal from its Contractholder Custodial Account in order to make benefit payments and annuity purchases prior to the Maturity Date of such BMA Synthetic GIC.[11] To make an Unscheduled Withdrawal, an independent Plan fiduciary will be required to certify that the benefit payment is in accordance with the terms of the Plan. However, as with Scheduled Withdrawals, BMA will fund the Plan's withdrawal amount from its own assets prior to receiving cash in the Contractholder Custodial Account equal to the premium for the annuity. If sufficient cash is not available in the Contractholder Custodial Account, BMA will have the right to direct the Custodian to liquidate securities held in the Contractholder Custodial Account at their fair market value.[12] The proceeds of such sale will be added to the cash available in the Contractholder Custodial Account to make a payment to BMA of an amount equal to the premium for the annuity. Similarly, the amount of cash withdrawn will be subtracted from the Contract Value Record. Assuming there are capital losses associated with the securities liquidated, BMA will bear the risk of loss.

16. At its discretion, BMA may advance the requested amount for benefit payments to Plan participants under a benefit-responsive BMA Synthetic GIC. However, cumulative Advances must not exceed 5 percent of the fair market value of the Contractholder Custodial Account and no single Advance may be outstanding for more than 90 days. An Advance is intended to cover a Plan participant's request for a small withdrawal, which because of its timing, might require market-inefficient transactions by the Contractholder Custodial Account.[13] BMA will not charge the Contractholder Custodial Account any interest in connection with an Advance.

According to BMA, the Advance and the repayment of the Advance can be viewed as distinct transactions between BMA and the Contractholder Custodial Account which do not affect the Contract Value Record or BMA's guarantees to the Plan. It is only the payment of the actual benefit to the Plan that reduces the Contract Value Record. Had no Advance been made, the Contractholder Custodial Account would have been required to liquidate collateral to meet the Plan's benefit obligations. Until the Advance is repaid to BMA, the Contractholder Custodial Account will hold assets that are in excess of BMA's obligations owed to the Plan. Repaying the Advance will restore the balance between collateral assets and BMA's obligations to the Plan that existed when the BMA Synthetic GIC was initiated.

17. On the Maturity Date, the Custodian will distribute to BMA all of the assets in the Contractholder Custodial Account. Thereafter, BMA will distribute to the Plan an amount equal to the aggregate Contract Value Record plus the applicable guaranteed rate of interest established by agreement between BMA and the Plan, less adjustments for previous Scheduled and Unscheduled Withdrawals.)[14] If the aggregate market value of the assets in the Contractholder Custodial Account is less than the Contract Value Record on the Maturity Date, BMA will pay from its general account any such deficiency. Conversely, BMA will retain any excess.

18. BMA's guarantee at the Maturity Date will be implemented in the two steps. First, the Plan fiduciary will preinstruct the Custodian to transfer the balance of all assets in the Contractholder Custodial Account to BMA as of the date of discontinuance, regardless of whether such assets are in the form of securities or otherwise, and without the sale of such securities. Second, simultaneously with the transfer of assets, BMA will pay the Plan, by wire transfer, an amount equal to the adjusted Contract Value Record at the time of the discontinuance. As a result, the underlying investments in the Plan's Contractholder Custodial Account will end up in BMA's general account.

BMA notes that if assets trading at a discount from their face amount on the Maturity Date had to be disposed of or distributed to the Plan on the Maturity Date, BMA would be compelled to realize an immediate loss with respect to those assets in meeting its contractual guarantee. By allowing those assets to be transferred to BMA on the Maturity Date, BMA states that the procedures for implementing the contractual guarantees will make it possible for it to hold such assets to maturity or at least until market conditions warrant disposing of them. BMA states that the transfer of assets will enable it to guarantee a higher rate of return than it would otherwise be able to guarantee.

19. In liquidating assets to meet contractual obligations on Scheduled Withdrawal Dates and the Maturity Date, the BMA Synthetic GIC will entitle BMA to sell assets from a Plan's Contractholder Custodial Account to BMA's general account or to an affiliate for a cash price equal to the fair market value of the assets as of the close of business on the date of the sale.[15] BMA represents that no brokerage or transactions costs will be imposed.

20. BMA represents that most of the securities in a Contractholder Custodial

[11] Under the BMA Synthetic GIC, withdrawals cannot be permitted on an unrestricted basis. Otherwise, BMA would be required to liquidate securities, from time to time, at prices that fluctuate unpredictably, thereby undermining the insurer's ability to meet its guarantees.

[12] See Representations 14 and 21 for a discussion of fair market value.

[13] For example, a Contractholder Custodial Account having a portfolio fully invested in asset-backed and mortgage-backed securities could receive a request for $100,000 in benefit withdrawals. To meet such a request, some securities would have to be sold from the Contractholder Custodial Account. However, asset-backed and mortgage-backed securities generally trade only in multiples of $1 million or more and such sale would be highly inefficient to meet a small cash requirement. Therefore, as an alternative, BMA may decide to advance the required cash to the Plan. Subsequently, when the Contractholder Custodial Account receives a regular coupon payment on a security held in its portfolio or possibly a prepayment on an asset-backed or mortgage-backed security, it would use some of this cash flow to repay the Advance to BMA.

[14] The reference to Unscheduled Withdrawals is inapplicable to the non-benefit responsive BMA Synthetic GIC.

[15] BMA does not believe the purchase of securities by it or an affiliate from a Plan's Contractholder Custodial Account will lead to ''cherry-picking'' of the best securities and leaving the worst ones in the Contractholder Custodial Account because any potential abuse will be offset by BMA's interest in meeting its guarantee on the maturity of the BMA Synthetic GIC. In this regard, BMA states that it bears the risk that the assets in the Contractholder Custodial Account will be inadequate to provide the amount guaranteed on maturity. According to BMA, to systematically pick and choose those assets with the view of purchasing desirable assets from a Plan's Contractholder Custodial Account would seriously affect the predictability of the cash flows available to meet subsequent guarantees. BMA further states that the risk is minimized if the Contractholder Custodial Account retains assets that are expected to appreciate. Because all assets purchased with the initial deposit and held in the Contractholder Custodial Account will be highly-rated and liquid, so long as transactions between BMA and the Contractholder Custodial Account are effected at market prices, BMA does not believe cherry-picking would be possible.

BMA also represents that the Contractholder Custodial Account's need to sell securities to BMA may not involve large sums of money and the market for such securities may not be efficient. Therefore, transactions between the Contractholder Custodial Account and BMA will permit such Account to effect needed transactions in small portions at the market price generally available only for transactions involving larger amounts. At contract maturity, all securities held by the Contractholder Custodial Account will be transferred to BMA. BMA will then have the opportunity to recombine the small portions of securities held in various portfolios into larger amounts.

Finally, BMA states that the Plan will have complete records of the Contractholder Custodial Account. If the independent Plan fiduciary discovers that BMA has engaged in abusive conduct, the BMA Synthetic GIC may be discontinued.

Account will have a recognized market value. Although certain securities may be regularly traded on an exchange, other investments will be securities for which an active secondary market exists and for which market quotations are readily available. BMA expects that a significant portion of the assets in a Contractholder Custodial Account will consist of high-quality, mortgage-backed securities and similar securities for which market quotations are readily available.

21. With BMA's Synthetic GIC, the only instances that a market value determination needs to be made with respect to a Contractholder Custodial Account are (a) for periodic (i.e., not more than quarterly) reports prepared by the Custodian, in which case the Custodian makes the market value determination; (b) whenever BMA purchases a security from the Contractholder Custodial Account prior to the maturity date; and (c) if there are illiquid assets to honor benefit payments, in the event of an Advance, a Scheduled Withdrawal or, with the exception of the non-benefit responsive BMA Synthetic GIC, an Unscheduled Withdrawal. However, in no event, will BMA or its affiliates value any of the securities held in a Plan's Contractholder Custodial Account.

For the preparation of custodial reports, the Custodian will determine fair market value by using well-established independent pricing services such as Merrill Lynch or similar organizations acceptable to BMA that have resources to provide fair, reasonable and defensible market values for securities in the Contractholder Custodial Accounts. For purposes of determining the fair market value of a security that is acquired by BMA from the Contractholder Custodial Account prior to the Maturity Date or in the event there are illiquid assets, BMA will base the fair market value of the security on the most recent sales price on the date of valuation (the Valuation Date) or, if no sales took place on the Valuation Date, a price that reflects the average of the bids of at least two major independent dealers for publicly-traded securities. For debt instruments that are not publicly-traded, BMA will base the fair market value of such securities on the average of the bids of at least two major dealers, or, if two bids cannot be obtained, then the fair market value will be determined by an independent appraisal made by an independent appraiser selected by either the Custodian or a Plan sponsor or fiduciary that is not affiliated with BMA or any of its affiliates. Where bids are required for either securities or debt instruments, if the bids of two major dealers vary by more than ''one point'' (i.e., one percent of par value), a third dealer's bid will be obtained by BMA and the fair market value will be the average of the three bids.

22. A Plan may discontinue its BMA Synthetic GIC Contract at any time, provided 30 days' advance written notice is given to BMA. However, BMA may discontinue a BMA Synthetic GIC arrangement with a Plan only if certain events enumerated in the BMA Synthetic GIC Contract occur and as long as BMA gives the Plan 30 day's prior written notice. For example, Section 8.03 of BMA's sample Synthetic GIC Contract states, in part, that BMA may discontinue a BMA Synthetic GIC Contract if—

(a) The Plan fails to give BMA written notice of any change or amendment to the Plan within 30 days of the date such change or amendment is adopted and such change materially and adversely impacts on BMA's financial experience under the BMA Synthetic GIC Contract.

(b) In the judgment of BMA, any change or amendment to the Plan necessitates the amendment of the BMA Synthetic GIC Contract, and, upon the written request of BMA, the Plan fails to consent to such amendment within 30 days of such request.

(c) The Plan is partially or completely terminated.

(d) The Plan fails to be tax-qualified in accordance with the Code.

(e) The Plan requests BMA to purchase annuities which would exceed the balance in the Contractholder Custodial Account.

23. If a BMA Synthetic GIC Contract is discontinued prior to the Maturity Date, BMA will be entitled to receive a Market Value Adjustment Charge which will be deducted from the Contract Value Record. The Market Value Adjustment Charge is intended to allow BMA to recover its direct costs and unreimbursable expenses incurred in managing the BMA Synthetic GIC over a maximum three year period. The Market Value Adjustment Charge will equal the sum of (1)+ (2), where—

(1) Is the excess, if any, of the Contract Value Record over the fair market value of the assets in the Contractholder Custodial Account at the determination date (*i.e.,* the distribution date), but not less than 0; and

(2) Is (a) + (b), where—

(a) Is the amount of any outstanding Advances to make benefit payments, and

(b) Is the amount equal to [(F * CVR)] * N, where—

F = The Market Value Expense Charge, expressed as an annual percentage rate, payable to BMA as agreed upon by BMA and the Plan and specified in the BMA Synthetic GIC Contract;

CVR = The amount of the Contract Value Record on the determination date; and

N = The number of days in the period from the determination date through the third anniversary of the effective date of the Contract, or the Maturity Date, if earlier, divided by 365. This variable also reflects the recovery of BMA's unreimbursable expenses over a maximum three year period and does not represent a penalty.

Whenever a withdrawal from the Contract is less than the value of the Contract Value Record and is subject to the Market Value Adjustment Charge, such Charge will be based upon the aforementioned formula. However, the Charge will be multiplied by a ratio, the numerator of which will reflect the amount of the withdrawal and the denominator, the amount of the Contract Value Record at the determination date.

The Plan will preinstruct the Custodian to transfer, to BMA, the balance of all assets that are held in the Contractholder Custodial Account as of the date of the discontinuance, whether in the form of securities or otherwise, and without the sale of such securities. Simultaneously with such transfer of assets, BMA will pay the Plan, by wire transfer, an amount equal to the adjusted Contract Value Record at the time of such discontinuance.

24. Interest and other income payments made by issuers of securities (*i.e.,* Plan Interest Proceeds) held in the Contractholder Custodial Account will be transferred to BMA as they are paid to the Custodian during the term of the BMA Synthetic GIC. BMA represents that Plan Interest Proceeds are generally too small to be reinvested efficiently in any one Contactholder Custodial Account. Therefore, BMA explains that it will be able to invest the stream of income derived from the Plan Interest Proceeds in its general account. BMA further represents that in exchange for its guarantees to pay benefits and interest on the Interest Payment Dates, the Plan fiduciary is acknowledging that the Plan Interest Proceeds cease to be plan assets upon their transfer to BMA and, thus, become the sole and exclusive property of BMA.

25. Because it is anticipated that a large portion of the securities held in the Contractholder Custodial Account will be high credit quality mortgage-backed and asset-backed securities,

BMA notes that such securities generally experience partial principal repayment on a regular basis. Therefore, BMA's Synthetic GIC will offer a Plan either of two investment options—(a) the opportunity to require that BMA reinvest all of the prepayments received by the Custodian and bear the reinvestment risks on such cashflows; or (b) the opportunity to allow BMA to negotiate with the Plan a BMA Synthetic GIC that will pay a higher guaranteed interest rate to such Plan, but which requires that the Plan receive some of the prepayments as they are paid to the Custodian.[16] In other words, some of the reinvestment risks from the prepayment of cashflows will not be borne by BMA. These options will be available to the Plan fiduciary prior to the inception of the BMA Synthetic GIC Contract.

26. Other than the Market Value Adjustment Charge described above, BMA does not anticipate charging any fees under the BMA Synthetic GIC inasmuch as its ''compensation'' will be based upon the anticipated difference between the market value of securities in the Contractholder Custodial Account and its guarantee of principal. However, the BMA Synthetic GIC Contract provides that a Contract Expense Charge may be imposed if it is individually negotiated with the Plan fiduciary. BMA states that the purpose of this provision is to allow the Plan to net a higher interest rate by paying a portion of BMA's expenses.[17] According to BMA, the Contract Expense Charge will not be in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

27. BMA will keep full and complete records and books of account reflecting all transactions of each Contractholder Custodial Account and will make them available on an annual basis for audit by independent certified public accountants selected by and responsible to the Plan. In addition, BMA will furnish annual reports of the operations of the Contractholder Custodial Account containing a list of the investments of such Account to an independent Plan fiduciary.

28. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The decision to enter into a BMA Synthetic GIC will be made on behalf of a participating Plan, in writing, by a fiduciary of such Plan who is independent of BMA.

(b) Each Plan or plan asset look-through vehicle investing in a BMA Synthetic GIC will have assets that are in excess of $50 million.

(c) Prior to and subsequent to the execution of a BMA Synthetic GIC, the Plan fiduciary, and if applicable, the Plan participant, will receive written disclosures concerning the BMA Synthetic GIC, including a description of all applicable fees and charges, as well as ongoing disclosures with respect to such investment.

(d) BMA will maintain, for a period of six years from the date of each BMA Synthetic GIC transaction, books and records of such transactions that will be subject to annual audit by independent, certified public accountants who are selected by and responsible solely to the relevant Plan.

Notice to Interested Persons

BMA represents that because those potentially interested participants and beneficiaries cannot be identified at this time, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. Therefore, comments and requests for a hearing must be received no later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

South Central New York District Council of Carpenters Pension Fund (the Fund) Johnson City, New York

[Application No. D–10755]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975 (c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: The sale (the Sale) of improved real property (the Property) to the Fund by the Local 281 Carpenters Property Corporation (the Corporation), a party in interest with respect to the Fund, provided the following conditions are met:

(a) The terms and conditions of the Sale are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party;

(b) The Fund purchases the Property for cash from the Corporation for the lesser of $250,000 or the fair market value of the Property as of the date of the Sale;

(c) The Sale is monitored and approved by an independent fiduciary acting on behalf of the Fund;

(d) The Sale is a one-time transaction for cash; and

(e) The Fund pays no fees or commissions in connection with the Sale.

Summary of Facts and Representations

1. The United Brotherhood of Carpenters and Joiners of America, Local 281 and Local 532 (the Union) is a union located in the Village of Johnson City, Broome County, New York. The Union represents carpenters who are employed throughout the state of New York. The Fund is a defined benefit pension plan established by the Union for the provision of retirement benefits to Union members. The Fund had 847 participants and approximately $29,600,175 in assets as of January 1, 1998.

2. The Corporation is a holding company established by the Union on April 18, 1974 for the holding and management of investment property. The Corporation purchased the Property on April 29, 1974 for $95,000 from the Baptist Bible Seminary, an unrelated party. The Property is located at 335 Main Street, in the Village of Johnson City, Broome County, New York. The Property is comprised of a two-story building having approximately 4,800 square feet in rentable space and is situated on approximately 2.3 acres. The applicant represents that the Fund currently rents office space, occupying 300 square feet, in the Property, on a month-to-month basis pursuant to Section 228 of New York State's Real Property Law.[18] The lease has been in force in excess of twenty-five years and the rental rate has not increased for the last thirteen years. The applicant further

[16] Under this option, if prepayments are paid to the Plan, the Contract Value Record will be reduced by the amount of the payment. However, the amount of prepayments will be limited to a maximum percentage of the principal balance of the security.

[17] For example, BMA states that the interest rate it is able to offer under the BMA Synthetic GIC will be affected by its investments. At the Plan's request, BMA explains that it would be willing to pass on some of these expenses to the Plan, and in exchange, it would offer a higher rate of interest. BMA further states that it would only charge such fees if the Plan fiduciary negotiating the BMA Synthetic GIC requests this provision in order to obtain a higher interest rate.

[18] In this regard, the applicant represents that a month-to-month tenancy may be terminated by providing written notice of at least 30 days.

represents that the rental rate was determined by D'Arcangelo & Co., LLP Certified Public Accountants, in excess of thirteen years ago, by allocating the Property's operating expenses in proportion to the square footage utilized by each tenant. This resulted in a monthly rental rate of $1 per square foot. Accordingly, the Fund has been charged a monthly rate of $300 for at least the past thirteen years.

In addition, the applicant represents that the Fund is represented by both employer and union trustees. In the latter part of 1997 through the present, George Hamarich was a union trustee of the Fund and a trustee of the Corporation.[19]

3. The Property was appraised (the Appraisal) on June 18, 1998 by Mr. John Miller (Mr. Miller) of the Central New York Appraisal Group (the Appraisal Group). The applicants represent that Mr. Miller and the Appraisal Group are independent of the Fund and the Union. Mr. Miller, an appraiser certified in the State of New York, used the sales comparison approach and compared the Property to five properties which were similar to the Property and which were also the subject of recent sales. Based on these comparisons, Mr. Miller concluded the value of the Property to be $250,000, as of June 2, 1998, as if the site was vacant and ready for redevelopment (the Appraised Value).

4. The applicant proposes the sale of the Property from the Union to the Fund for $250,000 (*i.e.,* the Sale). The applicant represents that proposed Sale was analyzed by Mr. John P. Jeanneret (Mr. Jeanneret) of J. P. Jeanneret Associates, an investment and consulting company located in Syracuse, New York. Mr. Jeanneret represents that he is an investment adviser registered with the Securities and Exchange Commission and is knowledgeable in matters concerning real estate and qualified employee benefit plans. Mr. Jeanneret additionally represents that he is the Fund's investment consultant and fiduciary and is knowledgeable in matters concerning the Fund's investment objectives and guidelines. Mr. Jeanneret represents that he has analyzed the proposed Sale and has determined that the proposed Sale is appropriate for the Fund and is in the best interest of the Fund's participants and beneficiaries.

The applicant additionally represents that the Fund has engaged the services of Mr. Thomas M. Barnell (Mr. Barnell) of Farrell, Martin, & Barnell LLP, located in Baldwinsville, New York, to act as independent fiduciary on behalf of the Fund for purposes of the proposed Sale. Mr. Barnell represents that he is independent of the Union and the Fund and has over 25 years of experience in matters concerning real estate transactions. Mr. Barnell additionally represents that he acknowledges his duties to the Fund and its participants and beneficiaries.

Mr. Barnell represents that he has personally inspected the Property and has analyzed the Appraisal and the terms of the Sale. Mr. Barnell represents that, based on his analysis, the Appraised Value of the Property is accurate. Mr. Barnell additionally represents that the terms of the Sale fully protect the interests of the Fund. The applicant represents that Mr. Barnell will represent the Fund to ensure that the Sale is in the best interests of the Fund and its participants and beneficiaries.

5. The applicant represents that the Sale, if granted, is administratively feasible in that it will be a one-time transaction for cash in which the Fund will pay no fees or commissions. The applicant also represents that the proposed Sale is in the best interest of the Fund since the Fund currently rents space in the Property and intends to continue utilizing the Property as its offices for the foreseeable future. The applicant further represents that the Fund presently has no intention of demolishing the structure which exists on the Property and re-selling the unimproved Property.[20] In addition, the applicants represent that a sale of the Property to a third-party may disrupt the Fund's operations. Finally, the applicants represent that the proposed Sale is protective of the Fund since the Property will comprise approximately one percent (1%) of the Fund's assets and an independent fiduciary acting on behalf of the Fund has represented that the proposed Sale meets the Fund's investment objectives.

6. In summary, the applicant represents that the subject transactions satisfy the statutory criteria contained in section 408(a) of the Act for the following reasons:

(a) The terms and conditions of the Sale are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party;

(b) The Fund purchases the Property from the Corporation for the lesser of $250,000 or the fair market value of the Property as of the date of the Sale;

(c) The Sale is monitored and approved by an independent fiduciary acting on behalf of the Fund;

(d) The Sale is a one-time transaction for cash; and

(e) The Fund pays no fees or commissions in connection with the Sale.

NOTICE TO INTERESTED PERSONS: Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: J. Martin Jara of the Department, telephone (202) 219–8883 (this is not a toll free number).

[19] The Corporation is a party in interest with respect to the Fund under section 3(14)(G) of the Act as * * * ''a corporation * * * of which (or in which) 50% or more of * * * is owned directly or indirectly, or held by * * *'' an employee organization any of whose members are covered by the (Fund). As a result, the lease is prohibited by section 406(a)(1)(A) of the Act which prohibits the ''* * * leasing * * * of any property between the (Fund) and a party in interest * * *'' However, section 408(b)(2) of the Act provides a statutory exemption, so long as the conditions therein are met, for * * * ''reasonable arrangements with a party in interest for office space * * * necessary for the * * * operation of the (Fund), if no more than reasonable compensation is paid therefor.'' Under regulation 29 CFR 2550.408(b)(2)(e)(1), an act described under section 406(b) of the Act constitutes a separate transaction which is not exempt under 408(b)(2) of the Act. Specifically section 406(b)(2) of the Act states that ''(a) fiduciary with respect to a (Fund) shall not * * * (2)(i)n his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interest are adverse to the interest of the plan or the interests of its participants or beneficiaries * * *'' As a result, the representation of the Fund and the Corporation by Mr. Hamarich, during the leasing, would constitute a violation of section 406(b)(2) of the Act. The Department is not proposing exemptive relief herein for the above described violation of the Act.

[20] In this regard, the Department notes that the Act's standards of fiduciary conduct will apply to the purchase and any possible future development of the Property. Section 404(a)(1) of the Act requires that a fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of a enterprise of a like character and with like aims. Accordingly, the fiduciaries of the Fund must act ''prudently'' with respect to the decision to purchase the Property, as well as to any possible future development of the Property (including where relevant, the determination as to whether to develop the Property, the types of improvements that are appropriate and the Plan's ability to finance any such improvements). The granting of this exemption should not be viewed as an endorsement by the Department of the Fund's subsequent use of such Property. Finally, we note that, if the decision by the fiduciaries to purchase and subsequently develop the Property is not prudent, the fiduciaries would be liable for any loss resulting from such breach even though the purchase of the Property was the subject of an administrative exemption.

S & S Partnership, Inc. Profit Sharing Plan (the Plan) Located in Stony Brook, New York

[Application No. D–10807]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed loan (the Loan) totaling $200,000 by the Plan to Hiramco Realty Corporation (Hiramco), a disqualified person with respect to the Plan, provided that the following conditions are met:

(a) The terms of Loan by the Plan are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party;

(b) The Loan does not exceed 20% of the assets of the Plan, throughout the duration of the Loan;

(c) The Loan is secured by a first mortgage on certain real property (the Property) which has been appraised by a qualified independent appraiser to have a fair market value not less than 150% of the principal amount of the Loan;

(d) The fair market value of the collateral remains at least equal to 150% of the outstanding principal balance plus accrued but not unpaid interest, throughout the duration of the Loan;

(e) Mr. Steven C. Fuchs and his wife, Margaret Fuchs (the Fuchs) are the only Plan participants to be affected by the Loan transaction; [21] and

(f) should any employee of the Plan Sponsor become eligible for plan participation, the new plan participant will be enrolled in another qualified retirement plan or Hiramco may elect to pay the entire balance on the Loan.

Summary of Facts and Representations

1. S & S Partnership, Inc. (the Partnership), the Plan's sponsor, is a partnership located in Stony Brook, New York. The Plan is a defined contribution profit sharing plan, with Mr. Steven C. Fuchs and his wife, Margaret Fuchs (the Fuchs) as its sole participants and trustees. As of December 31, 1998, the Plan had total assets of approximately $1,230,238.

2. Hiramco is a corporation in the real estate management business, of which 50% ownership interests remain with Mr. Fuchs and J.A. Green Development Corporation, respectively. Hiramco wishes to borrow $200,000 from the Plan, which represents approximately 16% of the current fair market value of the assets of the Plan. The Loan will be amortized over a 10 year period, with equal monthly payments of principal and interest over the 10 year term. The interest rate for the Loan will be 10% per annum. The total monthly payments for the Loan will be $2,643.02 per month. Mr. Daniel J. Liberty, Senior Vice President of KeyBank (the Bank) of Melville, New York, has represented in a letter dated October 8, 1999, that the terms and conditions of the mortgage are within the current conditions for commercial mortgages provided by the financial services industry. The Bank is independent of the Plan and Plan Sponsor.

3. The applicant represents that Hiramco has a sufficient cash flow stream to meet the monthly payments under the terms of the Loan. The applicant further represents that Hiramco currently leases the Property to a prime tenant, the United Stated Post Office.

4. The Loan will be secured by a first mortgage on the Property, which is located at 117 North Paul's Path, Coram, New York. The Property has been appraised by Mr. Richard C. Clarke, a real estate appraiser in Stony Brook, New York, to have a fair market value of $650,000 as of July 28, 1999. The applicant represents that the Plan's security interest will be perfected in the manner required by applicable law in New York by recording with the appropriate government officials. Furthermore, the applicant represents that the Property securing the Loan will be insured against casualty loss in an amount not less than the amount of the outstanding principal of the Loan (plus accrued but unpaid interest), and the Plan will be named beneficiary of the policy.

5. The applicant represents that should the fair market value of the Property decline below 150% of the balance of the Loan, the Plan Sponsor will provide additional collateral to maintain the 150% threshold or pay the entire balance on the Loan.

6. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria of section 4975(c)(2) of the Code because: (a) The Loan represents approximately 16% of the assets of the Plan; (b) the terms of the Loan will be at least as favorable the Plan as those obtainable in an arm's length transaction with an unrelated party, as demonstrated by the letter from the Bank; (c) the Loan will be secured by a first mortgage on the Property, which has been determined by a qualified, independent appraiser to have a fair market value of not less than 150% of the total principal amount of the Loan that it will secure; (d) the Fuchs are the only participants in the Plan to be affected by the transaction, and they desire that the transaction be consummated.

NOTICE TO INTERESTED PERSONS: Because the applicants are the only participants in the Plan, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: J. Martin Jara of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

First American Capital Management, Inc. (FACM) Located in Newport Beach, California

(Exemption Application No. D–10819)

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Definitions and Special Rules

The following definitions and special rules will apply to this proposed exemption:

(a) The term ''person'' includes the person and affiliates of the person.

(b) An ''affiliate'' of a person includes the following:

(1) Any person directly or indirectly controlling, controlled by, or under common control with, the person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), brother, sister, or spouse of a brother or sister, of the person; and

(3) Any corporation or partnership of which the person is an officer, director or partner.

A person is not an affiliate of another person solely because one of them has investment discretion over the other's assets. The term ''control'' means the power to exercise a controlling influence over the management or

[21] Since the Fuchs are the sole owners of the Plan sponsor and the only participants in the Plan, there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3–3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

policies of a person other than an individual.

(c) An ''affiliate of FACM'' includes Pacific American Securities, LLC, (PAS) and any other broker-dealer registered under the Securities Exchange Act of 1934 with respect to which FACM has at least a 40 percent minority ownership interest and which is subject to regulations similar to those to which PAS is subject (such entities referred to collectively herein as ''FACM'').

(d) An ''agency cross transaction'' is a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

(e) The term ''covered transaction'' means an action described in section II(a), (b), or (c) of this proposed exemption.

(f) The phrase ''effecting or executing a securities transaction'' means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial or other functions ancillary thereto.

(g) A Plan fiduciary is independent of a person only if the fiduciary has no relationship to or interest in such person that might affect the exercise of such fiduciary's best judgment as a fiduciary.

(h) The term ''profit'' includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(i) The term ''securities transaction'' means the purchase or sale of securities.

(j) The term ''nondiscretionary trustee'' of a Plan means a trustee or custodian whose power and duties with respect to any assets of the Plan are limited to (1) the provision of nondiscretionary trust services to the Plan, and (2) duties imposed on the trustee by any provision or provisions of the Act or the Code. The term ''nondiscretionary trust services'' means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this proposed exemption, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype Plan, the power to amend such Plan.

Section II—Covered Transactions

If each condition of Section III of this proposed exemption is either satisfied or non-applicable under Section IV, the restrictions of section 406(b) of the Act and the sanctions resulting from the application of sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) or (F) of the Code, shall not apply to—

(a) First American Capital Management (FACM) using its authority to cause an employee benefit plan (a ''Plan'') to pay a fee to PAS, or another affiliate of FACM, for effecting or executing securities transactions as an agent for the Plan, but only to the extent that such transactions are not excessive under the circumstances, in either amount or frequency;

(b) FACM acting through PAS, or another affiliate of FACM, as an agent in an agency cross transaction for both a Plan with respect to which FACM is a fiduciary and one or more other parties to the transaction; or

(c) The receipt by FACM, through its affiliates, of reasonable compensation for effecting or executing an agency cross transaction in which a Plan is a party from one or more other parties to the transaction.

Section III—Conditions

Except to the extent otherwise provided in Section IV of this proposed exemption, Section II of this proposed exemption applies only if the following conditions are satisfied:

(a) The person engaging in the covered transaction is not a trustee (other than a nondiscretionary trustee) or an administrator of the Plan, or an employer any of whose employees are covered by the Plan.

(b) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each Plan whose assets are involved in the transaction, which Plan fiduciary is independent of FACM.

(c) The authorization referred to in paragraph (b) of this section is terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice of termination. A form expressly providing an election to terminate the authorization described in paragraph (b) of this section with instructions on the use of the form must be supplied to the authorizing fiduciary no less than annually. The instructions for such form must include the following information:

(1) the authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice from the authorizing fiduciary or other Plan official having authority to terminate the authorization; and

(2) failure to return the form will result in the continued authorization of FACM to engage in the covered transactions on behalf of the Plan.

(d) Within three (3) months before an authorization is made, the authorizing fiduciary is furnished with any reasonably available information that FACM reasonably believes to be necessary for the authorizing fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this exemption (if granted), the form for termination of authorization described in Section II(c), a description of FACM's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

(e) FACM furnishes the authorizing fiduciary with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten (10) business days of the securities transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934, 17 CFR 240.10b–10; or

(2) At least once every three (3) months, and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the Plan pursuant to subparagraph (e)(1) of this Section during the three-month period covered by the report;

(B) the total of all securities transaction-related charges incurred by the Plan during such period in connection with such covered transactions; and

(C) the amount of the securities transaction-related charges retained by FACM and the amount of such charges paid to other persons for execution or other services.

For purposes of this paragraph (e), the words ''incurred by the Plan'' shall be construed to mean ''incurred by the pooled fund'' when FACM engages in covered transactions on behalf of a pooled fund in which the Plan participates.

(f) The authorizing fiduciary is furnished with a summary of the information required under paragraph (e)(1) at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the Plan during the period in connection with covered securities transactions;

(2) The amount of the securities transaction-related charges retained by

FACM and the amount of these charges paid to other persons for execution or other services;

(3) A description of FACM's brokerage placement practices, if such practices have materially changed during the period covered by the summary;

(4) (i) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in discharging its duty of prudence. The requirements of this subparagraph (f)(4)(i) will be met if the ''annualized portfolio turnover ratio,'' calculated in the manner described in subparagraph (f)(4)(ii), is contained in the summary;

(ii) The ''annualized portfolio turnover ratio'' shall be calculated as a percentage of the Plan assets consisting of securities or cash over which FACM had discretionary investment authority, or with respect to which FACM rendered, or had any responsibility to render, investment advice (the ''portfolio'') at any time or times (''management period(s)'') during the period covered by the report. First, the ''portfolio turnover ratio'' (not annualized) is obtained by dividing (A) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (B) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less are excluded from both the numerator and the denominator.

The ''annualized portfolio turnover ratio'' is then derived by multiplying the ''portfolio turnover ratio'' by an annualizing factor. The annualizing factor is obtained by dividing (C) the number twelve (12) by (D) the aggregate duration of the management period(s) expressed in months (and fractions thereof).

(iii) The information described in this paragraph (f)(4) is not required to be furnished in any case where FACM has not exercised discretionary authority over trading in the Plan's account during the period covered by the report.

For purposes of this paragraph (f), the words ''incurred by the Plan'' shall be construed to mean ''incurred by the pooled fund'' when FACM engages in covered transactions on behalf of a pooled fund in which the Plan participates.

(g) If an agency cross transaction to which Section IV(b) does not apply is involved, the following conditions must also be satisfied:

(1) The information required under Sections III(d) or IV(d)(1)(B) of this proposed exemption includes a statement to the effect that, with respect to agency cross transactions, FACM will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under Section III(f) of this proposed exemption includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by FACM in connection with those transactions during the period;

(3) FACM has the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to the transaction, but not both;

(4) The agency cross transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transaction is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

Section IV—Exceptions From Conditions

(a) Certain plans not covering employees. Section III does not apply to covered transactions to the extent they are engaged in on behalf of individual retirement accounts (IRAs) meeting the conditions of 29 CFR 2510.3–2(d), or Plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3–3.

(b) Certain agency cross transactions. Section III of this proposed exemption does not apply in the case of an agency cross transaction, provided that FACM:

(1) does not render investment advice to any Plan for a fee within the meaning of section 3(21)(A)(ii) of the Act with respect to the transaction;

(2) is not otherwise a fiduciary who has investment discretion with respect to any Plan assets involved in the transaction (see 29 CFR 2510.3–21(d)); and

(3) does not have the authority to engage, retain or discharge any person who is, or is proposed to be, a fiduciary regarding any such Plan assets.

(c) Recapture of profits. Section III(a) of this proposed exemption does not apply in any case where FACM returns or credits to the Plan all profits earned by FACM in connection with the securities transactions associated with the covered transaction.

(d) Special rule for pooled funds. If FACM engages in a covered transaction on behalf of an account or fund for the collective investment of the assets of more than one Plan (a Pooled Fund):

(1) Sections III(b), (c), and (d) do not apply if—

(A) The arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this paragraph (d)(1), of a plan fiduciary with respect to each Plan whose assets are invested in the Pooled Fund who is independent of FACM. The requirement that the authorizing fiduciary be independent of FACM shall not apply in the case of a Plan covering only employees of FACM, if the requirements of Sections IV(d)(2)(A) and (B) are met.

(B) The authorizing fiduciary is furnished with any reasonably available information that FACM believes to be necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of FACM's brokerage placement practices, and, where requested, any reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

(C) In the event an authorizing fiduciary submits a notice in writing to FACM objecting to the implementation of, material change in, or continuation of, the arrangement, the Plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the Pooled Fund, without penalty to the Plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing Plans and to the non-withdrawing Plans. In the case of a Plan that elects to withdraw under this subparagraph (d)(1)(C), the withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a Plan electing to withdraw.

(D) In the case of a Plan whose assets are proposed to be invested in the Pooled Fund subsequent to the implementation of the arrangement and

that has not authorized the arrangement in the manner described in subparagraphs (d)(1)(B) and (C) of this section, the Plan's investment in the Pooled Fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraph (d)(1)(A).

(2) Section III(a) of this proposed exemption, to the extent that it prohibits FACM from being the employer of employees covered by a plan investing in a pool managed by FACM, does not apply if—

(A) FACM is an ''investment manager'' as defined in section 3(38) of the Act, and

(B) Either (i) FACM returns or credits to the Pooled Fund all profits earned by FACM in connection with all covered transactions engaged in by FACM on behalf of the Pooled Fund, or (ii) the Pooled Fund satisfies the requirements of subparagraph (d)(3) of this section.

(3) A Pooled Fund satisfies the requirements of paragraph (d) of this section for a fiscal year of the Fund if—

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the Pooled Fund during the fiscal year by any Plan covering employees of FACM, the aggregate fair market value of the interests in such Fund of all Plans covering employees of FACM does not exceed twenty (20) percent of the fair market value of the total assets of the Fund; and

(B) The aggregate brokerage commissions received by FACM, in connection with covered transactions engaged in by FACM on behalf of all Pooled Funds in which a Plan covering employees of FACM participates, do not exceed five (5) percent of the total brokerage commissions received by FACM from all sources in such fiscal year.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective for transactions described herein occurring on or after the date this proposed exemption is published in the **Federal Register**.

Summary of Facts and Representations

1. The applicant, First American Capital Management (FACM), is located in Newport Beach, California. FACM is registered as an investment adviser with the U.S. Securities and Exchange Commission (SEC), pursuant to the Investment Advisers Act of 1940. As of December 31, 1998, FACM had approximately $1.36 billion in assets under management and $581,000 in stockholders' equity.

FACM owns forty-two (42) percent of the outstanding equity of Pacific American Securities, LLC (PAS).[22] PAS is registered with, and regulated by, the SEC as a broker-dealer pursuant to the requirements of the Securities Exchange Act of 1934. PAS is a member of the National Association of Securities Dealers (NASD).

All references herein to ''FACM'' will include ''PAS'' and any other broker-dealer for which FACM may have at least a 40 percent minority ownership interest and which is subject to regulations similar to those to which PAS is subject.

FACM requests an individual exemption to permit:

(i) FACM to use its authority to cause an employee benefit plan (a ''Plan'') to pay a fee to PAS, or another affiliate of FACM (as defined herein), for effecting or executing securities transactions as agent for that Plan; or

(ii) FACM, through PAS or another affiliate of FACM (as defined herein), to act as an agent in an agency cross transaction for both a Plan with respect to which FACM is a fiduciary and one or more other parties to the transaction; or

(iii) the receipt by FACM, through its affiliates, of reasonable compensation for effecting and executing an agency cross transaction to which a Plan is a party from one or more other parties to the transaction.

Each transaction described above will meet the applicable requirements of Prohibited Transaction Class Exemption 86–128 (PTCE 86–128, 51 FR 41686, November 18, 1986), with the principal exception that the agent for the Plan effecting or executing the securities transactions (including any agency cross transactions) will not be an ''affiliate'' of FACM within the meaning of that term as it is used in Part I of PTCE 86–128.

For purposes of this proposed exemption, Section I(c) herein defines the phrase ''affiliate of FACM'' to include PAS and any other broker-dealer with respect to which FACM has at least a 40 percent minority ownership interest and which is subject to regulations similar to those to which PAS is subject (such entities referred to collectively as ''FACM''). Thus, this exemption (if granted) would apply to securities transactions executed by PAS, as a broker-dealer ''affiliated'' with FACM, the investment manager for a Plan which causes the execution of such transactions to be made by PAS, in situations where PTCE 86–128 would not apply because that exemption requires that the plan fiduciary have a controlling interest in the broker-dealer executing the covered transactions.

2. FACM represents that the use by a Plan fiduciary of its authority to cause a Plan to pay a fee to an affiliate of such fiduciary as an agent of such Plan for effecting or executing securities transactions, and an affiliate acting as agent in agency cross transactions for both a Plan and one or more other parties to such transactions and receiving reasonable compensation from one or more other such parties, are common practices. FACM states that such arrangements can provide Plans with the opportunity to decrease the costs of engaging in securities transactions and pose little or no risk to the Plans. For example, an affiliate of a Plan fiduciary may be able to better effect or execute securities transactions with a lower commission charged to the Plan than if such orders were placed with another brokerage firm. Thus, FACM represents that Plans for which it acts as a fiduciary will be better able to maximize the returns, and lower the commission costs, on their portfolios if the requested exemption is granted.

3. PTCE 86–128 provides an exemption for a Plan fiduciary to cause a Plan to pay a fee to an ''affiliate'' of that person (as defined therein) for effecting or executing securities transactions as an agent to the Plan, and to act as an agent in an agency cross transaction for both a Plan and one or more other parties to the transaction and to receive a fee from such other parties, if certain condition are met. The applicant states that the Department, in granting PTCE 86–128, recognized the benefits to Plans of permitting Plan fiduciaries to obtain certain brokerage services from affiliates of such fiduciaries. However, PTCE 86–128 defines an ''affiliate'' of a person to include, among others, any person directly or indirectly controlling, controlled by, or under common control with such person. Therefore, as noted above, the applicant represents that the securities transactions for which an individual exemption is requested may fall outside the scope of relief provided by PTCE 86–128 because FACM holds only a minority ownership interest in PAS and may not be considered an ''affiliate'' within the meaning of the definition contained in PTCE 86–128. However, the applicant is concerned that FACM's minority ownership of PAS may give rise to a prohibited transaction if FACM were to engage in any of the transactions described in Section II of this proposed exemption.

4. FACM requests this proposed exemption to permit it to engage in the

[22] In this regard, the applicant states that there is a controlling equity ownership interest in PAS that is held by an individual who is otherwise unrelated to FACM.

transactions described herein, each of which will meet the applicable conditions of PTCE 86–128, except that PAS would be an entity to which FACM holds a non-controlling, minority ownership interest. In this regard, neither FACM nor PAS will be a trustee (other than a nondiscretionary trustee) or an administrator of the Plan, or an employer any of whose employees are covered by the Plan, except in a case where FACM returns or credits to the Plan all profits earned by FACM in connection with the securities transactions associated with the covered transaction.

5. Except in certain limited circumstances, all covered transactions will be performed under a written authorization executed in advance by a fiduciary of each Plan whose assets are involved in the transaction, which Plan fiduciary is independent of FACM, PAS, and their affiliates.

If FACM engages in a covered transaction on behalf of a Pooled Fund, the arrangement under which the covered transaction is performed will be subject to the prior and continuing authorization of a plan fiduciary, with respect to each Plan whose assets are invested in the Pooled Fund, who is independent of FACM. However, the requirement that the authorizing fiduciary be independent of FACM shall not apply in the case of a Plan covering only employees of FACM (a FACM Plan), if certain requirements are met. In this regard, FACM must be an ''investment manager,'' as defined in section 3(38) of the Act, for the FACM Plan, and must either (i) Return or credit to the Pooled Fund all profits earned by FACM in connection with all covered transactions engaged in by FACM on behalf of the Pooled Fund, or (ii) satisfy certain additional requirements with respect to the Fund. Such additional requirements state that a Pooled Fund with assets of a FACM Plan may take advantage of the relief provided herein for covered transactions for a fiscal year of the Fund if:

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the Pooled Fund during the fiscal year by any FACM Plan, the aggregate fair market value of the interests in such Fund of all FACM Plans does not exceed twenty (20) percent of the fair market value of the total assets of the Fund; and

(B) the aggregate brokerage commissions received by FACM, in connection with covered transactions engaged in by FACM on behalf of all Pooled Funds in which a FACM Plan participates, do not exceed five (5) percent of the total brokderage commissions received by FACM from all sources in such fiscal year.

6. With respect to any Pooled Fund, the authorizing Plan fiduciary will be furnished with any reasonably available information that FACM believes to be necessary to determine whether an authorization to engage in the covered transactions should be given or continued. This information must be furnished not less than 30 days prior to implementation of the arrangement, or any material change to such arrangement. Such information must include (but not be limited to) a description of FACM's brokerage placement practices, and any reasonably available information regarding the matter upon the request of the authorizing Plan fiduciary at any time.

In the event an authorizing Plan fiduciary submits a notice in writing to FACM objecting to the implementation of, a material change in, or continuation of, the arrangement, the Plan on whose behalf the objection was tendered will be given the opportunity to terminate its investment in the Pooled Fund, without penalty to the Plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing Plans and to the non-withdrawing Plans. In the case of a Plan that elects to withdraw, the withdrawal will be effected prior to the implementation of, or material change in, the arrangement. However, an existing arrangement need not be discontinued by reason of a Plan electing to withdraw.

In the case of a Plan whose assets are proposed to be invested in the Pooled Fund subsequent to the implementation of the arrangement, and such Plan has not previously authorized the arrangement, the Plan's investment in the Pooled Fund will be subject to the prior written authorization of an authorizing Plan fiduciary who is independent of FACM and its affiliates.

7. All authorizations for covered transactions will be terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice of termination. A form expressly providing an election to terminate the authorization (Termination Form), with instructions on the use of the form, must be supplied to the authorizing fiduciary no less than annually. The instructions for the Termination Form must include the following information:

(1) The authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice from the authorizing fiduciary or other Plan official having authority to terminate the authorization; and

(2) failure to return the form will result in the continued authorization of FACM to engage in the covered transactions on behalf of the Plan.

Within three (3) months before an authorization is made, the authorizing Plan fiduciary will be furnished with any reasonably available information that FACM believes to be necessary for the authorizing fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this exemption (if granted), the Termination Form, a description of FACM's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

In addition, FACM will furnish the authorizing fiduciary with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten (10) business days of the securities transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934, 17 CFR 240.10b–10; or

(2) At least once every three (3) months, and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the Plan during the three-month period covered by the report;

(B) The total of all securities transaction-related charges incurred by the Plan during such period in connection with such covered transactions; and

(C) The amount of the securities transaction-related charges retained by FACM and the amount of such charges paid to other persons for execution or other services.

For this purposes, the words ''incurred by the Plan'' shall be construed to mean ''incurred by the Pooled Fund'' when FACM engages in covered transactions on behalf of a Pooled Fund in which the Plan participates.

8. The authorizing Plan fiduciary will be furnished with a summary of the information described in Paragraph 7 above at least once per year. This summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the Plan during the period in connection with covered securities transactions;

(2) The amount of the securities transaction-related charges retained by FACM and the amount of these charges

paid to other persons for execution or other services;

(3) A description of FACM's brokerage placement practices, if such practices have materially changed during the period covered by the summary;

(4) (i) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in discharging its duty of prudence. These requirements will be met if the ''annualized portfolio turnover ratio,'' calculated in the manner described below, is contained in the summary;

(ii) The ''annualized portfolio turnover ratio'' shall be calculated as a percentage of the Plan assets consisting of securities or cash over which FACM had discretionary investment authority, or with respect to which FACM rendered, or had any responsibility to render, investment advice (the ''portfolio'') at any time or times (''management period(s)'') during the period covered by the report. First, the ''portfolio turnover ratio'' (not annualized) must be obtained by dividing (A) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (B) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average will be calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less will be excluded from both the numerator and the denominator.

The ''annualized portfolio turnover ratio'' will be derived by multiplying the ''portfolio turnover ratio'' by an annualizing factor. The annualizing factor will be obtained by dividing (C) the number twelve (12) by (D) the aggregate duration of the management period(s) expressed in months (and fractions thereof).

The information described above will not be required in any case where FACM or an affiliate has not exercised discretionary authority over trading in the Plan's account during the period covered by the report.

For purposes of the above description of information to be included in any summary report, the words ''incurred by the Plan'' shall be construed to mean ''incurred by the Pooled Fund'' when FACM engages in covered transactions on behalf of a Pooled Fund in which the Plan participates.

9. If the covered transaction is an agency cross transaction, certain additional conditions must also be satisfied, unless the person effecting or executing the transaction:

(i) Does not render investment advice to any Plan for a fee within the meaning of section 3(21)(A)(ii) of the Act with respect to the transaction;

(ii) Is not otherwise a fiduciary who has investment discretion with respect to any Plan assets involved in the transaction (see 29 CFR 2510.3–21(d)); and

(iii) Does not have the authority to engage, retain or discharge any person who is, or is proposed to be, a fiduciary regarding any such Plan assets.

These additional conditions require that the information submitted to an authorizing Plan fiduciary include a statement to the effect that, with respect to any agency cross transactions, FACM will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions. In addition, the summary information furnished to authorizing Plan fiduciaries at least once per year must include a statement identifying the total number of agency cross transactions during the period covered by the summary, and the total amount of all commissions or other remuneration received or to be received from all sources by PAS in connection with those transactions during the period.

With respect to any agency cross transaction, FACM may have the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to a covered transaction, but not both.[23] Any agency cross transaction must be a purchase or sale for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available. The agency cross transaction must be executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

10. In summary, the applicant represents that the proposed transactions will meet the statutory criteria of section 408(a) of the Act because, among other things:

(a) The Plans will be able to maximize their returns from engaging in securities transactions by improving the execution of such transactions, and paying lower brokerage commissions, by using broker-dealers affiliated with FACM, the Plans' investment manager; and

(b) The Plans will engage in the covered transactions under terms and conditions which are virtually identical to those required for transactions covered by PTCE 86–128.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction

[23] The Department notes that no relief is being provided in this proposed exemption for agency cross transactions beyond that already provided in PTCE 86–128, under the conditions required therein.

The Department notes further that cross-trading transactions could result in violations of one or more provisions of Part 4 of Title I of the Act. Section 406(b)(2) provides that a fiduciary may not act in any transaction involving a plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Where an investment manager has investment discretion with respect to both sides of a cross-trade of securities and at least one side is an employee benefit plan account, the Department has previously taken the position that a violation of section 406(b)(2) of the Act would occur (see *Reich* v. *Strong Capital Management Inc.,* No. 96–C–0669, USDC E.D. Wis. (June 6, 1996).

is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 14th day of December, 1999.

Ivan Strasfeld,

Director of Exemption Determinations Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 99–32753 Filed 12–16–99; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 99–47; Exemption Application No. D–10688, et al.]

Grant of Individual Exemptions; Bankers Trust Co., (BTC), et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Bankers Trust Company (BTC) Located in New York, New York

[Prohibited Transaction Exemption 99–47; Exemption Application Nos. D–10688 through D–10691]

Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the execution by certain employee benefit plans (the Plans) investing in Transwestern Office Partners II, L.P. (the LP) of a partner agreement and estoppel (the Estoppel) under which the Plans agree to honor capital calls made to the Plans by BTC as the representative of certain lenders (the Lenders) that will fund a so-called ''credit facility'' providing credit to the LP in connection with the Plans'' capital commitments to the LP where the LP has granted to BTC security interests in the capital commitments, and where the Lenders are parties in interest with respect to the Plans; provided that (a) the grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (b) the decisions on behalf of each Plan to invest in the LP and to execute such grants and agreements in favor of BTC are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BTC; (c) with respect to Plans that have invested or may invest in the LP in the future, such Plans have or will have assets of not less than $100 million and not more than 5% of the assets of any such Plan are or will be invested in the LP. For purposes of this condition (c), in the case of multiple plans maintained by a single employer or single controlled group of employers, the assets of which are invested on a commingled basis, (e.g., through a master trust), this $100 million threshold will be applied to the aggregate assets of all such plans; and d) the general partner of the LP must be independent of BTC, the Lenders and the Plans.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on September 24, 1999 at 64 FR 51794.

WRITTEN COMMENTS: The Department received one written comment, which was submitted by the applicant to correct a typographical error that appeared in the Notice. The applicant notes that the first sentence of paragraph 6 of the Summary of Facts and Representations (the Summary) should read as follows: ''BTC will become agent for a group of Lenders providing a *$37 million* revolving Credit Facility to the LP.'' [emphasis added] The Department notes this correction to the information contained in the Summary.

No other comments were received from interested persons. Accordingly, the Department has determined to grant the exemption as proposed.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Information Systems Development, Inc. Employees Profit Sharing Plan (the Plan) Located in Cincinnati, Ohio

[Prohibited Transaction Exemption 99–48; Exemption Application No. D–10787]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale by the Plan of certain illiquid limited partnership interests (collectively; the

Interests) to CONVERGYS Information Management Group Inc. (the Company), the sponsor of the Plan and a party in interest with respect to the Plan, provided that the following conditions are met:

(1) The sale is a one-time transaction for cash;

(2) The Plan receives an amount equal to the greater of: (a) The Plan's cost for the Interests, less all cash distributions received as a result of owning the Interests (*i.e.*, the adjusted cost), (b) the fair market value of the Interests on the date of the sale, as established by a qualified independent appraiser, or (c) the estimated value of the Interests, as determined by the general partner of each partnership and reported on the most recent account statements available at the time of the sale;

(3) The Plan pays no commissions or any other expenses relating to the sale; and

(4) The Plan suffers no loss, as a result of its acquisition and holding of the Interests, taking into account all cash distributions received by the Plan as a result of owning the Interests.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on October 22, 1999 at 64 FR 57151.

Tax Consequences of Transaction

The Department of Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or an affiliate thereof) results in the plan either paying less or receiving more than fair market value, such excess may be considered a contribution by the sponsoring employer to the plan, and therefore must be examined under the applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 219–8883. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 14th day of December, 1999.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 99–32754 Filed 12–16–99; 8:45 am]

BILLING CODE 4510–29–P

NORTHEAST DAIRY COMPACT COMMISSION

Notice of Meeting

AGENCY: Northeast Dairy Compact Commission.

ACTION: Notice of meeting.

SUMMARY: The Compact Commission will hold its monthly meeting to consider matters relating to administration and enforcement of the price regulation, including the reports and recommendations of the Commission's standing Committees. The Commission will also continue its deliberative meeting, which was convened at the December 1, 1999 Commission meeting, to consider whether to implement an assessment/refund supply management program.

DATES: The meeting is scheduled for 10:00 a.m. on Wednesday, January 5, 2000.

ADDRESSES: The meeting will be held at The Centennial Inn, Armenia White Room, 96 Pleasant Street, Concord, New Hampshire (I–93 Exit 14).

FOR FURTHER INFORMATION CONTACT: Kenneth M. Becker, Executive Director, Northeast Dairy Compact Commission, 34 Barre Street, Suite 2, Montpelier, VT 05602. Telephone (802) 229–1941.

Authority: 7 U.S.C. 7256.

Dated: December 13, 1999.

Kenneth M. Becker,

Executive Director.

[FR Doc. 99–32744 Filed 12–16–99; 8:45 am]

BILLING CODE 1650–01–P

NUCLEAR WASTE TECHNICAL REVIEW BOARD

Potential Yucca Mountain, Nevada, Repository; Board Meeting

Board meeting: January 25–26, 2000 Las Vegas, Nevada: Discussion of the sources and types of uncertainty associated with a performance assessment of a potential Yucca Mountain repository; update on scientific studies undertaken at the Yucca Mountain site; and status report on the DOE's development of a safety strategy for a potential Yucca Mountain repository.

Pursuant to its authority under section 5051 of Public Law 100–203, Nuclear Waste Policy Amendments Act of 1987, on Tuesday, January 25, and Wednesday, January 26, 2000, the Nuclear Waste Technical Review Board (Board) will meet in Las Vegas, Nevada, to discuss the sources and types of technical and scientific uncertainty associated with an assessment of the performance of a potential Yucca Mountain repository and the U.S. Department of Energy's (DOE) proposed safety strategy for such a repository. The Board also will be briefed by the DOE on the status of scientific and technical studies being conducted in connection with the characterization of the Yucca Mountain site. The DOE is evaluating the Yucca Mountain site, located about 100 miles northwest of Las Vegas, to determine is suitability as the location of a repository for the permanent disposal of spent nuclear fuel and high-level radioactive waste.

The meeting will be held at the Alexis Park Hotel, 375 East Harmon Avenue, Las Vegas, Nevada 89109. The telephone numbers for the Alexis Park

are (702) 796–3300 and (800) 453–8000. The meeting sessions will begin at 8:30 a.m. on both days.

On the morning of January 25, the DOE will update the Board on events that have taken place recently within the civilian radioactive waste management program and the Yucca Mountain project. The meeting then will turn to the topic of ''addressing uncertainty,'' with presentations on the role of uncertainty in complex analyses, decision-making under uncertainty, addressing uncertainty in licensing a Yucca Mountain repository, and how uncertainty will be addressed and communicated in a decision about whether to recommend Yucca Mountain for development as a repository. Presentations on these topics will be made throughout the day and will be followed by a panel discussion of the presentation topics.

The morning session on Wednesday, January 26, will focus on the DOE's safety strategy for a possible Yucca Mountain repository, including a discussion of the ''principal factors'' that have been identified by the DOE as being the most important to repository performance. Two of the factors, seepage and drip shield design, will be looked at in some detail in an effort to understand the process for identifying and establishing priorities for the various factors. Later in the morning and throughout the rest of the day, the DOE will update the Board on the status of scientific studies being conducted in connection with the characterization of the Yucca Mountain site, including chlorine-36 studies, fluid inclusion work, the studies at Busted Butte.

The two-day meeting will be open to the public. Time for public comment will be set aside on both days. Those wanting to speak are encourage to sign the ''Public Comment Register'' at the check-in table. Depending on the number of requests, a time limit may be set on oral statements; written comments may be submitted for inclusion in the record of the meeting. Interested parties also may submit written questions to the Board. As time permits, written questions will be answered during the sessions.

A detailed agenda will be available approximately one week before the meeting. Copies of the agenda can be requested by telephone or obtained from the Board's Web site at www.nwrb.gov. Transcripts of the meeting will be available on the Board's Web site via e-mail, on computer disk, and on a library-loan basis in paper format from Davonya Barnes of the Board staff, beginning on February 21, 2000. For further information on the meeting, contact Karyn Severson, External Affairs, NWTRB, at 2300 Clarendon Boulevard, Suite 1300, Arlington, Virginia 22201–3367; (tel) 703–235–4473; (fax) 703–235–4495; (e-mail) info@nwtrb.gov.

A block of rooms has been reserved at the Alexis Park Hotel. Individuals wanting to reserve one of those rooms must do so by January 3, 2000. To receive the preferred rate, please state that you are attending the Nuclear Waste Technical Review Board meeting.

The Nuclear Waste Technical Review Board was created by Congress in the Nuclear Waste Policy Amendments Act of 1987. Its purpose is to evaluate the technical and scientific validity of activities undertaken by the Secretary of Energy related to managing the disposal of the nation's spent nuclear fuel and high-level radioactive waste. In the same legislation, Congress directed the DOE to characterize a site at Yucca Mountain, Nevada, to determine its suitability as the location of a potential repository for the permanent disposal of spent nuclear fuel and high-level radioactive waste.

Dated: December 13, 1999.

William D. Barnard,

Executive Director, Nuclear Waste Technical Review Board.

[FR Doc. 99–32688 Filed 12–16–99; 8:45 am]

BILLING CODE 6820–AM–M

SECURITIES AND EXCHANGE COMMISSION

Existing Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, 450 5th Street, NW, Washington, DC 20549.

Extension:

Rule 17a–7, SEC File No. 270–238, OMB Control No. 3235–0214

Rule 17a–8, SEC File No. 270–225, OMB Control No. 3235–0235

Rule 17e–1, SEC File No. 270–224, OMB Control No. 3235–0217

Rule 19a–1, SEC File No. 270–240, OMB Control No. 3235–0216

Rule 31a–1, SEC File No. 270–173, OMB Control No. 3235–0178

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17a–7 (17 CFR 270.17a–7) under the Investment Company Act of 1940 (the ''Act'') is entitled ''Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.'' It provides an exemption from section 17(a) of the Act for purchases and sales of securities between registered investment companies that are considered affiliates because of a common adviser, director, or officer. Rule 17a–7 requires investment companies to keep various records in connection with purchase or sale transactions affected by the rule. The rule requires the board of directors of an investment company to establish procedures reasonably designed to ensure that all conditions of the rule have been satisfied, and requires the investment company to maintain and preserve permanently a written copy of those procedures. If an investment company enters into a purchase or sale transaction with an affiliated person, the rule requires the investment company to maintain written records of the transaction for a period of not less than six years from the end of the fiscal year in which the transaction occurred.[1] In addition, under the rule, the board is required to determine, at least on a quarterly basis, that all affiliated transactions made during the preceding quarter were made in compliance with these established procedures. The Commission's examination staff uses these records to evaluate transactions between affiliated investment companies for compliance with the rule.

The Commission estimates that approximately 750 investment companies enter into transactions affected by rule 17a–7 each year.[2] The average annual burden for rule 17a–7 is estimated to be approximately two burden hours per respondents,[3] for an annual total of 1,500 burden hours for all respondents. The collection of information required by rule 17a–7 is necessary to obtain the benefits of the

[1] The written records are required to set forth a description of the security purchased or sold, the identity of the person on the other side of the transaction, and the information or materials upon which the board of directors' determination that the transaction was in compliance with the procedures.

[2] Based on the experience of the Commission's examination and inspections staff, the Commission staff estimates that most investment companies (3,000 of the estimated 3,560 registered investment companies) have adopted procedures for compliance with rule 17a–7. Of these 3,000 investment companies, the Commission staff assumes that each year approximately 25% (750) enter into transactions affected by rule 17a–7.

[3] This estimate is based on conversations with attorneys familiar with the information collection requirements of rule 17a–7

rule. Responses will not be kept confidential.

Rule 17a–8 (17 CFR 270.17a–8) under the Act is entitled ''Mergers of certain affiliated investment companies.'' Rule 17a–8 exempts certain mergers and similar business combinations (''mergers'') of affiliated registered investment companies (''funds'') from section 17(a)'s prohibitions on purchases and sales between a fund and its affiliates. The rule requires fund directors to consider certain issues and to record their findings in board minutes. The average annual burden of meeting the requirements of rule 17a–8 is estimated to be 1.5 hours for each fund. The Commission staff estimates that approximately 80 funds rely each year on the rule. The estimated total average annual burden for all respondents therefore is 120 hours.

Rule 17e–1 (17 CFR 270.17e–1) under the Act is entitled ''Brokerage Transactions on a Securities Exchange.'' The rule governs the remuneration that a broker affiliated with an investment company may receive in connection with securities transactions by the investment company. The rule requires an investment company's board of directors to establish, and review as necessary, procedures reasonably designed to provide that the remuneration to an affiliated broker is a fair amount compared to that received by other brokers in connection with transactions in similar securities during a comparable period of time. Each quarter, the board must determine that all transactions with affiliated brokers during the preceding quarter complied with the procedures established under the rule. Rule 17e–1 also requires the investment company to: (i) Maintain permanently a written copy of the procedures adopted by the board for complying with the requirements of the rule; and (ii) maintain for a period of six years a written record of each transaction subject to the rule setting forth: the amount and source of the commission, fee or other remuneration received; the identity of the broker; the terms of the transaction; and the materials used to determine that the transactions were effected in compliance with the procedures adopted by the board. The Commission's examination staff uses these records to evaluate transactions between investment companies and their affiliated brokers for compliance with the rule.

The Commission staff estimates that approximately 1,850 investment companies may rely on rule 17e–1 each year.[4] The total average annual burden for rule 17e–1 per respondent is estimated to be approximately 10 burden hours,[5] for an annual total of approximately 18,500 burden hours for all respondents.

Section 19(a) (15 U.S.C. 80a–19(a)) of the Act makes it unlawful for any registered investment company to pay any dividend or similar distribution from any source other than the company's net income, unless the payment is accompanied by a written statement to the company's shareholders which adequately discloses the sources of the payment. Section 19(a) authorizes the Commission to prescribe the form of the statement by rule.

Rule 19a–1 (17 CFR 270.19a–1) under the Act is entitled ''Written Statement to Accompany Dividend Payments by Management Companies.'' Rule 19a–1 sets forth specific requirements for the information that must be included in statements made under section 19(a) by registered investment companies. The rule requires that the statement indicate what portions of the payment are made from net income, net profits and paid-in capital.[6] When any part of the payment is made from net profits, the rule requires that the statement disclose certain other information relating to the appreciation or depreciation of portfolio securities. If an estimated portion is subsequently determined to be significantly inaccurate, a correction must be made on a statement made under section 19(a) or in the first report to shareholders following the discovery of the inaccuracy. The proposed of rule 19a–1 is to afford fund shareholders adequate disclosure of the sources from which dividend payments are made.

The Commission staff estimates that approximately 6,700 portfolios of management companies may be subject to rule 19a–1 each year.[7] The total average annual burden for rule 19a–1 per portfolio is estimated to be approximately 30 minutes.[8] The total annual burden for all portfolios is therefore estimated to be approximately 3,350 burden hours. Compliance with the collection of information required by rule 19a–1 is mandatory for management companies that make statements to shareholders pursuant to section 19(a) of the Act. Responses will not be kept confidential.

Rule 31a–1 (17 CFR 270.31a–1) under the Act is entitled ''Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.'' Rule 31a–1 requires registered investment companies (''funds''), and every underwriter, broker, dealer, or investment adviser that is a majority-owned subsidiary of a fund, to maintain and keep current accounts, books, and other documents which constitute the record forming the basis for financial statements required to be filed pursuant to sect8ion 30 of the Act (15 U.S.C. 80a–29) and of the auditor's certificates relating thereto. The rule lists specific records to be maintained by funds. The rule also requires certain underwriters, brokers, dealers, depositors, and investment advisers to maintain the records that they are required to maintain under federal securities laws.

There are approximately 4,295 investment companies registered with the Commission, all of which are required to comply with rule 31a–1. For purposes of determining the burden imposed by rule 31a–1, the Commission staff estimates that each registered investment company is divided into approximately four series, on average, and that each series is required to comply with recordkeeping requirements of rule 31a–1. Based on conversations with fund representatives, it is estimated that rule 31a–1 imposes an average burden of approximately 1,200 hours annually per series for a

[4] Item 14 of Form N–SAR requires investment companies to list any affiliated brokers or dealers. Based on the Form N–SARs filed for the six-month period ended August 31, 1999, it is estimated that approximately 1,850 investment companies have affiliated broker dealers, and may be subject to rule 17e–1 each year.

[5] This estimate is based on conversions with attorneys familiar with the information collection requirements of rule 17e–1.

[6] Rule 19a–1 requires, among other things, that every written statement made under section 19 of the Act by or on behalf of a management company clearly indicate what portion of the payment per share is made from the following sources: net income for the current or preceding fiscal year, or accumulated undistributed net income, or both, not including in either case profits or losses from the sale of securities or other properties; accumulated undistributed not profits from the sale of securities or other properties; and paid-in surplus or other capital source.

[7] The Commission staff estimates that there are approximately 3,000 registered investment companies that are ''management companies'' as defined by the Act, and each may have one or more separate portfolios that report dividends to shareholders. The Commission's records indicate that those 3,000 management companies have approximately 6,700 portfolios that report paying dividends, and so may be subject to rule 19a–1.

[8] According to respondents, no more than approximately 15 minutes is needed to make the determinations required by the rule and include the required information in the shareholders' dividend statements. The Commission staff estimates that, on average, each portfolio mails two notices per year to meet the requirements of the rule, for an average total annual burden of approximately 30 minutes.

total of 4,800 annual hours per investment company. The estimated total annual burden for all 4,295 investment companies subject to the rule therefore is approximately 20,616,000 hours. Based on conversations with fund representatives, however, the Commission staff estimates that even absent the requirements of rule 31a–1, most of the records created pursuant to the rule are the type that generally would be created as a matter of normal business custom and to prepare financial statements.

The estimates of burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. 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.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections 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 in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW, Washington, DC 20549.

Dated: December 9, 1999.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–32711 Filed 12–16–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission Office of Filings and Information Services Washington, DC 20549.

Extension:

Rule 15c2–8, SEC File No. 270–421, OMB Control No. 3235–0481

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

• *Rule 15c2–8 Delivery of Prospectus*

Rule 15c2–8 requires broker-dealers to delivery preliminary or final prospectuses to specified persons in association with securities offerings. This requirement ensures that information concerning issuers flows to purchasers of the issuers' securities in a timely fashion. There are approximately 8,500 broker-dealer, any of which potentially may participate in an offering subject to Rule 15c2–8. The Commission estimates that Rule 15c2–8 creates approximately 50,000 burden hours with respect to 650 initial public offerings and 1,750 other offerings.

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 control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450th Street, NW, Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 7, 1999.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–32709 Filed 12–16–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 9b–1, SEC File No. 270–429, OMB Control No. 3235–0480

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 (*et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 9b–1 sets forth the categories of information required to be disclosed in an options disclosure document (''ODD'') and requires the options markets to file an ODD with the Commission 60 days prior to the date it is distributed to investors. In addition, Rule 9b–1 provides that the ODD must be amended if the information in the document becomes materially inaccurate or incomplete and that amendments must be filed with the Commission 30 days prior to the distribution to customers. Finally, Rule 9b–1 requires a broker-dealer to furnish to each customer an ODD and any amendments, prior to accepting an order to purchase or sell an option on behalf of that customer.

There are 4 options markets that must comply with Rule 9b–1. These 4 respondents work together to prepare a single ODD covering options traded on each market, as well as amendments to the ODD. These respondents file no more than one amendment per year, which requires approximately 8 hours per year for each respondent. Thus, the total compliance burden for options markets per year is 32 hours. The approximate cost per hour is $100, resulting in a total cost of compliance for these respondents of $3,200 per year (32 hours @ $100).

In addition, approximately 2,000 broker-dealers must comply with Rule 9b–1. Each of these respondents will process an average of three new customers for options each week and, therefore, will have to furnish approximately 156 ODDs per year. The postal mailing or electronic delivery of the ODD takes respondents no more than 30 seconds to complete for an annual compliance burden for each of these respondents of 78 minutes, or 1.3 hours. Thus, the total compliance burden per year is 2,600 hours (2,000 broker-dealers × 1.3 hours). The approximate cost per hour to these respondents is $10 per hour, resulting in a total cost of compliance for these respondents of $26,000 per year (2,600 hours @ $10).

The total compliance burden for all respondents under this rule (both options markets and broker-dealers) is 2632 hours per year (32+2,600), and

total compliance costs of $29,200 ($3,200+$26,000).

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 control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 9, 1999.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–32710 Filed 12–16–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42219; File No. SR–NASD–98–26]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to Amendment No. 8 to a Proposed Rule Change by the National Association of Securities Dealers, Inc. to Institute, on a Pilot Basis, New Primary Nasdaq Market Maker Standards for Nasdaq National Market Securities

Dated: December 9, 1999.

On December 6, 1999, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly-owned subsidiary, the Nasdaq Stock Market, Inc. (''Nasdaq''), submitted to the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to: (1) Continue to suspend the current PMM standards until September 30, 2000; and (2) extend the NASD's Short Sale Rule pilot until September 30, 2000 (''Amendment No. 8'').[3] Amendment No. 8 to the proposed rule change, SR–NASD–96–28, is described in Items I and II below, which Items have been prepared by the NASD. The Commission is publishing this notice and order to solicit comments on Amendment No. 8 from interested persons and to approve the amendment on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

In the current amendment, Nasdaq is proposing to extend the Short Sale Rule pilot and the suspension of existing PMM standards to allow more time to refine the PMM standards. The proposed rule language, as amended, follows. Additions are italicized; deletions are bracketed.

NASD Rule 3350

(a)–(k) No Changes

(l) This Rule shall be in effect until [December 31, 1999] *September 30, 2000.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Presently, NASD Rule 4612 provides that a member registered as a Nasdaq market maker pursuant to NASD Rule 4611 may be deemed a PMM if that member meets certain threshold standards. The implementation of the SEC Order Handling Rules and what some perceive as a concurrent move toward a more order-driven, rather than a quote-driven, market raised questions about the continued relevance of those PMM standards. As a result, the PMM standards were suspended beginning in early 1997.[4] Currently, all market makers are designated as PMMs.

Since February 1997, Nasdaq has worked to develop PMM standards that are more meaningful in what may be an increasingly order-driven environment, and that better identify firms engaged in responsible market making activities deserving of the benefits associated with being a PMM, such as being exempt from NASD Rule 3350, the NASD's Short Sale Rule.

In light of a substantial number of comments on the proposed new PMM standards, Nasdaq staff is August 1998 convened a subcommittee to develop new standards. Nasdaq expects that it will file an amendment to SR–NASD–98–26 to incorporate the new PMM standards that are currently being developed by the subcommittee or, in the alternative, that it will withdraw SR–NASD–98–26 and submit the new PMM standards as a new filing. In the interim, the NASD now proposes to extend the current suspension of the existing PMM standards and extend the Short Sale Rule pilot.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 8, including whether the proposed Amendment is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Robert E. Aber, Senior Vice President and General Counsel, Nasdaq, to Richard Strasser, Assistant Director, Division of Market Regulation, Commission, dated November 18, 1999. The current suspension and extension would expire on December 31, 1999. *See* Exchange Act Release No. 41568 (June 28, 1999), 64 FR 36416 (July 6, 1999).

[4] *See* Exchange Act Release Nos. 38294 (February 14, 1997), 62 FR 8289 (February 24, 1997) (approving temporary suspension of PMM standards); 39198 (October 3, 1997), 62 FR 53365 (October 14, 1997) (extending suspension through April 1, 1998); 39819 (March 30, 1998), 63 FR 16841 (April 6, 1998) (extending suspension through May 1, 1998); 39936 (April 30, 1998), 63 FR 25253 (May 7, 1998) (extending suspension through July 1, 1998); 40140 (June 26, 1998), 63 FR 36464 (July 6, 1998) (extending suspension through October 1, 1998); 40485 (September 25, 1998), 63 FR 52780 (October 1, 1998) (extending suspension through March 31, 1999); 41195 (March 19, 1999), 64 FR 14778 (March 26, 1999) (extending suspension through June 30, 1999); and 41568 (June 28, 1999), 64 FR 36416 (July 6, 1999) (extending suspension through December 31, 1999).

SR–NASD–98–26 and should be submitted by January 7, 2000.

IV. Commission's findings and Order Granting Accelerated Approval of the Amendment

After careful consideration, the commission finds, for the reasons set forth below, that the extension of the Short Sale Rule pilot and the suspension of the existing PMM standards until September 30, 2000, is consistent with the requirements of the Act and the rules and regulations thereunder. In particular, the extension is consistent with section 15A(b)(6)[5] of the Act, which requires that NASD's rules be designed, among other things, to remove impediments to and perfect the mechanism of a free and open market and a national market system and to promote just and equitable principles of trade.

The Commission finds that continuation of the Short Sale Rule pilot and the continued suspension of the current PMM standards will maintain the *status quo* while the NASD develops revised PMM standards. Because the Commission's ultimate stance on the Short Sale Rule may be affected, in part, by the operation of revised PPM standards, it is reasonable to keep the Short Sale Rule pilot in place while work continues on the PMM standards. Furthermore, it is judicious, in the short term, to avoid reintroducing the previous PMM standards prior to implementing new PMM standards.

The Commission finds good cause for approving the extension of the Short Sale Rule pilot and the suspension of existing PMM standards prior to the 30th day after the date of publication of notice of the filing in the **Federal Register.** It could be disruptive to the Nasdaq market and confusing to market participants to reintroduce the previous PMM standards for a brief period prior to implementing a new PMM pilot.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[6] that Amendment No. 8 to the proposed rule change, SR–NASD–98–26, which extends the NASD Short Sale Rule pilot and the suspension of the current PMM standards to September 30, 2000, is approved on an accelerated basis.[7]

For the Commission, by the division of market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–32712 Filed 12–16–99; 8:45 am]

BILLING CODE 8010–01–M

[5] 15 U.S.C. 78o–3(b)(6).

[6] 15 U.S.C. 78s(b)(2).

[7] In approving Amendment No. 8, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Revocation of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration by the Final Order of the United States District Court for the Northern District of California, San Francisco Division, entered September 29, 1998, the United States Small Business Administration hereby revokes the license of Seaport Ventures, Inc., a California corporation, to function as a small business investment company under the Small Business Investment Company License No. 09/09–0311 issued to Seaport Ventures, Inc. on November 22, 1982 and said license is hereby declared null and void as of October 29, 1998.

Small Business Administration.

Dated: December 3, 1999.

Don A. Christensen,

Associate Administrator for Investment.

[FR Doc. 99–32691 Filed 12–16–99; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3225]

State of Florida; Amendment #2

In accordance with information received from the Federal Emergency Management Agency dated December 6, 1999, the above-numbered Declaration is hereby amended to change the deadline for filing applications for physical damage as a result of this disaster from December 18 to December 20, 1999.

All other information remains the same, i.e., the deadline for filing applications for economic injury is July 20, 2000.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 9, 1999.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 99–32786 Filed 12–16–99; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Federal Assistance for Women's Business Center (WBC) Program To Provide Financial Counseling and Other Management and Technical Assistance to Women

AGENCY: Small Business Administration.

ACTION: Program Announcement No. OWBO–2000–013.

SUMMARY: The Small Business Administration (SBA) plans to issue program announcement No. OWBO–2000–013 to invite applications from eligible nonprofit organizations to conduct Women's Business Center projects. The authorizing legislation is the Small Business Act, sections 2(h) and 29, 15 U.S.C. 631(h) and 656. SBA Headquarters must receive applications/proposals by 4 p.m., Eastern Standard Time, on the closing date of the application period. SBA will select successful applicants using a competitive process. The successful applicants will receive an award to provide long term training and other technical assistance to women who want to start or expand businesses.

Service and assistance areas must include financial, management, marketing, loan packaging, eCommerce and government procurement/certification assistance. Applicants must plan to include women who are socially and economically disadvantaged in the target group. The applicant may propose specialized services that will assist women in Empowerment Zones, women who are veterans, women with disabilities, women who have home-based businesses, women in agribusiness, or women in rural or urban areas. SBA will require award recipients to provide content and support to the SBA-funded Online Women's Business Center, (*www.onlinewbc,org*) and provide training on the business uses of the Internet.

Each applicant must submit a five-year plan that describes proposed fund-raising, training and technical assistance activities. A center may receive financial assistance up to five years, however, the award will be issued annually to conduct a 12-month project.

Award recipients must provide non-Federal matching funds as follows: one non-Federal dollar for each two Federal dollars in years 1 and 2; and one non-Federal dollar for each Federal dollar in years 3, 4 and 5. Up to one-half of the non-Federal matching funds may be in the form of in-kind contributions.

DATES: The application period will be from late December 1999 to late February 2000.

FOR FURTHER INFORMATION CONTACT: Sally Murrell, (202) 205–6673 or Mina Wales (202) 205–7080.

Sherrye P. Henry,

Assistant Administrator, SBA/Office of Women's Business Ownership.

[FR Doc. 99–32690 Filed 12–16–99; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Federal Assistance for Women's Business Centers (WBC) Sustainability Pilot Program To Provide Financial Counseling and Other Technical Assistance to Women

AGENCY: Small Business Administration.

ACTION: Program Announcement No. OWBO–2000–014.

SUMMARY: The U.S. Small Business Administration (SBA) plans to issue program announcement No. OWBO–2000–014 to invite applications from eligible nonprofit organizations to conduct Women's Business Center (WBC) projects. Eligible applicants are nonprofit organizations that have received financial assistance from SBA under its WBC Program. To be eligible the applicant must be either in the final year of its WBC 5-year project or have completed a WBC project financed by SBA which continues to provide assistance to women entrepreneurs. Funds will be provided to continue business training, counseling and technical assistance to women for an additional 5-year period. The authorizing legislation to establish this 4-year pilot program is the Women's Business Center Sustainability Act and the Small Business Act, sections 2 (h) and 29, 15 U.S.C. 631 (h) and 656. SBA Headquarters must receive applications/proposals by 4:00 p.m., Eastern Standard Time, on the closing date of the application period. SBA will select successful applicants using a competitive process. Applications will be reviewed and awarded simultaneously with other applications for first-time WBCs submitted under Program Announcement No. OWBO–2000–013.

Service and assistance areas must include financial, management, marketing, loan packaging, eCommerce and government procurement/certification assistance. Applicants must plan to include women who are socially and economically disadvantaged in the target group. The applicant may propose specialized services that will assist women in Empowerment Zones, women who are veterans, women with disabilities, women with home-based businesses, women in agribusiness, or women in rural or urban areas.

SBA will require award recipients to provide content and support to the SBA-funded Online Women's Business Center, (*www.onlinewbc,org*) and provide training on the business uses of the Internet. Applicants' technical proposal must contain information about its current status and past performance, and a 5-year plan for service delivery, fund-raising, training and technical assistance activities. A center may receive financial assistance up to four years during the pilot's authoriziation period, however, the award will be issued annually to conduct a 12-month project.

The non-Federal match requirement is one non-Federal dollar for each Federal dollar in years 1 through 5 of the project. Up to one-half of the non-Federal matching funds may be in the form of in-kind contributions.

DATES: The application period will be from late December 1999 to late February 2000.

FOR FURTHER INFORMATION CONTACT: Sally Murrell, (202) 205–6673 or Mina Wales (202) 205–7080.

Sherrye P. Henry,

Assistant Administrator, SBA/Office of Women's Business Ownership.

[FR Doc. 99–32692 Filed 12–16–99; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Approval of Noise Compatibility Program Amendment, Baton Rouge Metropolitan Airport, Baton Rouge, LA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the amendment to the noise compatibility program submitted by the city of Baton Rouge, Louisiana under the provisions of Title 49, USC, Chapter 475 and CFR Part 150. These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96–52 (1980). On March 31, 1992, the FAA determined that the noise exposure maps submitted by the city of Baton Rouge, Louisiana under Part 150 were in compliance with applicable requirements. On September 22, 1992, the Administrator approved the noise compatibility program. On December 1, 1999, an amendment to the program was approved.

EFFECTIVE DATE: The effective date of the FAA's approval of the amendment to the Baton Rouge Metropolitan Airport noise compatibility program is December 1, 1999.

FOR FURTHER INFORMATION CONTACT: Mike Saupp, Department of Transportation, Federal Aviation Administration, 2601 Meacham Boulevard, Fort Worth, Texas, 76137, (817) 222–5645. Documents reflecting this FAA action may be reviewed at this same location.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the amendment to the noise compatibility program for Baton Rouge Metropolitan Airport, effective December 1, 1999.

Under Title 49 USC, Section 47504 (Hereinafter referred to as ''Title 49''), an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing noncompatible land uses within the area covered by the noise exposure maps. Title 49 requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with Federal Aviation Regulations (FAR) Part 150 is a local program, not a Federal Program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of FAR Part 150 program recommendations is measured according to the standards expressed in part 150 and Title 49 and is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150;

b. Program measures are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and preventing the introduction of additional noncompatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas

preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in FAR Part 150, section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where Federal funding is sought, requests for project grants must be submitted to the FAA Airports Division Office in Fort Worth, Texas.

On June 10, 1999, the FAA accepted from the city of Baton Rouge, Louisiana a proposed amendment to the previously approved noise compatibility plan. Notice of this acceptance was published in the **Federal Register** on June 17, 1999.

The amendment to the noise compatibility program adds an action element to purchase a noise navigation easement on certain noise-impacted properties from willing property owners. It was requested that the FAA evaluate and approve this material as an amendment noise compatibility program as described in Title 49. The FAA began its review of the program on June 10, 1999, and was required by a provision of the Act to approve or disapprove the program amendment within 180 days. Failure to approve or disapprove such a program amendment within the 180-day period shall be deemed to be an approval of such program.

The submitted program amendment contained one proposed action for noise mitigation off the airport. The FAA completed its review and determined that the procedural and substantive requirements of Title 49 and FAR Part 150 have been satisfied. The amendment to the program, therefore, was approved by the Administrator effective December 1, 1999.

This determination is set forth in detail in a Record of Approval endorsed by the Administrator on December 1, 1999. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available at the FAA office listed above and at the administrative offices of the city of Baton Rouge, Louisiana's Aviation Department.

Issued in Fort Worth, Texas, December 7, 1999.

Naomi L. Saunders,

Manager, Airports Division.

[FR Doc. 99–32776 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 195; Flight Information Services Communications (FISC)

Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for Special Committee (SC)–195 meeting to be held January 5–6, 2000, starting at 8:30 a.m. each day. The meeting will be held at Allied Signal, 23500 West 105th Street, Olathe, Kansas.

The agenda will include: January 5: (1) Welcome and Introductions; (2) Agenda Overview; (3) Review of Summary of Previous Meeting; (4) Report from Working Group 1 on activities; (5) Review FIS–B MASPS Section 4.0, Procedures for Performance Requirements Verification, Development; (6) Review FIS–B MASPS Section 3.2.1, FIS Broadcast Network Interface and Appendix D, APDU Header Format; January 6: (7) Work on FISB–B MASPS Appendix E, Application Payload Encoding; (8) Review Action Items; (9) Date and Location of Next Meeting; (10) Other Business; (11) Closing.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting.

Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW, Suite 1020, Washington, DC, 20036; (202) 833–9339 (phone); (202) 833–9434 (fax); or http://www.rtca.org (web site). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 1, 1999.

Janice L. Peters,

Designated Official.

[FR Doc. 99–31616 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. RSAC–96–1, Notice No. 19]

Railroad Safety Advisory Committee (''RSAC''); Working Group Activity Update

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Announcement of Railroad Safety Advisory Committee (RSAC) working group activities.

SUMMARY: FRA is updating its announcement of RSAC's working group activities to reflect the current status of working group activities.

FOR FURTHER INFORMATION CONTACT: Vicky McCully, RSAC Coordinator, FRA, 400 7th Street, SW Washington, DC 20590, (202) 493–6305 or Grady Cothen, Deputy Associate Administrator for Safety Standards Program Development, FRA, 400 7th Street, SW, Stop 25, Washington, DC 20590, (202) 493–6302.

SUPPLEMENTARY INFORMATION: This notice serves to update FRA's last announcement of working group activities and status reports on April 6, 1999 (64 FR 16778). The twelfth full Committee meeting was held September 8, 1999. The next meeting of the full Committee is scheduled for January 28, 1999, at the Wyndham Hotel in Washington, DC.

Since its first meeting in April of 1996, the RSAC has accepted fifteen tasks. Status for each of the tasks is provided below:

Task 96–1—Revising the Freight Power Brake Regulations. This Task was formally withdrawn from the RSAC on June 24, 1997. FRA published an NPRM on September 9, 1998, reflective of what FRA had learned through the collaborative process. Two public hearings were conducted and a technical conference was held. The date for submission of written comments was extended to March 1, 1999. FRA is preparing a final rule. Contact: Thomas Hermann (202) 493–6036.

Task 96–2—Reviewing and recommending revisions to the Track Safety Standards (49 CFR Part 213). This task was accepted April 2, 1996, and a Working Group was established.

Consensus was reached on recommended revisions and an NPRM incorporating these recommendations was published in the **Federal Register** on July 3, 1997, (62 FR 36138). The final rule was published in the **Federal Register** on June 22, 1998 (63 FR 33991). The effective date of the rule was September 21, 1998. A task force was established to address Gage Restraint Measurement System (GRMS) technology applicability to the Track Safety Standards. An amendment to the final rule is being prepared for presentation to the RSAC. Contact: Al MacDowell (202) 493–6236.

Task 96–3—Reviewing and recommending revisions to the Radio Standards and Procedures (49 CFR Part 220). This Task was accepted on April 2, 1996, and a Working Group was established. Consensus was reached on recommended revisions and an NPRM incorporating these recommendations was published in the **Federal Register** on June 26, 1997 (62 FR 34544). The final rule was published on September 4, 1998 (63 FR 47182) and was effective on January 2, 1999. Contact: Gene Cox (202) 493–6319.

Task 96–4—Reviewing the appropriateness of the agency's current policy regarding the applicability of existing and proposed regulations to tourist, excursion, scenic, and historic railroads. This Task was accepted on April 2, 1996, and a Working Group was established. The Working Group monitored the steam locomotive regulations task. Contact: Grady Cothen (202) 493–6302.

Task 96–5—Reviewing and recommending revisions to Steam Locomotive Inspection Standards (49 CFR Part 230). This Task was assigned to the Tourist and Historic Working Group on July 24, 1996. Consensus was reached and an NPRM was published on September 25, 1998 (63 FR 51404). A public hearing was held on February 4, 1999, and recommendations were developed in response to comments received. The final rule was published on November 17, 1999 (64 FR 62828). Contact: George Scerbo (202) 493–6349.

Task 96–6—Reviewing and recommending revisions to miscellaneous aspects of the regulations addressing Locomotive Engineer Certification (49 CFR Part 240). This Task was accepted on October 31, 1996, and a Working Group was established. Consensus was reached and an NPRM was published on September 22, 1998. The Working Group met to resolve issues presented in public comments. The RSAC recommended issuance of a final rule with the Working Group modifications. The final rule was published November 8, 1999 (64 FR 60966). Contact: John Conklin (202) 493–6318.

Task 96–7—Developing On-Track Equipment Safety Standards. This task was assigned to the existing Track Standards Working Group on October 31, 1996, and a Task Force was established. The Task Force is finalizing a proposed rule to present to the RSAC for consideration. Contact: Al MacDowell (202) 493–6236.

Task 96–8—This Planning Task evaluated the need for action responsive to recommendations contained in a report to Congress entitled, Locomotive Crashworthiness & Working Conditions. This Planning Task was accepted on October 31, 1996. A Planning Group was formed and reviewed the report, grouping issues into categories.

Task 97–1—Developing crashworthiness specifications to promote the integrity of the locomotive cab in accidents resulting from collisions. This Task was accepted on June 24, 1997. A Task Force on engineering issues was established by the Working Group on Locomotive Crashworthiness to review collision history and design options and additional research was commissioned. The Working Group reviewed results of the research and is drafting standards for freight and passenger locomotives to present to the RSAC for consideration. Contact: Sean Mehrvazi (202) 493–6237.

Task 97–2—Evaluating the extent to which environmental, sanitary, and other working conditions in locomotive cabs affect the crew's health and the safe operation of locomotives, proposing standards where appropriate. This Task was accepted June 24, 1997. A draft sanitation NPRM is under review by the Working Group on Cab Working Conditions. Task forces on noise and temperature were formed to identify and address issues. The Noise Task Force is preparing draft recommendations for noise exposure requirements. Contact: Brenda Hattery (202) 493–6326.

Task 97–3—Developing event recorder data survivability standards. This Task was accepted on June 24, 1997. An Event Recorder Working Group and Task Force have been established and are actively meeting. A draft proposed rule is being reviewed. Contact: Edward English (202) 493–6321.

Task 97–4 and *Task 97–5*—Defining Positive Train Control (PTC) functionalities, describing available technologies, evaluating costs and benefits of potential systems, and considering implementation opportunities and challenges, including demonstration and deployment.

Task 97–6—Revising various regulations to address the safety implications of processor-based signal and train control technologies, including communications-based operating systems. These three tasks were accepted on September 30, 1997, and assigned to a single Working Group. A Data and Implementation Task Force, formed to address issues such as assessment of costs and benefits and technical readiness, completed a report on the future of PTC systems. The report was accepted as RSAC's Report to the Administrator at the September 8, 1999, meeting. The Standards Task Force, formed to develop PTC standards, is developing draft recommendations for performance-based standards for processor-based signal and train control standards for presentation to the RSAC. Contact: Grady Cothen (202) 493–6302.

Task 97–7—Determining damages qualifying an event as a reportable train accident. This Task was accepted on September 30, 1997. A working group was formed to address this task and conducted their initial meeting February 8, 1999. Contact: Robert Finkelstein (202) 493–6280.

Please refer to the notice published in the **Federal Register** on March 11, 1996 (61 F.R. 9740) for more information about the RSAC.

Issued in Washington, DC, on December 14, 1999.

Michael J. Logue,

Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 99–32783 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–99–6623]

Decision That Certain Nonconforming Motor Vehicles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of decision by NHTSA that certain nonconforming motor vehicles are eligible for importation.

SUMMARY: This document announces decisions by NHTSA that certain motor vehicles not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to vehicles originally manufactured for importation into and/or sale in the United States and certified

by their manufacturers as complying with the safety standards, and they are capable of being readily altered to conform to the standards.

DATES: These decisions are effective December 17, 1999.

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

NHTSA received petitions from registered importers to decide whether the vehicles listed in Annex A to this notice are eligible for importation into the United States. To afford an opportunity for public comment, NHTSA published notice of these petitions as specified in Annex A. The reader is referred to those notices for a thorough description of the petitions. No comments were received in response to these notices. Based on its review of the information submitted by the petitioners, NHTSA has decided to grant the petitions.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final decision must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. Vehicle eligibility numbers assigned to vehicles admissible under this decision are specified in Annex A.

Final Decision

Accordingly, on the basis of the foregoing, NHTSA hereby decides that each motor vehicle listed in Annex A to this notice, which was not originally manufactured to comply with all applicable Federal motor vehicle safety standards, is substantially similar to a motor vehicle manufactured for importation into and/or sale in the United States, and certified under 49 U.S.C. 30115, as specified in Annex A, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 10, 1999.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.

Annex A—Nonconforming Motor Vehicles Decided To Be Eligible for Importation

1. Docket No. NHTSA–99–5503
   Nonconforming Vehicle: 1998–1999 Lexus RX300
   Substantially similar U.S.-certified vehicle: 1998–1999 Lexus RX300
   Notice of Petition published at: 64 FR 19212 (April 19, 1999)
   Vehicle Eligibility Number: VSP–307
2. Docket No. NHTSA–99–5580
   Nonconforming Vehicles: 1990–1992 Acura Legend
   Substantially similar U.S.-certified vehicles: 1990–1992 Acura Legend
   Notice of Petition published at: 64 FR 23896 (May 4, 1999)
   Vehicle Eligibility Number: VSP–305
3. Docket No. NHTSA–99–5733
   Nonconforming Vehicles: 1995–1998 Toyota Avalon
   Substantially similar U.S.-certified vehicles: 1995–1998 Toyota Avalon
   Notice of Petition published at: 64 FR 29937 (June 3, 1999)
   Vehicle Eligibility Number: VSP–308
4. Docket No. NHTSA–99–5736
   Nonconforming Vehicles: 1994–1997 Honda Prelude
   Substantially similar U.S.-certified vehicles: 1994–1997 Honda Prelude
   Notice of Petition published at: 64 FR 29941 (June 3, 1999)
   Vehicle Eligibility Number: VSP–309
5. Docket No. NHTSA–99–5908
   Nonconforming Vehicles: 1998–1999 BMW 5 Series
   Substantially similar U.S.-certified vehicles: 1998–1999 BMW 5 Series
   Notice of Petition published at: 64 FR 36957 (July 8, 1999)
   Vehicle Eligibility Number: VSP–314
6. Docket No. NHTSA–99–5909
   Nonconforming Vehicle: 1995–1999 Triumph Thunderbird Motorcycles
   Substantially similar U.S.-certified vehicle: 1995–1999 Triumph Thunderbird Motorcycles
   Notice of Petition published at: 64 FR 36959 (July 8, 1999)
   Vehicle Eligibility Number: VSP–311
7. Docket No. NHTSA–99–5910
   Nonconforming Vehicles: 1995–1999 BMW 7 Series
   Substantially similar U.S.-certified vehicles: 1995–1999 BMW 7 Series
   Notice of Petition published at: 64 FR 36959 (July 8, 1999)
   Vehicle Eligibility Number: VSP–313
8. Docket No. NHTSA–99–5911
   Nonconforming Vehicles: 1987–1999 Kawasaki ZX6, ZX7, ZX9, ZX10, and ZX11 Motorcycles
   Substantially similar U.S.-certified vehicles: 1987–1999 Kawasaki ZX6, ZX7, ZX9, ZX10, and ZX11 Motorcycles
   Notice of Petition published at: 64 FR 36961 (July 8, 1999)
   Vehicle Eligibility Number: VSP–312
9. Docket No. NHTSA–99–5912
   Nonconforming Vehicles: 1991–1997 Honda VFR 750 and 1998–1999 Honda VFR 800 Motorcycles
   Substantially similar U.S.-certified vehicles: 1991–1997 Honda VFR 750 and 1998–1999 Honda VFR 800 Motorcycles
   Notice of Petition published at: 64 FR 36791 (July 7, 1999)
   Vehicle Eligibility Number: VSP–315
10. Docket No. NHTSA–99–5913
   Nonconforming Vehicles: 1993 Mercedes-Benz 320CE
   Substantially similar U.S.-certified vehicles: 1993 Mercedes-Benz 320CE
   Notice of Petition published at: 64 FR 36740 (July 7, 1999)
   Vehicle Eligibility Number: VSP–310

[FR Doc. 99–32563 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Exemption Applications

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), RSPA is publishing the following list of exemption applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

DATES: J. Suzanne Hedgepeth, Director, Office of Hazardous Materials, Exemptions and Approvals, Research and Special Programs Administration,

U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001, (202) 366–4535.

Key to ''Reasons for Delay''

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of exemption applications.

Meaning of Application Number Suffixes

N—New application.

M—Modification request.

PM—Party to application with modification request.

Issued in Washington, DC, on December 10, 1999.

J. Suzanne Hedgepeth,

Director, Office of Hazardous Materials, Exemptions and Approvals.

NEW EXEMPTION APPLICATIONS

Application No.	Applicant	Reason for delay	Estimated date of completion
11767–N	Ausimont USA, Inc., Thorofare, NJ	4	01/31/2000
11862–N	The BOC Group, Murray Hill, NJ	4	01/31/2000
11927–N	Alaska Marine Lines, Inc., Seattle, WA	4	01/31/2000
12106–N	Air Liquide America Corporation, Houston, TX	4	01/31/2000
12125–N	Mayo Foundation, Rochester, MN	4	01/31/2000
12126–N	LaRoche Industries, Inc., Atlanta, GA	4	01/31/2000
12138–N	Gas Supply Resources, Inc., Albany, NY	4	01/31/2000
12142–N	Aristech Chemical Corp., Pittsburgh, PA	4	01/31/2000
12146–N	Luxfer Gas Cylinders, Riverside, CA	4	01/31/2000
12148–N	Eastman Kodak Company, Rochester, NY	4	01/31/2000
12156–N	Columbia Falls Aluminum Co., Columbia Falls, MT	4	01/31/2000
12158–N	Hickson Corporation, Conley, GA	4	01/31/2000
12164–N	Rhodia, Inc., Shelton, CT	4	01/31/2000
12166–N	Dow Corning Corp., Midland, MI	4	01/31/2000
12171–N	Arichell Technologies, Inc., West Newton, MA	4	01/31/2000
12181–N	Aristech, Pittsburgh, PA	4	01/31/2000
12205–N	Independent Chemical Corp., Glendale, NY	4	02/28/2000
12220–N	d/b/a Laird Farms, Waterloo, NY	4	02/28/2000
12237–N	U.S. Department of Defense, Falls Church, VA	4	02/28/2000
12247–N	Weldship Corp., Bethlehem, PA	4	02/28/2000
12248–N	Ciba Specialty Chemicals Corp., High Point, NC	4	02/28/2000
12258–N	JL Shepherd & Associates, San Fernando, CA	4	02/28/2000
12269–N	Solutia, Inc., St. Louis, MO	4	02/28/2000
12277–N	The Indian Sugar & General Engineering Corp. ISGE, Haryana, IX	4	02/28/2000
12280–N	Combined Tactical Systems, Inc., Jamestown, PA	4	02/28/2000
12281–N	ABS Group, Inc., Houston, TX	4	02/28/2000
12286–N	FMC Corporation, Philadelphia, PA	4	02/28/2000
12290–N	Savage Industries, Inc., Pottstown, PA	4	03/31/2000
12293–N	Intercontinental Packaging Corp., Tuckahoe, NY	4	03/31/2000

MODIFICATIONS TO EXEMPTIONS

Application No.	Applicant	Reason for delay	Estimated date of completion
6293–M	Dyno Nobel, Inc., Salt Lake City, UT	4	01/31/2000
6611–M	Gardner Cryogenics, Lehigh Valley, PA	4	01/31/2000
6765–M	Gardner Cryogenics, Lehigh Valley, PA	4	01/31/2000
8723–M	Buckley Powder Company, Englewood, CO	4	01/31/2000
9266–M	ERMEWA, Inc., Houston, TX	4	01/31/2000
10480–M	Gardner Cryogenics, Lehigh Valley, PA	4	01/31/2000
10656–M	Conf. of Radiation Control Program Directors, Inc., Frankfort, KY	4	01/31/2000
10672–M	Burlington Packaging, Inc., Brooklyn, NY	4	01/31/2000
10821–M	BFI Waste Systems of North America, Inc., Atlanta, GA	4	01/31/2000
10921–M	The Procter & Gamble Company, Cincinnati, OH	4	01/31/2000
10929–M	Consolidated Rail Corporation, Philadelphia, PA	4	01/31/2000
10962–M	International Compliance Center, Mississauga ON L4Z 1X8, CA	4	01/31/2000
10977–M	Federal Industries Corporation, Plymouth, MN	4	01/31/2000
11186–M	Cryenco, Inc., Denver, CO	4	01/31/2000
11248–M	HAZMATPAC, Houston, TX	4	01/31/2000
11327–M	Phoenix Serivves Limited Partnership, Pasadena, MD	4	02/28/2000
11380–M	Baker Atlas, Houston, TX	4	02/28/2000
11406–M	Conf. of Radiation Control Program Directors, Inc., Frankfort, KY	4	02/28/2000
11458–M	Reckitt & Colman, Inc., Wayne, NJ	4	02/28/2000
11769–M	Great Western Chemical Company, Portland, OR	4	02/28/2000
11903–M	Comptank Corporation, Bothwell, Ontario, CA	4	02/28/2000
11942–M	Niklor Chemical Company, Long Beach, CA	4	02/28/2000
12069–M	Compagnie des Containers Reservoirs, Paris, Fr	4	02/28/2000
12074–M	Van Hool NV, B–2500 Lier Koningshooikt, BG	4	02/28/2000
12232–M	Bell Helicopter, Hurst, TX	4	02/28/2000

[FR Doc. 99–32785 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33832]

Arizona & California Railroad Company Limited Partnership d/b/a Puget Sound & Pacific Railroad—Trackage Rights Exemption—The City of Tacoma d/b/a Tacoma Rail

The City of Tacoma d/b/a Tacoma Rail (TR) has agreed to grant overhead trackage rights to Arizona & California Railroad Company Limited Partnership (ARZC) d/b/a Puget Sound & Pacific Railroad Company (PS&P) (collectively, ARZC d/b/a PS&P): [1] (1) From the Lakeside Siding near Blakeslee Junction, milepost 60.0, southwest six miles to the interchange with The Burlington Northern and Santa Fe Railway Company (BNSF) at Chehalis, milepost 66.0 (the TR/BNSF Interchange); and (2) From the TR/BNSF Interchange one mile to milepost 67.0, where TR's rail lines connect with rail line owned by the Port of Chehalis, for a total distance of approximately 7.0 miles.[2]

The transaction is scheduled to be consummated on or shortly after the December 13, 1999, effective date of the exemption.

The trackage rights will promote operating efficiencies, such as enabling ARCZ d/b/a PS&P to interchange traffic with BNSF and TR at certain locations.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33832, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW, Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Rose-Michele Weinryb, Esq., Weiner, Brodsky, Sidman & Kider, P.C., Suite 800, 1350 New York Avenue, NW, Washington, DC 20005–4797.

Board decisions and notices are available on our website at ''WWW.STB.DOT.GOV.''

Decided: December 10, 1999.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 99–32655 Filed 12–16–99; 8:45 am]

BILLING CODE 4915–00–P

[1] ARZC is an existing Class III rail carrier, and PS&P is an operating division of ARZC. *See Arizona & California Railroad Company Limited Partnership—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company,* STB Finance Docket No. 33448 (STB served Sept. 11, 1999).

[2] ARZC d/b/a PS&P previously filed a modified rail certificate to operate over a 10-mile rail line owned by the Port of Chehalis. *See Arizona & California Railroad Company Limited Partnership d/ba/a Puget Sound & Pacific Railroad—Modified Rail Certificate,* STB Finance Docket No. 33812 (STB served Oct. 27, 1999).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–209823–96]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–209823–96 (TD 8791), Guidance regarding Charitable Remainder Trusts and Special Valuation Rules for Transfers of Interests in Trusts.

DATES: Written comments should be received on or before January 18, 2000 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Faye Bruce, (202) 622–6665, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Guidance Regarding Charitable Remainder Trusts and Special Valuation Rules for Transfers of Interests in Trusts.

OMB Number: 1545–1536.

Regulation Project Number: REG–209823–96.

Abstract: This regulation provides guidance relating to charitable remainder trusts and to special valuation rules for transfers of interests in trusts. Section 1.664–1(a)(7) of the regulation provides that either an independent trustee or a qualified appraiser using a qualified appraisal must value a charitable remainder trust's assets that do not have an objective, ascertainable value.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 150.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 75.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

REQUEST FOR 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 shall have 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 of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 8, 1999.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 99–32698 Filed 12–16–99; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 97–12

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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)). Currently, the IRS is soliciting comments concerning Notice 97–12, Electing Small Business Trusts.

DATES: Written comments should be received on or before January 18, 2000 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Faye Bruce, (202) 622–6665, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Electing Small Business Trusts.

OMB Number: 1545–1523.

Notice Number: Notice 97–12.

Abstract: This notice provides the time and manner for making the Electing Small Business Trust election to be a shareholder of an S corporation pursuant to Internal Revenue Code section 1361(e)(3).

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5,000.

Estimated Time Per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 5,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

REQUEST FOR 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 shall have 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 of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 8, 1999.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 99–32699 Filed 12–16–99; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of Pacific-Northwest Citizen Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Pacific-Northwest Citizen Advocacy Panel will be held in Honolulu, Hawaii.

DATES: The meeting will be held Friday January 21, 2000 and Saturday January 22, 2000.

FOR FURTHER INFORMATION CONTACT: Lori M. Dupuis at 1–888–912–1227 or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Citizen Advocacy Panel will be held Friday January 21, 2000, 9 a.m. to 4:30 p.m. at the Internal Revenue Service Honolulu Headquarters Building located at 300 Ala Moana Blvd, Honolulu, HI 96850 and Saturday January 22, 2000, 9 a.m. to Noon in Room Ohia #118, Kapiolani Community College, 4303 Diamond Head Road, Honolulu, HI 96816. The public is invited to make oral comments. Individual comments will be limited to 10 minutes. If you would like to have the CAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write Lori M. Dupuis, CAP Office, 915 2nd Avenue, Room 442, Seattle, WA 98174. Due to limited conference space, notification of intent to attend the meeting must be made with Lori M. Dupuis. Ms. Dupuis can be reached at 1–888–912–1227 or 206–220–6096.

The Agenda will include the following: various IRS issue updates and reports by the CAP subgroups.

Note: Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: December 6, 1999.

John J. Mannion,

Chief, Special Projects.

[FR Doc. 99–32700 Filed 12–16–99; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF VETERANS AFFAIRS

Rehabilitation Research and Development Service Scientific Merit Review Board, Notice of Meeting

The Department of Veterans Affairs gives notice under Public law 92–463 (Federal Advisory Committee Act) as amended, by section 5(c) of Public Law 94–409 that a meeting of the Rehabilitation Research and Development Service Scientific Merit Review Board will be held at the Crowne Plaza Hotel, 1001 14th Street, NW, Washington, DC on January 27 through January 28, 2000.

The sessions on January 27 and January 28, 2000, are scheduled to begin at 8:30 a.m. and end at 6:30 p.m. The purpose of the meeting is to review rehabilitation research and development applications for scientific and technical merit and to make recommendations to the Director, Rehabilitation Research and Development Service, regarding their funding.

The meeting will be open to the public for the January 27 session from

8:30 a.m. to 9 a.m. for the discussion of administrative matters, the general status of the program, and the administrative details of the review process. On January 27, from 9:00 a.m. through January 28, 2000, the meeting is closed during which the Board will be reviewing research and development applications.

This review involves oral comments, discussion of site visits, staff and consultant critiques of proposed research protocols, and similar analytical documents that necessitate the consideration of the personal qualifications, performance and competence of individual research investigators. Disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. Disclosure would also reveal research proposals and research underway which could lead to the loss of these projects to third parties and thereby frustrate future agency research efforts.

Thus, the closing is in accordance with 5 U.S.C. 552b(c)(6), and (c)(9)(B) and the determination of the Secretary of the Department of Veterans Affairs under Section 10(d) of Public Law 92–463 as amended by Section 5(c) of Public Law 94–409.

Those who plan to attend the open session should write to Ms. Victoria Mongiardo, Program Analyst, Rehabilitation Research and Development Service (122P), Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420 (Phone: 202–408–3684) at least five days before the meeting.

Dated: December 7, 1999.

By Direction of the Secretary.

Marvin R. Eason,

Committee Management Officer.

[FR Doc. 99–32729 Filed 12–16–99; 8:45 am]

BILLING CODE 8320–01–M

federal register

Friday
December 17, 1999

Part II

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 740 et al.

Valid Existing Rights; Final Rule

30 CFR Part 761

Interpretative Rule Related to Subsidence Due to Underground Coal Mining; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 740, 745, 761, 762, 772, 773, 778, 780, and 784

RIN 1029–AB42

Valid Existing Rights

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule and record of decision.

SUMMARY: This rule redefines the circumstances under which a person has valid existing rights (VER) to conduct surface coal mining operations on lands listed in section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or ''the Act''). Section 522(e) prohibits or restricts surface coal mining operations on certain lands, including, among other areas, units of the National Park System, Federal lands in national forests, and buffer zones for public parks, public roads, occupied dwellings, and cemeteries. The rule also establishes requirements for submitting and processing requests for VER determinations for those lands. Finally, the rule modifies the exception for existing operations; revises the procedures for compatibility findings for surface coal mining operations on Federal lands in national forests; and establishes requirements governing coal exploration activities on the lands listed in section 522(e) of SMCRA. Adoption of this rule removes all existing suspensions affecting 30 CFR part 761.

EFFECTIVE DATE: January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Dennis Rice, Office of Surface Mining Reclamation and Enforcement, Room 115, South Interior Building, 1951 Constitution Avenue, NW, Washington, DC 20240. Telephone: (202) 208–2829. E-mail address: drice@osmre.gov. Additional information concerning OSM, this rule, and related documents may be found on OSM's home page on the Internet at http://www.osmre.gov.

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I. National Environmental Policy Act of 1969 and Record of Decision.

I. How Did We Obtain and Consider Public Input?

This final rule is based on a proposed rule that we published for public review and comment on January 31, 1997 (62 FR 4836). We also posted the proposed rule and associated documents on our home page on the Internet. In response to requests from the public, we held public hearings on the proposed rule in Athens, Ohio; Billings, Montana; Washington, Pennsylvania; and Whitesburg, Kentucky. The comment period was originally scheduled to close June 2, 1997, but, in response to several requests, we extended the deadline until August 1, 1997. *See* 62 FR 29314, May 30, 1997.

In addition to the testimony offered at the four hearings, we received approximately 75 written comments specific to the proposed rule: 31 from private citizens, 28 from companies and associations affiliated with the mining industry, 4 from environmental organizations, and 11 from Federal, State, and local governmental entities and associations. In developing the final rule, we considered all comments that were germane to the proposed rule. In this preamble, we discuss how we revised the proposed rule in response to comments. We also explain the disposition of those comments that did not result in a change in the proposed rule.

II. What General Comments Did We Receive on the Proposed Rule?

Many comments from private citizens expressed general opposition to mining on public lands, especially in national parks and national forests. Since SMCRA allows mining on these lands under certain circumstances, we have no authority to adopt a regulation that would impose an absolute prohibition on mining on these lands.

One commenter representing several States disputed the need for any rulemaking, arguing that the present system is working well and is consistent with the principles of State primacy under SMCRA. However, some commenters representing individual State regulatory authorities expressed support for the clarity and additional specificity that the rule would provide. Furthermore, two Federal district courts have ordered OSM to take steps to promulgate a final rule defining VER. *Belville Mining Co.* v. *Lujan,* No. C–1–89–790 (S.D. Ohio 1991) and *Helmick* v. *U.S.,* No. 95–0115 (N.D. W.Va. 1997).

Finally, we believe that a Federal definition is necessary to establish a reference point for State definitions and to ensure that the lands listed in section 522(e) of the Act are protected as Congress intended. The good faith/all permits standard that we are adopting as part of the VER definition in this final rule will cause relatively little disruption to existing State regulatory programs. Twenty of the 24 States with approved regulatory programs under section 503 of the Act already rely upon a good faith/all permits or all permits standard for VER.

One commenter requested that the final rule and related documents consistently use the term ''type'' to refer to the distinction between surface and underground mining. Similarly, the commenter stated that the term ''method'' should refer only to the specific techniques employed for either surface or underground mining operations; *e.g.,* area, contour or mountaintop removal for surface mining operations and longwall or room and pillar for underground mining operations. We have endeavored to apply these terms in the manner recommended, although ''type'' may also mean ''method,'' depending upon context, deed nuances, and the vagaries of State property law.

III. How Does the Final Rule Differ Stylistically From the Proposed Rule?

On June 1, 1998, President Clinton issued an Executive Memorandum requiring the use of plain language in all proposed and final rulemaking documents published after January 1, 1999. The memorandum provides the following description of plain language:

> Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization, easy-to-read design features, and use:
> • Common, everyday words, except for necessary technical terms;
> • ''you'' and other pronouns;
> • the active voice, and
> • short sentences.

The President's memorandum includes an exception for final rules based upon proposed rules published before January 1, 1999. While that exception applies to this final rule, we have incorporated some plain language principles in this rule, as required by a memorandum dated June 10, 1998, from the Office of the Secretary of the Department of the Interior. Thus, the final rule and preamble use the pronouns ''we,'' ''us,'' and ''our'' to refer to OSM, and the pronouns ''you'' and ''your'' to refer to a person who claims or seeks to obtain an exception or waiver authorized under 30 CFR 761.11 or section 522(e) of the Act. In all other cases, we specifically identify the person or agency to which the rule or preamble refers. Other changes include avoidance of the word ''shall.'' Instead, the final rule and preamble use ''must'' to indicate an obligation, ''will'' to identify a future event, and ''may not'' to convey a prohibition.

We recognize that more could be done to comply more fully with plain language principles. However, further changes would require a wholesale revision of the entire regulation, which would delay considerably publication of a final rule. For this reason, we have deferred a more extensive plain language rewrite.

IV. In What Context Does the Term VER Appear in SMCRA?

As summarized below, section 522(e) of SMCRA, 30 U.S.C. 1272(e), prohibits or restricts surface coal mining operations on certain lands after the date of SMCRA's enactment (August 3, 1977). However, the Act specifies that these prohibitions and restrictions are ''subject to valid existing rights.'' It further provides that these prohibitions and restrictions do not apply to operations in existence on the date of enactment.

Section 522(e)(1) protects all lands within the boundaries of units of the National Park System; the National Wildlife Refuge System; the National System of Trails; the National Wilderness Preservation System; the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act; and National Recreation Areas designated by Act of Congress.

Section 522(e)(2) prohibits surface coal mining operations on Federal lands within the boundaries of any national forest unless the Secretary finds that there are no significant recreational, timber, economic, or other resources that may be incompatible with such operations. If the Secretary makes this finding, the Act allows the approval of surface operations and impacts incident to an underground mine on any national forest lands. In addition, if the Secretary makes this finding, the Act allows approval of any type of surface coal mining operations on national forest lands west of the 100th meridian (except the Custer National Forest) that lack significant forest cover, provided

the proposed operations comply with certain statutes.

Section 522(e)(3) prohibits surface coal mining operations that would adversely impact publicly owned parks and properties listed on the National Register of Historic Places. However, this paragraph of the Act provides a waiver for surface coal mining operations that receive joint approval from the regulatory authority and the agency with jurisdiction over the park or place.

Section 522(e)(4) prohibits surface coal mining operations within 100 feet of the outside right-of-way line of any public road, but it provides a mechanism and criteria for approval of exceptions from this prohibition. It also exempts mine access and haulage roads at the point of intersection with a public road.

Section 522(e)(5) prohibits surface coal mining operations within 100 feet of a cemetery or within 300 feet of a public building, school, church, community or institutional building, or public park. This paragraph also prohibits operations within 300 feet of an occupied dwelling, but it allows the owner of the dwelling to waive the prohibition.

The term VER also appears in section 601(d) of SMCRA, which pertains to the designation of Federal lands as unsuitable for mining operations for minerals or materials other than coal. Specifically, this paragraph of the Act provides that ''[v]alid existing rights shall be preserved and not affected by such designation.''

SMCRA does not define or explain the meaning of VER in the context of either section 522(e) or section 601. Today's rulemaking addresses VER only in the context of section 522(e).

V. What Is the Legislative History of the VER Provision in Section 522(e)?

The legislative history of section 522(e) in general and the VER exception in particular is sparse. In this portion of the preamble, we either quote or summarize all the legislative history that we found pertinent to the rationale for the final rule and disposition of comments. The other portions of this preamble discuss how we and others interpret the legislative history, and how these interpretations influenced the decision-making process.

Language in Previous Versions of SMCRA

The phrase ''subject to valid existing rights'' and the current outline of section 522(e) first appear in the conference committee version of the 1974 precursor to SMCRA. Prior to the conference committee changes, the Senate bill (S. 425) excluded only existing operations from the prohibitions of what is now section 522(e). The House bill (H.R. 11500) contained an exception only for certain situations in which a person had made substantial legal and financial commitments in an existing mine before September 1, 1973—and that exception applied only to the lands listed in what is now paragraphs (e)(1) and (e)(2) of section 522 of the Act.

Committee Reports

The 1977 conference committee report on the legislation that became SMCRA does not address VER. *See* H.R. Conf. Rep. No. 95–493, at 110–11 (1977). Thus, the most authoritative source in the legislative history of SMCRA does not clarify congressional intent with respect to the meaning of VER under section 522(e).

The 1974 conference committee report explains that the addition of the phrase ''subject to valid existing rights'' to section 522(e) was intended to address surface coal mining operations on national forest lands. H.R. Conf. Rep. No. 93–1522, at 85 (1974). Subsequent committee reports on succeeding versions of SMCRA contain either substantively identical or abbreviated discussions of this topic without further elucidation on the meaning of VER under section 522(e). *See* S. Rep. No. 94–28, at 220 (1975); H.R. Conf. Rep. No. 94–189, at 85 (1975); H.R. Rep. No. 94–896, at 47–48 (1976); H.R. Rep. No. 94–1445, at 47 (1976); H.R. Rep. No. 95–218, at 95 (1977); and S. Rep. No. 95-128, at 94–95 (1977). Therefore, for purposes of providing background for this rulemaking, we will quote only the discussions from the most recent committee reports, which pertain to the legislation that the President ultimately signed into law.

The committee report on H.R. 2, the House version of the legislation that ultimately became SMCRA, contains the following passage:

> The language ''subject to valid existing rights'' in section 522(e) is intended, however, to make clear that the prohibition of strip mining on the national forests is subject to previous court interpretations of valid existing rights. For example, in West Virginia's Monongahela National Forest, strip mining of privately owned coal underlying federally owned surface has been prohibited as a result of *United States* v. *Polino,* [131] F. Supp. [772] (1955). In this case the court held that ''stripping was not authorized by mineral reservation in a deed executed before the practice was adopted in the county where the land lies, unless the contract expressly grants stripping rights by use of direct or clearly equivalent words. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties.'' The phrase ''subject to valid existing rights'' is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.

H.R. Rep. No. 95–218, at 95 (1977).

The committee report on S. 7, the Senate version of the legislation that ultimately became SMCRA, contains a similar discussion:

> All of these bans listed in subsection (e) are subject to valid existing rights. This language is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language of 422(e) [now 522(e)] is in no way intended to affect or abrogate any previous State court decisions. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties. The phrase ''subject to valid existing rights'' is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.

S. Rep. No. 95–128, at 94–95 (1977).

Congressman Manuel Lujan, Jr. attached the following statement of separate views to the House committee report:

> Much has been said about the problem presented by the language contained in Sec. 522(e) of H.R. 2 * * *.
>
> As the Committee Report indicates, this section's limitation that the prohibition is ''subject to valid existing rights'' is not intended to open up national forest lands to strip mining when previous legal precedents have prohibited stripping. Naturally, the bill's language is also subject to the corollary that it is not intended to preclude mining where the owner of the mineral has the legal right to extract the coal by surface mining method[s].
>
> Concerns in this area are not merely hypothetical. For example, in the establishment of the national forest system in many areas of the country, grantors sold the land to the United States government for inclusion in a national forest, but reserve[d] mineral rights for themselves and deeds of conveyance for which the United States was a party. The language of Sec. 522(e) itself, the thrust of the report discussion and common sense all dictate that the only logical interpretation of Sec. 522(e) is that enactment of this legislation does not disrupt the relationship between the owner of the coal and the Federal government.
>
> I believe, therefore, that it would be contrary to the intention of the Act, and a misuse of the Act, for the Forest Service (or anyone else) to argue that [SMCRA] somehow modifies the relationship between the owner of the surface and subsurface rights. Clearly, alienation by sale, assignment, gift, or inheritance of the property right of the coal is not affected by the Act nor is the legal right

to mine the coal in any way modified if such right existed prior to enactment of the Act.

H.R. Rep. No. 95–218, at 189 (1977).

Part VII.C.5. of this preamble contains a discussion of the significance of Congressman Lujan's statements.

Floor Debate (Congressional Record)

In remarks made on the House floor during debate on the 1975 precursor to SMCRA, Congressman John Dingell questioned the need for the phrase ''subject to valid existing rights,'' stating that ''it is extra verbiage and really has no meaning.'' 121 Cong. Rec. H7048 (March 18, 1975) (statement of Rep. Dingell). He offered an amendment that would have removed this phrase and replaced it with a provision allowing surface coal mining operations in national forests and grasslands whenever the deeds conveying lands to the United States reserved the coal and specifically provided for the use of surface mining methods. The House rejected the amendment. 121 Cong. Rec. H7050 (March 18, 1975).

During floor debate on the same bill, Congressman Delbert Latta asked ''whether this legislation affects in any way the rights of an owner of mineral rights situated below land owned by the Federal Government.'' 121 Cong. Rec. H6679 (March 14, 1975). In response, Congressman Morris Udall cited section 714 of SMCRA, which he characterized as requiring surface owner consent before any underlying Federal coal may be mined. Congressmen Latta, Udall, and others then engaged in the following exchange:

Mr. LATTA. That takes care of the Federal Government when it owns the mineral rights, but I have reference to the opposite situation where the surface is owned by the Federal Government, but the mineral rights have been retained by a private owner.

Mr. UDALL. We did not deal with that problem. I do not know of any instance in which it would arise or be affected.

Mr. LATTA. It is not covered by this bill.

Mr. OTTINGER. Mr. Speaker, if the gentleman would yield, why would not the rights of a surface owner be protected where the mineral rights were not owned by the Federal Government, but were owned privately?

Mr. UDALL. The problem we dealt with was the situation in the instance where private interests owned the surface but the Federal Government owned the coal.

* * * * *

Mr. OTTINGER. If the gentleman will yield further, I think there are situations where private owners own both the surface and the coal, and there is no protection provided.

Mr. UDALL. In that case the whole thrust of the bill is to regulate how to mine coal, whatever the ownership is.

* * * * *

Mr. LATTA. * * * [I]f I understood what you said, this bill does not deal with the situation propounded in my question, meaning where a private citizen has sold the surface to the Federal Government and has retained the mineral rights. This bill would not in any way affect the mineral rights of that private citizen?

Mr. UDALL. This is a bill that deals with how one mines coal in that situation and every other situation, but we do not attempt to change property rights in the situation the gentleman talks about and thus the mineral rights are not affected.

121 Cong. Rec. H6679 (1975).

Part VII.C.5. of this preamble includes a discussion of the significance of this colloquy.

Some commenters referred to a floor debate on a proposed amendment to section 601 of H.R. 2, the House bill that eventually became SMCRA. (Section 601 provides for the designation of Federal lands as unsuitable for the mining of minerals and materials other than coal.) Congressman Teno Roncalio proposed an amendment to delete the sentence in section 601(d) that reads, ''[v]alid existing rights shall be preserved and not affected by such designation.'' Congressman Udall opposed the amendment ''because it takes from the bill a statement that valid legal rights should be preserved. I do not think we should do that without paying compensation under the fifth amendment [*sic*].'' 123 Cong. Rec. H12878 (1977) (April 29, 1977) (statement of Rep. Udall). The House rejected the amendment and retained the language at issue. However, as discussed in parts VII.C.4. and VIII of this preamble, we now find this colloquy to be of little relevance to the meaning of VER under section 522(e).

VI. How Did We Previously Define or Attempt To Define VER?

The 1978 Proposed Rule

In our first attempt to define VER after the enactment of SMCRA, we proposed to adopt different VER standards for different categories of lands. For lands protected under paragraphs (e)(1) and (e)(2) of section 522, we proposed a form of the ownership and authority standard. Specifically, the proposed rule would have defined VER as:

Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document which expressly authorizes the applicant to produce coal by surface coal mining operations and the exercise of such rights cannot, under applicable State or Federal law, be conditioned or denied in the manner provided in [30 CFR Part 761].

For lands protected under paragraphs (e)(3) through (e)(5) of section 522, we proposed to limit VER to those lands for which a person had obtained all State and Federal permits needed to conduct surface coal mining operations as of August 3, 1977. The preamble to the proposed rule indicates that we presumed that the first standard would apply only to Federal lands, while the second standard would apply only to State and privately owned lands. *See* 41 FR 41662, 41686, 41826, September 18, 1978.

The 1979 Final Rule

After evaluating the comments received on the 1978 proposed rule, we decided that the proposed ''dual definition was not really workable because it did not distinctly separate Federal lands from private lands.'' 44 FR 14993, March 13, 1979. Section 522(e)(1) includes both Federal and non-Federal lands, and paragraphs (e)(3) through (e)(5) of that section apply regardless of land ownership. Except for paragraph (e)(2), Congress did not establish Federal versus non-Federal ownership as a criterion for protection under section 522(e). Nor did Congress prescribe different levels of protection under section 522(e) for Federal and non-Federal lands.

Accordingly, the final rule promulgated in 1979 contains a single definition of VER that applies to all lands listed in section 522(e). In developing this definition, we relied upon (1) a belief that Congress created the VER exception as a means of avoiding compensable takings of private property and (2) the principle that the extent to which the Federal government and States may prohibit or restrict the exercise of private property rights without providing compensation is determined by case law established pursuant to the Fifth and Fourteenth Amendments to the Constitution. Specifically, we ''endeavored to determine the point at which payment would be required because a taking had occurred, then to define 'valid existing rights' in those terms, *i.e.,* those rights which cannot be affected without paying compensation.'' 44 FR 14992, March 13, 1979, col 1.

The definition provided that, except for haul roads, VER included only those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary permits for the proposed surface coal mining operation on or before August 3, 1977 (the ''all permits'' standard), or could demonstrate that the coal for which the exception was sought was both needed for and immediately adjacent to a surface coal mining operation in existence on August 3, 1977 (the

''needed for and adjacent'' standard). *See* 44 FR 14902, 15342, March 13, 1979.

Litigation Concerning the 1979 Final Rule

The mining industry, the State of Illinois, the National Wildlife Federation, and assorted environmental organizations all challenged the validity of the 1979 definition. Industry and Illinois alleged that this definition entailed a taking of property in violation of the Fifth and Fourteenth Amendments. Because the plaintiffs presented no evidence that the definition had caused actual loss or harm to a specific party, the court declined to rule on the constitutionality of the definition on the basis of a hypothetical claim. However, the court asserted that a person who applies for all permits, but fails to receive one or more through government delay, engenders the same investments and expectations as a person who has obtained all permits. Specifically, the court stated that ''a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test.'' *In re Permanent Surface Mining Regulation Litigation I,* 14 Env't Rep. Cas. (BNA) 1083, 1091 (D.D.C., Feb. 26, 1980), (*''PSMRL I, Round I''*).

The industry plaintiffs appealed those portions of the district court's decision in *PSMRL I, Round I* that were adverse to their interests. However, the U.S. Court of Appeals for the Federal Circuit remanded the appeal after the government informed the court that it was reconsidering the 1979 definition. Thus, the court never reached a decision on the merits of the appeal. The remand order specified that the judgment of the District Court could not be considered final. *See In re Permanent Surface Mining Regulation Litigation,* No. 80–1810, Order of Remand (D.C. Cir., Feb. 1, 1983).

The 1980 Suspension Notice

To comply with the decision in *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) 1091 (1980), which partially remanded the all permits standard, we suspended the 1979 definition of VER to the extent that it required that all permits have been obtained before August 3, 1977. *See* 45 FR 51547–48, August 4, 1980. The suspension document stated that, pending further rulemaking, we would interpret the definition as including the court's suggestion that a good faith effort to obtain all permits by that date should suffice to establish VER. This standard is known as the ''good faith/all permits'' standard.

The 1982 Proposed Rule

On June 10, 1982 (47 FR 25278), we published a proposed rule setting out six options for revising the definition of VER. These options included the good faith/all permits standard, a mineral rights ownership standard, a mineral rights ownership plus right to mine by the method intended standard (the ''ownership and authority'' standard), and three variations on the latter two standards. Since the proposed standards all attempted to establish a clearly defined ''bright-line'' test for VER, they became known as ''mechanical tests.''

The 1983 Final Rule

Commenters criticized each option in the 1982 proposed rule as either too broad or too narrow, and many argued that one or more of the proposed options would result in a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution. Because the Supreme Court has consistently declined to prescribe set formulas for determining when a taking will occur, we concluded that any mechanical test likely would be either over-inclusive or under-inclusive of all potential takings that might result from the section 522(e) prohibitions. Therefore, on September 14, 1983 (48 FR 41314), we adopted a definition of VER which provided, in part, that a person has VER if a prohibition on surface coal mining operations would result in a compensable taking of that person's property interests under the Fifth and Fourteenth Amendments to the Constitution. This standard is known as the ''takings'' standard.

The revised definition also (1) removed the requirement for a demonstration of a property right to the coal on August 3, 1977, (2) defined the ''needed for'' aspect of the needed for and adjacent standard, and (3) added a provision (sometimes referred to as ''continually created VER'') to establish VER standards for lands that come under the protection of section 522(e) after August 3, 1977. This situation would arise, for example, when a park is created or expanded or a protected structure is built after that date.

Litigation Concerning the 1983 Final Rule

The mining industry, the National Wildlife Federation, and assorted environmental organizations all challenged the validity of the 1983 definition. The U.S. District Court for the District of Columbia subsequently remanded most of that definition on procedural grounds. The court held that the takings standard represented such a significant departure from the options presented in the 1982 proposed rule that a new notice and comment period was necessary to comply with the public participation requirements of the Administrative Procedure Act, 5 U.S.C. 553. *See In re Permanent Surface Mining Regulation Litigation II, Round III—Valid Existing Rights,* 22 Env't Rep. Cas. (BNA) 1557, 1564 (D.D.C. 1985) (*''PSMRL II, Round III—VER''*). The court also held that the proposed rule failed to provide adequate notice that it would expand the needed for and adjacent standard to include properties acquired after the date of enactment of SMCRA (August 3, 1977). Accordingly, the court remanded paragraphs (a) and (d)(2) of the definition, which relied upon the takings standard to determine VER, and the revised needed for and adjacent standard in paragraph (c) of the definition to the Secretary for proper notice and comment.

The 1986 Suspension Notice

In response to the remand order in *PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1564 (1985), we suspended paragraphs (a) and (c) of the 1983 definition of VER on November 20, 1986 (51 FR 41952, 41961). These paragraphs contained the takings standard and the revised needed for and adjacent standard. We also suspended paragraph (d)(2) of the definition to the extent that it relied upon the takings standard. As discussed at 51 FR 41954–55, this action effectively reinstated the 1980 good faith/all permits standard and the 1979 needed for and adjacent standard.

The preamble to the suspension notice stated that, with two exceptions, we would use the VER definition in the applicable State or Federal regulatory program when making VER determinations. As discussed at 51 FR 41955, one of these exceptions occurs when a State definition relies upon an all permits standard. In that case, we would apply the State standard as if it included a good faith component. The second exception involves State programs that include a takings standard for VER. In those situations, the preamble stated that, pending promulgation of a new Federal definition of VER, we would not process requests for VER determinations involving lands within units of the National Park System.

The 1988 Proposed Rule

On December 27, 1988 (53 FR 52374), we proposed the good faith/all permits

standard and the ownership and authority standard as options for a regulatory definition of VER. Under the ownership and authority standard, a person could establish VER by demonstrating both a property right to the coal and the right to mine it by the method intended, as determined by State law. After evaluating the comments received, we withdrew the entire proposed rule for further study on July 21, 1989 (54 FR 30557).

The 1990 VER Symposium

On April 3–4, 1990, we and the University of Kentucky College of Law, in cooperation with the American Bar Association, cosponsored a national symposium on the meaning of VER under section 522(e) of SMCRA. Volume 5, Number 3 of the *Journal of Mineral Law and Policy* contains the proceedings of this symposium. The participants provided extensive analyses of takings jurisprudence and case law related to VER, but they did not reach a consensus on how to define VER. The arguments presented ranged from the theory that we could prohibit all mining in section 522(e) areas as a public nuisance or noxious use to the position that Congress intended the VER exception to operate as complete protection for all property rights in existence on August 3, 1977.

The Belville Litigation

In 1990, the Belville Mining Company, an Ohio mining firm, filed suit against the Secretary of the Interior alleging that he had, among other things:

- Failed to perform a mandatory duty to promulgate the definition of VER needed to implement section 522(e);
- In lieu of regulations, issued various statements and directives on VER, including the policy set forth in the November 20, 1986 suspension notice, without notice and comment in violation of the Administrative Procedure Act; and
- Made VER determinations relying on State regulations identical to an invalidated Federal regulation.

See Belville Mining Co. v. *Lujan*, No. C–1–89–790 (S.D. Ohio 1991), *modified* September 21, 1992 (''*Belville I*'').

In a July 22, 1991, decision, the court in *Belville I* ordered the Secretary to begin proceedings to promulgate a final rule defining VER; enjoined him from enforcing or applying the November 20, 1986 suspension notice or any temporary directive that extends the policy of the suspension notice; and directed him to immediately begin proceedings to disapprove State program definitions of VER that rely upon the all permits standard. On September 21, 1992, pursuant to the Government's motion for reconsideration, the court narrowed the portion of its ruling concerning disapproval of State program definitions to require only the disapproval of the Ohio program definition of VER insofar as that definition affects Belville and its requests for VER determinations. In doing so, the court accepted the Government's argument that Federal remedy law prohibits the imposition of injunctive remedies that are beyond the scope of the plaintiff's individual injuries and related requests for VER determinations. Consequently, we interpreted the decision barring use of the 1986 policy as applying only to Ohio. The final rule that we are adopting today effectively renders both the *Belville I* decision and the 1986 suspension notice moot with respect to the applicable definition of VER.

The 1991 Proposed Rule

On July 18, 1991, we proposed to revise the definition of VER by reinstating the takings standard, the good faith/all permits standard, and the 1979 version of the needed for and adjacent standard. In addition, we proposed to eliminate the separate standards for VER for lands that come under the protection of section 522(e) after August 3, 1977. Instead, the proposed rule modified the other VER standards in the definition to incorporate the concept that VER determinations should reflect the circumstances that existed when the land came under the protection of section 522(e), which may be later than August 3, 1977.

The Energy Policy Act

On October 24, 1992, the President signed the Energy Policy Act of 1992 (Pub. L. 102-486, 206 Stat. 2776) (''EPAct'') into law. Section 2504(b) of that law required adherence to the VER policy in the November 20, 1986 suspension notice (51 FR 41952) for one year after the date of enactment. That provision had the effect of staying implementation of the July 1991 *Belville I* decision, as modified in September 1992, and halting publication of a new final rule defining VER based upon the 1991 proposed rule.

Appropriations Act Moratoriums

The EPAct provision expired on October 24, 1993. However, at the Department's request, the appropriations acts for the Department of the Interior and related agencies for fiscal years 1994 and 1995 each included language that effectively placed a moratorium on adoption of a new or revised Federal VER definition or disapproval of existing State program definitions of VER. The last moratorium (section 111 of Pub. L. 103–332) lapsed on October 1, 1995. Congress did not include similar language in any legislation for fiscal year 1996 or subsequent fiscal years.

The 1997 Proposed Rule

After evaluating the comments received on the 1991 proposed rule and taking intervening events into consideration, on January 31, 1997 (62 FR 4836), we withdrew the 1991 proposal and published a new, extensively revised proposed rule concerning the definition of VER and related issues. This proposal forms the basis for the final rule being published today.

VII. Section 761.5: How Are We Defining VER in This Final Rule?

A. Introductory Language.

The definition of VER that we are adopting today as part of 30 CFR 761.5 describes VER as a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations that section 522(e) of the Act and 30 CFR 761.11 would otherwise prohibit. This language establishes the conceptual framework within which the provisions of paragraphs (a) through (c) of the definition must be applied.

In a change from the proposed rule, we have added the phrase ''subject to regulatory authority approval'' to emphasize that a person with VER is not automatically entitled to conduct surface coal mining operations on protected lands. One commenter appeared to believe otherwise. For the same reason, we have added a sentence to the introductory portion of the definition to clarify that, even if a person has VER and thus is exempt from the prohibitions and limitations of section 522(e) and 30 CFR 761.11, surface coal mining operations on these lands are subject to all other pertinent requirements of the Act and the applicable regulatory program. The VER exception does not entitle a person to an exemption from any permitting requirements or performance standards.

One commenter charged that by defining VER as a condition rather than as a right, the proposed rule altered the essence of VER from a recognition of property rights to a regulatory standard or condition that a surface coal mining operation must meet prior to mining. We have made a few essentially editorial changes in response to this

comment to clarify that VER means a set of circumstances (rather than ''conditions'') under which a person is exempt from the prohibitions and restrictions of section 522(e) and 30 CFR 761.11 and may seek approval from the regulatory authority to conduct surface coal mining operations on those lands in accordance with standard regulatory program requirements.

While property rights are an element of some of the standards for VER, we do not agree with the commenter's claim that VER must be defined solely in terms of property rights. Congress did not define VER, and the legislative history of section 522(e) emphasizes that, with certain exceptions, Congress intended to prohibit new surface coal mining operations on the lands listed in that section. *See*, for example, S. Rep. No. 95–128, at 55 (1977). We believe that these facts argue against adoption of a rule that defines VER solely in terms of property rights. Except for unleased Federally owned coal, such a rule would present little or no impediment to surface coal mining operations on the lands listed in section 522(e) of the Act. Thus, it would offer little protection to those lands beyond the protection that the permitting requirements and performance standards of the regulatory program afford to all lands.

B. Paragraph (a): Property Rights Demonstration.

Paragraph (a) of the definition of VER in the final rule provides that a person claiming VER for any type or component of surface coal mining operations other than roads must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person with the right, as of the date that the land came under the protection of section 522(e) of the Act and 30 CFR 761.11, to conduct the type of surface coal mining operations intended. Interpretation of the documents relied upon to establish property rights must be based upon applicable State statutory or case law, unless otherwise provided under Federal law. If no applicable law exists, interpretation of these documents must reflect custom and generally accepted usage at the time and place that the documents came into existence.

Under the final rule, a person need not necessarily provide a property rights demonstration for roads used or constructed as part of surface coal mining operations. Instead, a person may demonstrate VER for roads using any of the standards in paragraph (c) of the definition.

The final rule is substantively identical to the corresponding provisions of the 1997 proposed rule, with one exception. We have added a clause clarifying that the provision requiring the use of State law to interpret documents does not apply if Federal law provides otherwise, as may be the case if the documents were issued under the Mineral Leasing Act or similar laws. In terms of organization, the final rule differs slightly from the proposed rule in that, for reasons of clarity and consistency with plain language principles, we have segregated the property rights demonstration into a separate paragraph, rather than including it in the same paragraph as the good faith/all permits and needed for and adjacent standards.

The requirement for a property rights demonstration and the provisions concerning interpretation of documents are consistent with the legislative history of the Act, which indicates that Congress did not intend to enlarge or diminish property rights under State law. See H.R. Conf. Rep. No. 95–493, at 106 (1977); H.R. Rep. No. 95–218, at 95 (1977); and S. Rep. No. 95–128, at 94–95 (1977). The legislative history frequently references *United States* v. *Polino*, 131 F. Supp. 772 (N.D. W.Va. 1955), in which the court held that the right to use surface mining methods to recover privately owned coal underlying Federal lands within the Monongahela National Forest depends upon the language of the deed, the interpretation of which is a matter of State law.

In addition, these provisions receive support from section 510(b)(6)(C) of SMCRA, which provides that, in cases where the private mineral estate has been severed from the private surface estate, ''the surface-subsurface legal relationship shall be determined in accordance with State law,'' and that ''nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.'' Language similar to the latter proviso also appears in the right-of-entry provisions of section 507(b)(9) of the Act.

History

The requirement for a property rights demonstration has its origins in paragraphs (a)(1) and (c) of the March 13, 1979 VER definition. Paragraph (c) of that definition required that interpretation of the terms of the documents be based not only upon usage and custom, but also upon a showing that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the person claims VER. However, on November 27, 1979, in connection with the *PSMRL I, Round I* litigation, we published a **Federal Register** notice stating that, as an alternative to the language of paragraph (c), ''existing State law may be applied to interpret whether the document relied upon establishes valid existing rights.'' 44 FR 67942, November 27, 1979. This alternative reflected the strong interest Congress expressed in deferring to State property law when interpreting documents relating to property interests. See the summary of and excerpts from the legislative history in Part V of this preamble.

For reasons that the preamble does not explain, the revised VER definition that we adopted on September 14, 1983, did not contain a counterpart to the property rights demonstration required by paragraph (a)(1) of the 1979 definition. However, the 1983 rule retained a revised version of paragraph (c) of the 1979 definition, which concerned interpretation of documents. This provision, which was codified as paragraph (e) of the 1983 definition, required that interpretation of the terms of documents ''be based upon either applicable State statutory or case law concerning interpretation of documents conveying mineral rights or, where no applicable State law exists, upon the usage and custom at the time and place it came into existence.''

On January 31, 1997 (62 FR 4836), we proposed to reinstate a revised version of the property rights demonstration required under paragraph (a)(1) of the 1979 definition. The proposed rule differed from the 1979 rule in three ways:

- It did not describe the person making the VER demonstration as the permit applicant, since the proposed rule also clarified that a person may request a VER determination without preparing and submitting a permit application.
- It provided that the requisite property rights must be vested as of the date that the land comes under the protection of 30 CFR 761.11 or section 522(e), rather than as of August 3, 1977.
- It did not limit eligible property rights to the right to produce coal.

The proposed rule incorporated the 1983 language pertaining to the interpretation of documents. However, we proposed to modify that language to eliminate its restriction to documents concerning mineral rights, since surface coal mining operations may involve property interests other than mineral rights. Also, unlike the 1983 definition, we proposed to require a property rights demonstration and apply the interpretation of documents provision to the needed for and adjacent standard.

(See the discussion of this standard in Part VII.D. of this preamble.)

The final rule incorporates all elements of the proposed rule as described above. The following discussion summarizes the comments that we received on this aspect of the proposed rule and our disposition of those comments.

Summary and Disposition of Comments on the Proposed Rule

One commenter requested that we revise the rule to clarify that the deed, lease, or other documents relied upon for the property rights demonstration must include explicit authority to conduct surface coal mining operations. In addition, the commenter asserted that these documents must explicitly sanction both the type of activity for which VER is claimed and the scope and location of that activity. We do not agree. In enacting the permitting requirements of sections 507(b)(9) and 510(b)(6) of SMCRA, Congress considered measures that would have required either explicit authority or surface owner consent in situations in which the surface and mineral estates are in separate ownership, but in the end decided to defer to State property law as interpreted by State courts. *See* S. Conf. Rep. No. 95–337 and H.R. Conf. Rep. No. 95–493, at 105–6 (1977); 123 Cong. Rec. H7587–88 (July 21, 1977) (statement of Rep. Seiberling). *See also,* Congress' failure to adopt Secretary Andrus' recommendation that surface owner consent be required in all cases for the entire area covered by a permit application (H.R. Rep. No. 95–218, at 156 (1977)). There is no suggestion in the Act or its legislative history that Congress intended to accord lesser deference to State property law in determining VER under section 522(e). Indeed, the discussion of the *Polino* decision and related discussions concerning mining on national forest lands in the congressional reports quoted or referenced in Part V of this preamble indicate otherwise.

Another commenter asserted that the property rights demonstration should be limited to discerning whether the person has a property right to conduct surface mining, not whether he or she has a right to use a specific method of surface mining. As summarized and excerpted in Part V of this preamble, the legislative history of the VER provision in section 522(e) clearly indicates that Congress did not intend for this provision to be construed in a manner that would allow surface coal mining operations of a nature that are not authorized under State property law. Therefore, the nature and detail of the property rights demonstration is dependent upon State property law concerning the interpretation of the language of deeds and other conveyances. It may be as simple as demonstrating the right to conduct surface coal mining operations in general, or, depending upon the wording of the conveyance and State property law, the requester may need to demonstrate that the method of surface coal mining operations meets the restrictions imposed by the conveyance or State law.

Some commenters expressed concern that the definition could be interpreted as negating a VER determination each time an operation or permit experiences a change in ownership. We disagree. As discussed in Part IX of this preamble, State law, the applicable VER standard, and the terms of the instrument of conveyance govern the extent to which a transfer of property rights or a change in ownership of a permit or operation impact VER. In general, we view VER as transferable because, unless otherwise provided by State law, the property rights, permits, and operations that form the basis for VER determinations are transferable. Therefore, except as discussed in Part IX of this preamble, we anticipate that permit transfers and changes in ownership of operations and property rights subsequent to a VER determination would have no effect on VER or the validity of the VER determination.

One commenter stated that, by requiring a property rights demonstration as part of the definition of VER, the proposed rule failed to recognize that mining entities may seek and obtain a permit for a surface coal mining operation before acquiring property rights for all lands within the permit area. We believe that the commenter's concern is misplaced. Under the final rule, there is no requirement that the same person make both the property rights demonstration required by paragraph (a) of the definition and the demonstration of compliance with the good faith/all permits or needed for and adjacent standard under paragraph (b) of the definition. In other words, under the final rule, the person who makes the property rights demonstration required by paragraph (a) of the definition need not be the same person as the one who demonstrates compliance with the requirements of the good faith/all permits or needed for and adjacent standards under paragraph (b) of the definition. However, each request must demonstrate compliance with both paragraphs (a) and (b) of the definition of VER. And the person holding the permits must obtain the necessary property rights before actually initiating surface coal mining operations on the land in question.

Some commenters opposed the proposed rule to the extent that it provided that property rights must be vested as of the date that the land comes under the protection of the Act, rather than as of the date of enactment of SMCRA (August 3, 1977) as in the 1979 rule. The commenters argued that persons conducting surface coal mining operations after the enactment of SMCRA should have immediately procured all necessary property rights (e.g., purchased a 300-foot buffer around all planned minesites to preclude application of the prohibition on mining within 300 feet of an occupied dwelling) to avoid potential adverse impacts from the creation of new protected areas after August 3, 1977. We do not agree. The lease or purchase of a buffer zone would be impractical in cases where the owners of that land refuse to lease or sell. Moreover, we first adopted the concept of basing VER on the circumstances that existed when the land came under the protection of section 522(e) rather than on the circumstances that existed on August 3, 1977, as part of our 1983 definition of VER. As discussed in Parts VII.F. and XVI of this preamble, this concept withstood a legal challenge. In view of the existence of this concept as part of our rules for 16 years, and the expectations engendered by that rule, we are not persuaded by the commenters' argument.

Some commenters opposed the proposed rule to the extent that it provided that property rights other than the right to produce coal are eligible for consideration. The commenters argued that this modification was arbitrary, an imprudent and unreasonable giveaway of surface rights, and inconsistent with congressional intent. They also argued that this aspect of the proposed rule had no basis under SMCRA, and that it was in violation of the definition of surface coal mining operations in section 701(28) of the Act. We disagree.

The statutory definition of surface coal mining operations in section 701(28) includes ''activities conducted on the surface of lands in connection with a surface coal mine or * * * surface operations and surface impacts incident to an underground coal mine.'' In addition to ''excavation for the purpose of obtaining coal,'' the definition expressly includes ''the cleaning, concentrating, or other processing or preparation'' of coal. And paragraph (B) of the definition includes ''any adjacent land the use of which is

incidental to any such activities'' as well as roads, impoundments, ventilation shafts, refuse banks, overburden piles, ''repair areas, storage areas, processing areas, shipping areas and other areas upon are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities [the activities listed in paragraph (A) of the definition].'' Clearly, the definition is not restricted to coal extraction activities or operations on lands from which coal is extracted. Therefore, our final rule properly acknowledges that, to the extent that a person has a right under State property law to conduct an activity or construct a facility included within the definition of surface coal mining operations on any lands listed in 30 CFR 761.11 and section 522(e), that person may seek to apply the VER exception to the proposed activity or facility even if there are no plans to extract coal from those lands.

As discussed above, the legislative history of the right-of-entry provisions of sections 507(b)(9) and 510(b)(6)(C) of SMCRA and of the prohibitions of section 522(e) indicates that Congress wanted to respect and defer to State court interpretations of documents concerning property rights. Hence, we find it appropriate to defer to State property law to determine whether a person has a property right to use a particular parcel of land for any activity or facility included in the definition of surface coal mining operations, rather than arbitrarily limiting the scope of the property rights to which the VER exception applies to the right to extract coal.

One commenter argued that the property rights demonstration must include explicit authority, by deed, lease or otherwise, to engage in non-extraction activities. He also asserted that the property rights documents must explicitly sanction both the type of activity for which VER is claimed and the scope and location of that activity. However, the commenter failed to provide a rationale for these statements. We see no reason or basis to establish differing standards for property rights demonstrations based on whether the land will be used for coal extraction or whether it will be used for other activities or facilities included within the definition of surface coal mining operations. Section 522(e) refers to surface coal mining operations without differentiating among the various activities and facilities included in the definition of that term. As discussed above and as excerpted in Part V of this preamble, the legislative history of SMCRA clearly indicates that Congress wanted to defer to State court interpretations of documents concerning property rights. Therefore, we see no basis or need to require that the documents in question expressly authorize use of the land for activities and facilities that are included in the definition of surface coal mining operations but that do not directly produce coal. A demonstration that State statutory or case law recognizes a person's right to use the land for those activities and facilities under the terms of the document used to establish property rights will suffice.

Some commenters stated that the VER inquiry should begin and end with the property rights demonstration. They argue that the Act and its legislative history as well as various court decisions mandate adoption of an ownership and authority standard for VER. That is, if a person has the property right under State law to conduct surface coal mining operations, the person also has VER under section 522(e) of SMCRA. As discussed in detail in Part VII.C.5. of this preamble, we do not agree that the Act and its legislative history require the adoption of an ownership and authority standard for VER. For the reasons outlined in Parts VII.A. and VII.C. of this preamble, we do not view VER as coextensive or synonymous with property rights. Instead, we view property rights as a prerequisite for demonstrating VER under the good faith/all permits and needed for and adjacent standards.

C. Paragraph (b): Primary Standards for VER

On January 31, 1997, we proposed to adopt two standards for VER for surface coal mining operations in general: the good faith/all permits standard (paragraph (a)(1) of the proposed definition) and the needed for and adjacent standard (paragraph (a)(2) of the proposed definition). The final rule revises these standards in response to comments and moves them to paragraph (b) of the definition. Part VII.C. of this preamble provides an explanation of the good faith/all permits standard and the disposition of related comments, while Part VII.D. of the preamble discusses the needed for and adjacent standard and related comments.

Several commenters argued that standards for the VER exception in section 522(e), which identifies lands that Congress designated as unsuitable for surface coal mining operations, should be more restrictive than the standard for exceptions under section 522(a), which pertains to lands designated by petition. In the preamble to the 1979 definition of VER, we concurred with this argument:

> OSM decided that the VER phrase must be distinguished from the definition of substantial legal and financial commitments. * * * The latter exemption applies to the petition process under Section 522(a), whereas VER applies to the Congressional prohibitions of mining under Section 522(e). This distinction suggests that, in order to qualify for VER and thereby mine in the prohibited areas of Section 522(e), they must have a property interest in the mine that is even greater than the substantial legal and financial commitments needed to mine despite a designation by petition under Section 522(a).

44 FR 14491–92, March 13, 1979.

We repeated this position in the *Greenwood Land and Mining Co.* VER determinations at 46 FR 36758, July 15, 1981; 46 FR 50422, October 13, 1981; and 47 FR 56191, December 15, 1982.

However, we reversed our stance in the preamble to the 1983 VER definition, stating that ''the two concepts are separate and distinct.'' 48 FR 41316, September 14, 1983. Neither the language of the Act nor its legislative history supports the proposition that the lands designated by Congress under section 522(e) are more deserving of protection than the lands designated by petition under section 522(a). See S. Rep. No. 95–128, at 55 (1977), which states that:

> [C]ertain lands simply should not be subject to new surface coal mining operations. These include primarily and most emphatically those lands which cannot be reclaimed under the standards of this Act and the following areas dedicated by the Congress [in section 522(e)].

The phrase ''lands which cannot be reclaimed under the standards of this Act'' refers to petition-initiated mandatory designations under section 522(a)(2), while the remainder of this passage addresses lands designated by Congress under section 522(e). Clearly, the Senate committee found at least some lands designated under section 522(a) to be equal in importance to lands designated under section 522(e). Consequently, we find no basis for the assumption that VER under section 522(e) must be more restrictive than the standard for exemptions from petition-initiated designations under section 522(a).

Another commenter asserts that restricting VER to the circumstances set out in the definition, especially the good faith/all permits standard, is inconsistent with our posture concerning the 1979 definition. He notes that briefs filed on behalf of the Secretary in connection with assorted litigation concerning the definition of

VER interpret the preamble to the 1979 definition of VER as meaning that we did not intend to limit the scope of the VER exception to cases meeting the standards prescribed by the definition. According to the briefs, the definition identified only those situations in which a person unequivocally has VER. In all other cases, VER would be determined on a case-by-case basis.

The briefs derive this characterization of the 1979 definition from the first and last sentences of the following preamble discussion:

> VER is a site-specific concept which can be fairly applied only by taking into account the particular circumstances of each permit applicant. OSM considered not defining VER, which would leave questions concerning VER to be answered by the States, the Secretary and the courts at later times. Without a definition, however, many interpretations of VER would be made and no doubt challenged by both operators and citizens; and once valid existing rights determinations are challenged, the permitting process would be delayed. OSM has therefore concluded that VER should be defined in order to achieve a measure of consistency in interpreting this important exemption. Under the final definition, VER must be applied on a case-by-case basis, except that there should be no question about the presence of VER where an applicant had all permits for the area as of August 3, 1977.

44 FR 14993 (March 13, 1979), col. 2–3.

The supplemental final environmental impact statement prepared for a 1983 rulemaking describes the 1979 definition as follows:

> [T]he existing regulation, as modified by the court, provides that at a minimum, an operator should be determined to have VER if he had made a good faith effort to apply by August 3, 1977, for all permits necessary to mine in one area. OSM, however, has consistently maintained, in court and elsewhere, that in each case OSM would examine the totality of the circumstances before deciding on any VER application and that the regulatory standard is not the exclusive means of obtaining VER.

January 1983 Supplement to OSM–EIS–1, Vol. 1: Analysis, at IV–39 (citations omitted).

In 1985, the U.S. District Court for the District of Columbia acknowledged that the 1979 preamble could be read as suggesting the interpretation discussed above, but the court questioned both the accuracy of this interpretation, given the context of the sentence upon which it depends, and the validity of the premise that preamble language could supersede regulatory language:

> The government and the industry-intervenors argue that even under the old ''all-permits'' test promulgated in 1979, states had to make, in addition to the all-permits determination, an independent takings analysis on a case by case basis in order to determine whether VER existed. * * *
>
> To support their claim that the 1979 * * * rule included an independent takings test, in addition to the all-permits test, defendants and intervenors point to one sentence in the preamble to the 1979 rule. ''Under the final definition, VER must be applied on a case-by-case basis, except that there should be no question about the presence of VER where an applicant had all permits for the area as of August 3, 1977.'' 44 Fed. Reg. 14993 (1979). That sentence, to be sure, does suggest that there would be instances other than the all-permits situation in which a VER determination could be made. But the paragraph in which it is included, however, may also mean simply that the VER all-permits issue must of necessity be decided anew each time a person seeks VER. In any event, *no such alternate method* of obtaining VER was included in the final 1980 rule, *see* 30 C.F.R. § 761.5 (1980).

PSMRL II, Round III—VER, 22 Env't Rep. Cas. (BNA) at 1561 (1985) (footnote omitted), emphasis in original.

For purposes of this rulemaking, we find it unnecessary to determine whether the interpretation advanced in the briefs and environmental impact statement remains valid in view of the pronouncements in the court opinion. As discussed in Part VII.C. of this preamble, we have reevaluated the language of the Act and its legislative history. We have determined that adherence to the terms of the good faith/all permits and needed for and adjacent standards in paragraph (b) of the definition is the most reasonable interpretation of VER and will better satisfy congressional intent in enacting section 522(e). And, in practice, to the extent allowed by the courts, we have always adhered to the definition established in the rules in making VER determinations, rather than relying upon the 1979 preamble to do otherwise.

One commenter urged us to adopt more restrictive permitting and bonding requirements and performance standards for surface coal mining operations conducted under the VER exception, regardless of the standard that we selected for the definition of VER. We find no basis under SMCRA for doing so, since there is no indication that Congress intended stricter standards for surface coal mining operations on these lands. Furthermore, we believe that our existing requirements are sufficiently stringent to protect environmental resources to the extent that SMCRA authorizes or requires protection of those resources. Among other things, section 510(b)(2) of the Act and 30 CFR 773.15(c)(2) prohibit approval of a permit application unless the applicant affirmatively demonstrates that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan in the permit application. In addition, section 509(a) of the Act and 30 CFR 800.14(b) require that the permittee post a performance bond in an amount sufficient to assure completion of the reclamation plan if the regulatory authority has to complete the work in the event of forfeiture.

1. What Alternatives Did We Consider?

In addition to the ''no action'' (no rulemaking) alternative, the environmental impact statement prepared for this rulemaking identified four major options for a primary standard for VER to accompany the needed for and adjacent standard:

- *Good Faith/All Permits:* Under this alternative, a person would have VER if, prior to the date the land came under the protection of 30 CFR 761.11 and section 522(e) of the Act, that person or a predecessor in interest had obtained, or made a good faith effort to obtain, all permits and other authorizations required to conduct surface coal mining operations.
- *Good Faith/All Permits or Takings:* Under this alternative, a person who could not meet the good faith/all permits standard would still have VER whenever a failure to recognize VER would be expected to result in a compensable taking of that person's property interests under the Fifth and Fourteenth Amendments to the U.S. Constitution.
- *Ownership and Authority:* Under this alternative, demonstration of both a property right to the coal and the right to mine it by the method intended would constitute VER.
- *Bifurcated:* Under this alternative, the ownership and authority standard would apply if the coal rights were severed from the surface estate before the land came under the protection of 30 CFR 761.11 and section 522(e). Otherwise, the good faith/all permits standard would apply.

In the proposed rule published on January 31, 1997, we announced our intention to adopt the good faith/all permits standard and the needed for and adjacent standard as the primary standards for VER. The draft environmental impact statement released on the same date identified the good faith/all permits standard as the preferred alternative to accompany the needed for and adjacent standard. In general, the environmental community and members of the public at large supported the good faith/all permits alternative, while industry advocated

the ownership and authority alternative. The few States that commented split among the good faith/all permits, takings, and bifurcated alternatives.

2. Why Did We Select the Good Faith/All Permits Standard?

In enacting SMCRA, Congress did not provide clear or dispositive direction on the meaning or purpose of VER under section 522(e). There are credible supporting and opposing arguments for each alternative. Indeed, as summarized in Part VI of this preamble, at various times during the past two decades, we have either proposed or adopted all the listed alternatives, plus some variations on these alternatives.

However, after carefully evaluating all comments received and conducting a rigorous analysis of the legislative history of section 522(e), relevant litigation, and the potential environmental impacts of each alternative, we believe that the good faith/all permits standard best achieves protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment. At the same time, it protects the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection of 30 CFR 761.11 and section 522(e). And, since 20 of the 24 approved State regulatory programs under SMCRA already rely upon either the good faith/all permits standard or the all permits standard, adoption of a good faith/all permits standard would cause the least disruption to existing State regulatory programs.

The good faith/all permits standard is consistent with the legislative history of section 522(e), which indicates that Congress' purpose in enacting section 522(e) was to prevent new surface coal mining operations on the lands listed in that section, either to protect human health or safety, or because the environmental values and other features associated with those lands are generally incompatible with surface coal mining operations. The report prepared by the Senate Committee on Energy and Natural Resources on S. 7, the Senate version of the legislation that became SMCRA, states that:

> [T]he Committee has made a judgment that certain lands simply should not be subject to new surface coal mining operations. These include primarily and most emphatically those lands which cannot be reclaimed under the standards of this Act and the following areas dedicated by the Congress in trust for the recreation and enjoyment of the American people: lands within the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, National Forests with certain exceptions, and areas which would adversely affect parks or [places listed on the] National Register of Historic Sites [*sic*].
>
> In addition, for reasons of public health and safety, surface coal mining will not be allowed within one hundred feet of a public road (except to provide access for a haul road), within 300 feet of an occupied building or within 500 feet of an active underground mine.
>
> Since mining has traditionally been accorded primary consideration as a land use there have been instances in which the potential for other equally or more desirable land uses has been destroyed. The provisions discussed in this section were specifically designed and incorporated in the bill in order to restore more balance to Federal land use decisions regarding mining.

S. Rep. No. 95–128, at 55 (1977).

In addition, the report prepared by the House Committee on Interior and Insular Affairs on H.R. 2, the House version of the legislation that became SMCRA, states that:

> [T]he decision to bar surface mining in certain circumstances is better made by Congress itself. Thus section 522(e) provides that, subject to valid existing rights, no surface coal mining operations except those in existence on the date of enactment, shall be permitted on lands within the boundaries of units of certain Federal systems such as the national park system and national wildlife refuge system * * * or in other special circumstances * * *.

H.R. Rep. No. 95–218, at 95 (1977). *See also* S. Rep. No. 95–128, at 94–95 (1977).

The final environmental impact statement (EIS) for this rulemaking indicates that, compared with the other alternatives considered, the good faith/all permits standard is the most protective of the lands listed in section 522(e). According to the analysis in the EIS, adoption of the takings standard in place of the good faith/all permits standard would result in the mining of an estimated additional 2,855 acres of protected lands between 1995 and 2015 (185 acres of section 522(e)(1) lands, 1,686 acres of Federal lands in eastern national forests, and 984 acres of State park lands and buffer zones for State parks). Adoption of either the bifurcated alternative or the ownership and authority standard would result in the mining of an estimated additional 3,062 acres during that time frame (304 acres of section 522(e)(1) lands, 1,761 acres of Federal lands in eastern national forests, and 997 acres of State park lands and buffer zones for State parks). See Table V–1 in Final Environmental Impact Statement OSM-EIS–29 (July 1999), entitled ''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.''

As these numbers show, the model predicts that the additional disturbance would occur entirely on some of the lands for which the Senate Committee expressed the most concern; i.e., public parks and the lands protected by paragraphs (e)(1) and (e)(2) of section 522 of the Act. See S. Rep. No. 95–128, at 55 (1977). Therefore, we believe that adoption of the good faith/all permits standard for VER will best fulfil the intent of Congress, as expressed in that report, to prohibit new surface coal mining operations on the lands protected by section 522(e), with certain exceptions.

In addition, the economic analysis that the U.S. Geological Survey and we prepared for this rulemaking found that adoption of the good faith/all permits standard would have a net positive benefit to society, while adoption of the takings, ownership and authority, or bifurcated alternatives would have a net negative benefit to society. The analysis found negligible differences among the alternatives in terms of their economic impact. None of the alternatives would have a significant economic impact on the mining industry or the cost of producing and delivering coal, assuming that the prohibitions and restrictions of section 522(e) do not apply to subsidence from underground mining operations. See ''Final Economic Analysis: 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'' (July 1999).

The good faith/all permits standard in the final rule requires a demonstration that the person claiming VER, or a predecessor in interest, had obtained, or made a good faith effort to obtain, all permits and other authorizations required to conduct surface coal mining operations on the land before it came under the protection of 30 CFR 761.11 and section 522(e) of the Act. Potentially necessary permits and authorizations include, but are not limited to, mining permits, National Pollutant Discharge Elimination System (NPDES) permits, U.S. Forest Service special use permits, Mine Safety and Health Administration authorizations, air quality plan approvals, local

government approvals, and (for some types of facilities) building permits and zoning changes.

The proposed rule language referred only to ''State and Federal permits and other authorizations.'' Several commenters objected to this limitation, noting that other governmental entities such as counties may require permits for surface coal mining operations. The commenters argued that these permits should be included within the universe of all necessary permits and authorizations under the good faith/all permits standard. In response, we have deleted the limiting phrase ''State and Federal'' from the rule. We agree with the commenters that the good faith/all permits standard should consider all necessary permits and authorizations, not just State and Federal permits and authorizations.

When permits and authorizations to operate do not establish boundaries for the mining operation, the geographical extent of the VER determination will be defined by the extent of surface coal mining operations contemplated by all parties at the time of issuance of or application for the permit or authorization. *See* the *Greenwood Land and Mining Co.* VER determinations at 46 FR 36758, July 15, 1981; 46 FR 50422, October 13, 1981; and 47 FR 56191, December 15, 1982; and the *Mower Lumber Co.* VER determinations at 45 FR 52467, August 7, 1980 and 45 FR 61798, September 17, 1980.

Some commenters complained that the good faith/all permits standard is not truly a bright-line standard. They cited the potentially wide and continually changing array of permits and authorizations required for surface coal mining operations and the difficulty in identifying which permits were required at any particular time. We believe that persons requesting a VER determination and the agency responsible for making the VER determination will be able to use public records to reconstruct what permits and authorizations were required for a particular site on the date that the land comes under the protection of 30 CFR 761.11 and section 522(e) of the Act. As demonstrated in the *Greenwood* and *Mower* determinations cited above, we have experienced little difficulty in identifying what permits are required at any particular time.

One commenter expressed concern that the good faith/all permits standard does not take into consideration the fact that mining firms may not be legally required to apply for or obtain certain permits and authorizations, such as an air quality plan approval, before obtaining a SMCRA permit and initiating surface coal mining operations. We do not interpret the good faith/all permits standard as requiring submission of applications for all necessary permits and authorizations before the date that the land comes under the protection of 30 CFR 761.11 or section 522(e) of the Act. We believe that the language of this standard is sufficiently flexible to remedy the concern raised by the commenter. Specifically, we interpret this standard as providing the agency making the VER determination with the discretion to decide (1) which non-SMCRA permits and authorizations are needed to initiate surface coal mining operations, and (2) what constitutes a good faith effort to obtain all necessary permits and authorizations. In making these decisions, the agency should consider any permitting time lines or regulatory authority policies in place when the land came under the protection of 30 CFR 761.11 and section 522(e).

A good faith effort may not necessarily require actual submission of applications for all required permits and authorizations in every instance. However, at a minimum, a good faith effort to obtain all necessary permits must include application for any required SMCRA permit. Because the SMCRA permit is the major permit needed for a surface coal mining operation, requiring submission of an application for this permit will ensure that the requester has made a significant effort to acquire the necessary permits. Therefore, we have added a sentence to paragraph (b)(1) of the definition specifying that, at a minimum, an application for any permit required under SMCRA must have been submitted before the land comes under the protection of 30 CFR 761.11 and section 522(e).

However, if, at the time that the land came under the protection of 30 CFR 761.11 and section 522(e) of SMCRA, State and Federal law did not require a SMCRA permit for the type of operation planned, none is needed to establish VER for that type of operation under this standard. In that case, the person must have obtained, or made a good faith attempt to obtain, all other necessary permits and authorizations to operate from the appropriate agencies by that date.

Revoked, expired or lapsed permits or authorizations do not qualify for consideration under the good faith/all permits standard because (1) they are no longer valid authorizations to operate and (2), in the case of an expired permit, the failure to renew or seek renewal in a timely fashion indicates a lack of a good faith effort to obtain all necessary permits and authorizations. One commenter stated that this restriction is incongruous with our position endorsing the transferability of VER and our statement in the preamble to the proposed rule that VER attach to the land rather than to a person or operation. The commenter expressed concern that this restriction would inhibit the remining and repermitting of bond forfeiture sites.

The commenter has misinterpreted the scope of this restriction. What we are saying is that once a permit expires, lapses, or is revoked, a person who requests a VER determination subsequent to the expiration, lapse, or revocation of that permit cannot rely upon the prior existence of that permit to satisfy the requirements of paragraph (b)(1) of the definition of VER. However, the expiration, lapse, or revocation of a permit in no way alters the validity of VER determinations made under the good faith/all permits standard before the permit expired, lapsed, or was revoked. As discussed in Part IX of the preamble to this final rule, we no longer adhere to the position that VER always attach to the land. However, in the case of the good faith/all permits standard, VER would effectively attach to the land since the only requirement apart from the property rights demonstration is a requirement that someone have made a good faith effort to obtain all necessary permits. There is no requirement that a person actually obtain a permit to demonstrate VER under this standard. Therefore, once we or the State regulatory authority determine that a person has VER for a particular site under the good faith/all permits standard, that determination remains valid for all future surface coal mining operations of the type and method covered by the determination, regardless of the status of any permit that may exist for that land. Therefore, the language to which the commenter objects does not present a barrier to repermitting lands for which permits have expired, lapsed, or been revoked. Previous VER determinations applicable to the site under the good faith/all permits standard would remain valid and any areas that come under the protection of 30 CFR 761.11 and section 522(e) before the permit expired, lapsed, or was revoked would be covered by the exception for existing operations in 30 CFR 761.12.

Some commenters argued that the good faith/all permits standard is inherently unfair and unreasonable because so few persons could qualify for VER under that standard 20 years after the enactment of SMCRA. They also note that, while industry generally

acquires mineral rights well in advance of any planned mining, it does not seek permits for those lands until mining is reasonably imminent. Section 506(b) of the Act generally limits permit terms to 5 years and section 506(c) provides that a permit will terminate if the permittee has not begun surface coal mining operations within 3 years of the date of issuance. Thus, the commenters argue, the good faith/all permits standard unfairly penalizes persons who have purchased coal reserves for investment purposes or to provide for the company's long-term security or future expansion.

We believe that the good faith/all permits standard properly implements the intent of Congress to prevent most new surface coal mining operations on the lands listed in section 522(e). We agree that, except for lands coming under the protection of 30 CFR 761.11 and section 522(e) after August 3, 1977, few persons will qualify for VER under this standard. But this result is fair, reasonable, and appropriate, given the congressional intent to protect section 522(e) lands.

To some extent, speculative investors in land and interests in land assume the risk of future changes in the regulatory environment. Under the 1979 Federal rule, the 1980 suspension notice, State regulatory programs, and our 1986 suspension notice, an all permits or good faith/all permits standard has been in place for most of the time since the enactment of SMCRA for most of the lands listed in section 522(e). Therefore, few mineral owners could plausibly claim that they were unaware of the applicability of the restriction, or that they had reasonable expectations of being held to a less restrictive standard. Furthermore, the needed for and adjacent VER standard in paragraph (b)(2) of the definition offers relief to some persons who are unable to meet the good faith/all permits standard. And, as discussed in the final environmental impact statement and final economic analysis for this rulemaking, mineral owners and mine operators frequently rely upon the other exceptions provided by section 522(e), such as waivers for the buffer zones for public roads and occupied dwellings, compatibility findings for Federal lands in national forests, and joint approval for publicly owned parks and historic places.

Section 522(e) of the Act affects a person's eligibility to obtain a permit for surface coal mining operations. Logically, then, the VER exception under section 522(e) should ensure fairness by protecting a pre-existing interest under the regulatory process that was in place when the prohibitions of section 522(e) took effect. That is, in general, the VER exception should protect an equitable interest in regulatory approval of proposed surface coal mining operations for which a person had taken steps to obtain regulatory approval in reliance upon the circumstances that existed before the land came under the protection of section 522(e). The good faith/all permits standard protects this equitable interest in regulatory approval.

This standard is also consistent with the general principles of equitable estoppel; *i.e.*, that one who has in good faith relied upon and complied with the requirements for obtaining an interest by ''doing all he could do'' should not be deprived of the interest. *See* Shostak and Barrett, *Valid Existing Rights in SMCRA,* 5 J. Min. L. & Pol'y 585, 600 (1990), and Note, *Regulation and Land Withdrawals; Defining ''Valid Existing Rights'',* 3 J. Min. L. & Pol'y 517 (1988). Thus, under the good faith/all permits standard, in determining whether a person has demonstrated VER, the agency will examine whether the record demonstrates that, by the time that the land came under the protection of 30 CFR 761.11 and section 522(e), that person or a predecessor in interest had relied upon and complied with all regulatory requirements for obtaining the necessary permits and authorizations by doing all that could be done to obtain those permits and authorizations. If a person makes both this demonstration and the property rights demonstration required by paragraph (a) of the definition of VER, it would be unfair to deny that person eligibility to apply for and obtain a permit under SMCRA.

SMCRA and its legislative history do not compel or support adoption of a VER standard crafted to (1) ensure continuation of all standard pre-SMCRA industry practices, (2) preserve the ability of all mineral owners to extract coal from protected areas by surface coal mining operations whenever authorized under State property law, or (3) maintain broad eligibility for VER on a nondeclining basis. We believe that adoption of a standard incorporating these principles would effectively vitiate the protections of section 522(e) for all lands except those overlying unleased Federal coal. This result would contravene Congress' intention in enacting this section.

Some commenters argued that nothing in the statute or its legislative history remotely suggests that VER be defined in terms of a good faith/all permits standard. We agree that neither the statute nor its legislative history mentions a good faith/all permits standard for VER. However, as discussed above, we believe that the good faith/all permits standard is consistent with the legislative history of section 522(e). In addition, the definition of VER is not restricted to the good faith/all permits standard; it also includes the needed for and adjacent standard.

Commenters also argue that if Congress had intended to provide a permit-based exception to the prohibitions of section 522(e), it would have done so expressly as it did in section 510(b)(5) (restrictions on mining alluvial valley floors), section 510(d)(2) (special requirements for surface coal mining operations on prime farmlands), and section 522(a)(2) (petition-initiated designations of land as unsuitable for surface coal mining operations). According to the commenters, adoption of a permit-based definition of VER conflicts with the judicially endorsed presumption that Congress has acted both purposely and intentionally when it includes particular language in one statutory provision but not in another.

We agree that the statute's use of different terminology for each of these exceptions means that Congress probably intended a somewhat different meaning for the VER exception under section 522(e) than for the exceptions provided under the other statutory provisions cited by the commenters. However, we do not agree that the difference in terminology rules out the adoption of any type of permit-based standard for VER under section 522(e). And the good faith/all permits standard in this final rule differs from the permit-based exceptions under other provisions of the Act in that it includes a good faith component, which the others do not. Furthermore, our definition of VER includes the needed for and adjacent standard, which is not a permit-based standard. Finally, nothing in the litigation history of the definition of VER indicates that the courts would likely find a permit-based standard unacceptable for the reasons advanced by the commenters.

Many commenters characterized *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 296 n.37 (1981) (''Hodel v. *VSMRA''*) as representing a rejection of a permit-based standard for VER, or at least an indication that the courts would view such a standard with disfavor. In that case, the Supreme Court stated in a footnote that nothing in the statutory language of SMCRA or its legislative history would compel adoption of an all permits standard for VER. One commenter also argued that, in *National*

Wildlife Fed'n v. *Hodel,* 839 F.2d 694, 750 n.86 (D.C. Cir. 1988) (''*NWF* v. *Hodel*''), the U.S. Court of Appeals for the Federal Circuit characterized this Supreme Court pronouncement as a rejection of the all permits standard: ''[T]he Supreme Court has previously rejected a too-restrictive interpretation of VER in an early challenge to the SMCRA brought by industry.'' We respectfully disagree with these characterizations of the Supreme Court's decision and opinion. First, the definition of VER was not before the court. Second, the language chosen by the Supreme Court is decidedly neutral. It addresses only the question of whether the statute compels adoption of an all permits standard. It does not reach the issue of whether an all permits standard (or good faith/all permits standard) is permissible.

Commenters attacked the good faith/all permits standard as unconstitutionally defining property rights in violation of the Tenth Amendment to the Constitution, which reserves that power to the States as one of their unenumerated powers. We disagree. Our definition of VER clearly defers to State property law on all questions of property rights. The final rule defining VER does not by its terms deprive any person of property rights. Instead, our definition establishes the limits of the VER exception to the prohibitions and restrictions of section 522(e), based on equitable considerations.

Furthermore, in *Hodel* v. *VSMRA,* 452 U.S. at 291 (1981), the Supreme Court stated:

> The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.

Commenters also argued that the good faith/all permits standard denies property owners due process under the Fifth Amendment because it conditions the retention of a property right on conditions that are unreasonable and of which the property owner had inadequate notice. We disagree. Property owners had the opportunity to comment on either an all permits or good faith/all permits standard in the 1978, 1982, 1988, 1991, and 1997 proposed rules. Furthermore, the final rule creates little change in the status quo since most States have applied a good faith/all permits or all permits standard ever since they obtained approval of their SMCRA regulatory programs. In addition, when the VER standard is applied, all VER determinations have been and will continue to be subject to administrative and judicial review.

Commenters allege that the good faith/all permits standard improperly relies upon the opinion in *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) at 1090–91 (1980). They note that, on February 1, 1983, the U.S. Court of Appeals for the Federal Circuit remanded these regulations to the Secretary for review and revision at his request. The order of remand in this case stated that the judgment of the district court in *PSMRL I, Round I, supra,* could not be considered final. *See In re Permanent Surface Mining Regulation Litigation,* No. 80–1810, Order of Remand (D.C. Cir., Feb. 1, 1983). While the district court's decision lacks precedential weight, the order of remand does not prohibit use of the opinion as guidance in developing revised regulations. Regardless, as discussed above, our rationale for adoption of the good faith/all permits standard rests primarily upon our analysis of the legislative history of section 522(e) and Congress' purpose in enacting that section, not upon the opinion accompanying the court's decision. Only the good faith component has its origins in the *PSMRL I, Round I* decision.

Commenters also asserted that the definition of VER does not comport with our statement in the *PSMRL I, Round I* litigation that ''Congress intended the term valid existing rights to encompass property rights recognized as valid under state case law.'' 14 Env't Rep. Cas. (BNA) at 1090 (1980). The commenters overlook the context of this statement, which pertained only to paragraph (c) of the 1979 definition of VER. *See* 44 FR 67942, November 27, 1979. Paragraph (c) established criteria for the interpretation of documents used as part of the property rights demonstration. It did not comprise an independent standard for VER, contrary to the apparent assumptions of the commenters.

As noted in the decision, the Secretary committed only to revise the definition to state that documents dealing with property rights entitling one to surface mine coal will be interpreted in accordance with appropriate State court decisions. He did not agree to waive the other requirements of the 1979 definition, which include compliance with one of the VER standards in paragraphs (a) and (b) of the definition (the all permits standard, the needed for and adjacent standard, or the separate standard for haul roads). Nor did he agree to alter paragraph (d) of the 1979 definition, which provided that VER ''does not mean mere expectation of a right to conduct surface coal mining operations.''

One commenter complained that the version of the good faith/all permits standard that we proposed in 1997 differs sharply from our representations to the courts concerning the meaning of VER under section 522(e). The commenter specifically referred to and quoted a reply brief that the Government filed with the Supreme Court in *Hodel* v. *VSMRA,* 452 U.S. 264 (1981), on behalf of the Secretary. We agree that the final rule is not fully consistent with the statements in this brief. However, as discussed above and in Part VII.C.5. of this preamble, we no longer subscribe to this brief's interpretation of the legislative history of section 522(e). Furthermore, the discussion of VER in the brief occurred in the context of a facial challenge to section 522(e) of the Act. The definition of VER was not before the Court, and the Court did not rule on the meaning of the VER exception. As the brief itself notes, the Secretary was engaged in rulemaking to redefine VER at the time that the brief was filed. And, as discussed above and in Part VII.C.5. of this preamble, we believe that the VER standards in the final rule are the standards that are most consistent with the legislative history and Congress' intent in enacting section 522(e).

Some commenters opposed the good faith/all permits standard as a violation of the principle of statutory construction that a statute must be construed in a manner that affords each provision separate effect. Specifically, they charged that adoption of the good faith/all permits standard would effectively merge the VER exception under section 522(e) into the exception for existing operations under the same section, and thus improperly render the VER exception superfluous. We do not agree. First, as defined in this rule, the exception for existing operations does not apply to lands for which a permit has not actually been obtained; *i.e.,* it has no good faith component.

Second, the exception for existing operations includes authorized operations that have already begun surface coal mining operations before the land comes under the protection of 30 CFR 761.11 and section 522(e); the VER exception is not intended to apply to these operations. Third, the definition of VER is not restricted to the good faith/all permits standard. It also includes the needed for and adjacent standard and a separate standard for roads, neither of which has any counterpart in the exception for existing

operations in 30 CFR 761.12. Therefore, the VER exception includes significant differences from the exception for existing operations. The only overlap occurs with respect to unstarted operations that have obtained a permanent program permit under SMCRA.

In summary, we believe that the good faith/all permits standard is both reasonable and consistent with congressional intent. As discussed above and as summarized in Part V of this preamble, the legislative history is sparse and unclear, and parts are arguably inapplicable with respect to how Congress intended the VER exception in section 522(e) of the Act to be interpreted. In the face of this difficulty in determining Congress' intent, we believe that the good faith/all permits standard best balances a number of statutory purposes and policy objectives. These purposes and objectives include establishing a reasonable standard that is practicable to administer, providing substantial environmental protection to congressionally designated areas, providing an exception to the prohibition on surface coal mining operations in those areas when it would be unfair to apply the prohibition, protecting surface landowners from the adverse effects of surface coal mining operations, minimizing disruption of existing State regulatory programs and expectations engendered thereunder, and, to the extent that it harmonizes with the other purposes and objectives, mitigating or minimizing compensable takings of property interests.

3. What Comments Did We Receive Regarding Takings Issues Concerning the Good Faith/All Permits Standard?

Many commenters argued that the good faith/all permits standard is constitutionally infirm because of its Fifth Amendment takings implications. This argument appears to rely upon three premises: (1) that any interference with property rights recognized under State law would be a compensable taking, (2) that the good faith/all permits standard would effectively deny mineral owners any reasonable economic use of their property, and (3) that a standard which, when applied, might result in some compensable takings is facially unconstitutional. We do not agree that any of these premises is correct.

With respect to the definition of VER under section 522(e) of SMCRA, the U.S. District Court for the District of Columbia has held that ''no mechanical formula [for VER] will ever perfectly define the universe of circumstances in which failure to grant VER will constitute a taking.'' *PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1563 (1985). And the Supreme Court has long held that regulation that affects the value, use, or transfer of property may constitute a compensable taking if it goes too far. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). However, the courts have also long held that the rights of property owners are not absolute and that government may, within limits, regulate the use of property. See the summary of takings law published at 56 FR 33161, July 18, 1991.

The Supreme Court has identified three factors as having particular significance in a regulatory takings analysis: (1) the economic impact of the proposed government policy or action on the property interest involved, (2) the extent to which the action or regulation interferes with any reasonable, investment-backed expectations of the owner of the property interest, and (3) the character of the government action. *Connolly* v. *Pension Benefit Guaranty Corp.,* 475 U.S. 211, 224–25 (1986). The courts generally find that a compensable taking exists only if the government action would cause inequitably disproportionate economic impacts on the property or interfere with reasonable, investment-backed expectations of persons with an interest in the property to such an extent that justice and fairness would require that the public, rather than the private property owners, pay for the public benefit resulting from the restrictions that the government action places on the property. *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960).

In declining to review the constitutionality of section 522(e) of SMCRA, the Supreme Court explained its historic approach to takings analyses as follows:

> [T]his court has generally ''been unable to develop any ''set formula'' for determining when ''justice and fairness'' require that economic injuries caused by public action be compensated, rather than remain disproportionately concentrated on a few persons.'' Rather, it has examined the ''taking'' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action—that have particular significance. *Kaiser Aetna* v. *United States,* 444 U.S. 164, 175 (1979). * * * These ''ad hoc factual inquiries'' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

Hodel v. *VSMRA,* 452 U.S. at 296 (1981) (citations omitted).

When regulation goes too far in infringing on private property rights is not precisely definable. The Supreme Court has consistently ''eschewed any 'set formula' for determining how far is too far, preferring to 'engage in * * * essentially ad hoc, factual inquiries.' '' *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992) (*''Lucas''*), quoting *Penn Cent. Transp. Co.* v. *New York City,* 438 U.S. 104, 124 (1978). In *Lucas,* the Supreme Court recognized what it characterized as a ''logically antecedent inquiry'' into a takings claimant's title prior to the inquiry into whether the government has interfered with rights inherent in that title in a manner that rises to the level of a Fifth Amendment taking. *Id.* at 1027. The Court noted in *Lucas* that its takings jurisprudence ''has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over the 'bundle of rights' that they acquire when they obtain title to property.'' *Id.* at 1027. Thus, the Court continued, some regulation of rights should be expected. ''In the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings,'' the possibility of significant impacts should be anticipated. *Id.* at 1027–28. But the Court indicated that interests in land have greater expectations of protection. *Id.* at 1028. Further, the Court suggested that an ''owner's reasonable expectations'' may be critical to a takings determination. *Id.* at 1016 n.7. These expectations are those that ''have been shaped by the State's law of property; i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution (or elimination) of value.'' *Id.* at 1016 n.7.

However, in a subsequent case, the Supreme Court reiterated that ''our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.'' *Concrete Pipe & Prod.* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 645 (1993). The Court cited *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 384 (1926), which involved an approximate 75 percent diminution in value, and *Hadacheck* v. *Sebastian,* 239 U.S. 394, 405 (1915), which involved a 92.5 percent diminution in value, as examples of the cases to which it was referring.

Even under *Lucas* (*see id.* at 1027–28), coal owners and the coal mining industry may not necessarily enjoy the same expectations of freedom from government interference as persons who have historically been subject to a lesser degree of regulation, a factor that must be considered when evaluating the impact of the governmental action on investment-backed expectations. The Supreme Court recently held that ''those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'' *Concrete Pipe & Prod.* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 645 (1993) (citations omitted). And, in the same case, the Court ruled that ''legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.'' *Id.* at 646 (citations omitted).

In *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) at 1091 (1980), the U.S. District Court for the District of Columbia declined to rule on the constitutionality of the 1979 all permits standard for VER because the plaintiffs' takings claims were purely hypothetical. However, in its opinion, the court stated that it found persuasive the government's arguments that the definition met the standards of existing takings jurisprudence. And the definition that we are adopting today is consistent with that court's declaration that ''a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test.''

Furthermore, in *Hodel* v. *VSMRA,* 452 U.S. at 296 n.37 (1981), the Supreme Court stated that, while nothing in the statutory language of SMCRA or its legislative history would compel adoption of an all permits standard for VER, section 522(e) ''does not, on its face, deprive owners of land within its reach of economically viable use of their land since it does not proscribe nonmining uses of such land.'' The definition of VER that we are adopting today likewise does not prohibit nonmining uses of land protected by section 522(e). Therefore, we believe that the good faith/all permits standard is consistent with the principles established by the Supreme Court.

The commenters are correct in noting that neither of these decisions specifically endorses the good faith/all permits standard as constitutionally sound. However, there is nothing in these court decisions, SMCRA, or its legislative history that precludes adoption of a good faith/all permits standard for VER under section 522(e) or suggests that adoption of this standard would be a facial regulatory taking. Therefore, the only question is the degree to which its application to individual situations may result in a compensable taking.

The takings implication assessment in Part XXIX.E. of this preamble states that the good faith/all permits standard has significant takings implications as that term is defined by Executive Order 12630. It also states that, of all the alternatives that we considered, this standard has the greatest potential to result in compensable takings. However, the assessment explains that, while these takings implications are unquantifiable, we anticipate that the rule will result in very few compensable takings. The final environmental impact statement and final economic analysis for this rulemaking suggest that any takings that do occur will be limited largely to lands in eastern national forests with Federal surface and non-Federal mineral ownership and to lands in State and local parks and buffer zones for those parks.

Also, we anticipate that, in most cases, the lands protected by section 522(e) and 30 CFR 761.11 will comprise only a small portion of the relevant property interests as a whole. Therefore, under established takings jurisprudence, these prohibitions are unlikely to result in compensable takings. *See Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130 (1978) (''Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.'') For example, because mineral ownership is commonly less fragmented than surface ownership, the buffer zones for dwellings, cemeteries, roads, public buildings, and parks are unlikely to preclude surface coal mining operations on the bulk of a parcel for which a person owns the mineral rights. Even if the entire parcel lies within one or more of the prohibited areas, there may be no compensable taking because (1) the person may be able to recover the coal through underground mining methods without constructing surface facilities on the protected lands, or (2) there may be residual non-coal interests in the property which are unaffected or even enhanced by the prohibitions. For example, prohibition of surface coal mining operations could increase the value of the surface estate for residential or commercial development.

One commenter stated that *Penn Central* retains little currency in view of the subsequent *Lucas* decision. We find nothing in *Lucas* that expressly or by implication reverses the aspect of *Penn Central* quoted in the previous paragraph. And, in a decision rendered after *Lucas,* the Supreme Court reaffirmed this aspect of its *Penn Central* decision:

> We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. [Citation to *Lucas* omitted.] While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that ''the property of [Concrete Pipe] which is taken, is taken in its entirety,'' we rejected this analysis years ago in *Penn Central,* where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Concrete Pipe & Prod. v. *Construction Laborers Pension Trust,* 508 U.S. 602, 643–44 (1993), citations omitted.

One commenter argued that the statutory prohibition in section 522(e), when combined with the good faith/all permits standard for VER, would physically appropriate a distinct property interest (the right to surface mine) and thus would constitute a compensable taking regardless of how much of a person's property was actually affected by section 522(e) or what other uses of the property might remain. However, the commenter did not explain why this situation would qualify as a physical intrusion under the standard established in *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). And we are aware of no basis for such an argument under existing takings jurisprudence.

One commenter stated that, based upon the takings implication assessment, adoption of the good faith/all permits standard is proscribed by *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568 (1988). In that case, which dealt with First Amendment issues, the Supreme Court held that if ''an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'' *Id.* at 575. The commenter argued that, under this decision, we must select an alternative other than the good faith/all permits standard because the takings implication assessment in the proposed rule found that the good faith/all permits standard has the greatest potential to result in

compensable takings. We do not agree that the rationale in this decision prohibits adoption of the good faith/all permits standard.

First, we believe that adoption of another alternative would be contrary to the intent of Congress. In enacting section 522(e) of SMCRA, Congress clearly intended to minimize the number of new surface coal mining operations on protected lands. The other alternatives for the definition of VER are all less protective of the lands in section 522(e). Therefore, we believe that adoption of one of those alternatives would be contrary to the intent of Congress in enacting section 522(e).

Second, we do not agree that adoption or implementation of the good faith/all permits standard presents a constitutional problem. The Fifth Amendment only prohibits the taking of property without compensation. And the Tucker Act, 28 U.S.C. 1491, provides recourse for an individual to seek compensation in any situation in which a compensable taking might arise as a result of a Federal action. According to the Supreme Court, when ''compensation is available for those whose property is in fact taken, the government action is not unconstitutional.'' *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121, 128 (1985). And the Supreme Court also ruled that the Takings Clause ''is designed not to limit governmental interference with property rights *per se,* but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'' *First English Evangelical Lutheran Church* v. *County of Los Angeles,* 482 U.S. 304, 315 (1987).

Furthermore, we have used the good faith/all permits standard most of the time since SMCRA's enactment. And 20 of the 24 approved State regulatory programs under SMCRA rely upon a VER definition that includes either the all permits standard or the good faith/all permits standard. Apart from two cases of limited precedential weight from the U.S. District Court for the Southern District of Ohio, *Belville Mining Co.* v. *Lujan,* No. C–1–89–790 (S.D. Ohio 1991) (*Belville I*) and *Sunday Creek Coal Co.* v. *Hodel,* No. C–2–88–0416 (S.D. Ohio, June 2, 1988), we are not aware of any final decisions in which State or Federal courts have found that the good faith/all permits standard, or an agency determination that a person did not have VER under the good faith/all permits standard, was invalid on the basis of a conclusion that the standard or determination would result in a compensable taking of a property interest under the Fifth and Fourteenth Amendments to the U.S. Constitution. And we are aware of no final decisions in which the U.S. Court of Federal Claims has held that a person who could not meet the good faith/all permits standard suffered a compensable taking. Therefore, we anticipate that application of the good faith/all permits standard will result in very few compensable takings.

The preamble to the proposed rule contains the following discussion, which relies upon a zoning analogy to support the validity of the good faith/all permits standard in the face of a Fifth Amendment challenge:

> Section 522(e) is a form of land use regulation that may be considered analogous to certain provisions of zoning law. VER under section 522(e) is generally analogous to those provisions of land use law that define when a person attains a vested right to a particular land use regardless of subsequent changes in zoning ordinances that would otherwise prohibit or restrict that use. State laws vary widely with respect to when a person develops a vested interest in a particular land use, but mere ownership is rarely sufficient. Some States require that a person both obtain all necessary permits and make significant expenditures in reliance on those permits. Others require that a person reach a certain point in the permit process or make substantial good faith expenditures based on the existing zoning before he or she develops a vested interest in uses allowed under that zoning.
>
> The good faith/all permits standard for VER has a similar effect and is based in part on a similar rationale. Therefore, OSM anticipates that, in any review of the validity of a final VER standard, a court would consider principles analogous to those that have guided judicial decisions on challenges to the validity of zoning ordinances and similar land use regulatory provisions. In general, the courts have upheld land use restrictions as a legitimate exercise of the police power under the U.S. Constitution.

62 FR 4844, January 31, 1997.

One commenter attacked this analogy as inappropriate and inconsistent with constitutional law. The commenter argued that zoning authority arises from the plenary police powers reserved to the States under the Tenth Amendment to the Constitution, while Congress' authority to regulate intrastate coal mining derives from judicial interpretation of the Commerce Clause of the Constitution. See *United States* v. *Lopez,* 514 U.S. 549, 566 (1995), citing *Hodel* v. *VSMRA, supra.* The commenter also quoted a different Supreme Court decision on SMCRA, in which the Court stated:

> We do not share the view of the District Court that the Surface Mining Act is a land-use measure after the fashion of the zoning ordinances typically enacted by state and local governments.

Hodel v. *Indiana,* 452 U.S. 314, 331 n.18 (1981).

We agree that the constitutional authority for SMCRA is the Commerce Clause. See *Hodel* v. *VSMRA,* 452 U.S. at 275–283 (1981), and *Hodel* v. *Indiana,* 452 U.S. at 321–329 (1981). We did not intend the discussion in the proposed rule to be interpreted as identifying the police power as a source of authority for either SMCRA or adoption of implementing regulations. Rather, we intended that discussion to explain in part why we do not anticipate that the courts will find this standard to be a facial regulatory taking; *i.e.,* we expect the courts to evaluate this rule as a justifiable balancing of private rights with protection of public interests, given the dictates of SMCRA. Our statement that, in general, the courts have upheld land use restrictions as a legitimate exercise of the police power under the Constitution referred to litigation involving measures enacted by State and local governments, not Federal laws and regulations.

One commenter argued that the good faith/all permits standard has no takings implications because all mining in section 522(e) areas would be either a public nuisance or a threat to public health and safety. The commenter stated that, under background principles of property and nuisance law, prohibition of surface coal mining operations in these areas would never rise to the level of a compensable taking. While this statement may be true in some cases for some lands listed in section 522(e), the *ad hoc,* fact-specific nature of takings jurisprudence means that we cannot assume that it will always be true.

In *Lucas, supra,* at 17–25, the Supreme Court stated that the ''harmful or noxious use'' principle in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962), and *Mugler* v. *Kansas,* 123 U.S. 623 (1887) (the nuisance law to which the commenter refers) was merely an earlier description by the Court of the police power justification for allowing the government to cause some diminution in the value of private property without requiring that the owner of that property be compensated. However, in *Lucas,* the Court held that a property owner must be compensated for all total regulatory takings; *i.e.,* situations in which the owner retains no economically viable or beneficial use of the property, unless the use or uses in question are already prohibited under background principles of State nuisance and property law.

The Court further stated that ''[t]he fact that a particular use has long been engaged in by similarly situated owners

ordinarily imports a lack of any common law prohibition.'' *Lucas,* 505 U.S. at 1015. This premise might apply to surface coal mining operations in many of the areas protected by section 522(e) because State and local laws often did not prohibit surface coal mining operations in these areas before SMCRA. Its exact applicability would vary from State to State and locality to locality depending on State and local laws and the facts of each case. Hence, the commenter's claim that all mining in section 522(e) areas is *per se* a public nuisance and a threat to public health and safety is of questionable merit. *See also Whitney Benefits, Inc.* v. *United States,* 18 Cl.Ct. 394 (1989), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), in which the court of appeals held that, at least in the context of prohibiting surface coal mining operations on alluvial valley floors, ''Congress was not in SMCRA abating a 'nuisance', within the meaning of Supreme Court and other cases.'' *Whitney Benefits* at 926 F.2d 1177. However, as discussed above and in the takings implication assessment, we believe that successful takings claims under the good faith/all permits standard will be rare.

Some commenters argued that adoption of any standard other than the good faith/all permits standard would result in compensable takings of surface owners' property rights to peaceful enjoyment of their property. We know of no Federal case law supporting this argument. However, because we are adopting the good faith/all permits standard, which the commenters favored, there is no need to respond to this comment.

A few commenters warned that the takings implications of the good faith/all permits standard may significantly disrupt State regulatory programs because a single successful claim could devastate State funding of these programs. The commenters stated that the threat of large inverse condemnation awards would cause some States to relinquish primacy, which, one commenter noted, would threaten ''the federalist foundation of the Act.'' We find this possibility to be remote since 20 of the 24 approved State regulatory programs already include either an all permits or a good faith/all permits standard, and have done so since the date that we approved their programs under section 503 of the Act.

One State regulatory authority warned that the financial exposure resulting from adoption of the good faith/all permits standard would likely lead to States referring all VER determinations to us to avoid any liability for compensable takings awards, which could easily bankrupt a regulatory agency. However, there is no provision of the Act that authorizes such referrals. Furthermore, we believe that referrals are unlikely because 20 of the 24 approved State programs, including the one for the State that the commenter represents, already include an all permits or good faith/all permits standard for VER. If a State does attempt to refer a VER determination to us, we will take whatever measures are appropriate under sections 503 and 504 of SMCRA.

4. Why Did We Reject the Takings Standard?

For the reasons discussed in Part VII.C.2. of this preamble, we believe that, of all the alternatives considered for the definition of VER, the good faith/all permits standard best comports with the intent of Congress in enacting section 522(e). For this and other reasons, we did not propose to adopt a takings standard for VER. However, some persons elected to comment on either this standard or the validity of our reasons for failing to propose a takings standard. None of the comments received on the proposed rule provides sufficient basis for reconsideration of our preferred alternative.

To the extent that they chose to comment on the possibility of a takings standard, most commenters from every interest group expressed opposition, just as they did when we formally proposed one in 1991. Commenters provided various reasons for their opposition. Some characterized the takings standard as unacceptably subjective or unpredictable, with results that would vary widely from State to State and perhaps within a State as well. Many expressed concern about the potentially onerous information collection and analytical burdens that this standard could place both on persons seeking a VER determination and on the agency making the determination. Commenters noted that these agencies are unlikely to have the resources needed to conduct a comprehensive takings analysis. Other commenters argued that only the courts have both the authority and the competence to determine whether an agency action would result in a compensable taking. In addition, a number of commenters opposed the takings standard because of their belief that it would be far less protective of the lands listed in section 522(e) than the good faith/all permits standard. Because we did not propose a takings standard, we find it unnecessary to discuss the merits of these arguments here.

In the preamble to the 1997 proposed rule, we explained that one of the reasons why we did not propose to adopt the takings standard is that a takings standard would be relatively difficult to administer, compared to the other alternatives. The few commenters who supported a takings standard as either their first or second choice argued that difficulty in administration is not a valid reason for not selecting an otherwise viable rulemaking alternative. We disagree. Executive Order 12988, ''Civil Justice Reform,'' encourages the adoption of rules that do not present or create administrative difficulties.

And, in a 1985 opinion, the U.S. District Court for the District of Columbia, while declining to rule on the merits of a takings standard, cast doubt upon its administrative viability:

> The Secretary seems to assume, and this court expresses no opinion on this issue, that Congress intended each and every VER determination made by a state agency or OSM to coincide precisely with what a judicial determination of a taking would be in that given factual setting. But * * * only a court can decide whether a taking has occurred. Thus, while at first blush, it would appear that the broad constitutional takings test as promulgated by the Secretary comports with Congress' wishes to avoid any takings, it is not clear whether the broad test or one of the mechanical tests will better carry out congressional intent.

PSMRL II, Round III—VER, 22 Env't Rep. Cas. (BNA) at 1563 (1985).

One commenter stated that there is nothing in SMCRA or its legislative history that suggests that VER under section 522(e) is coextensive with the Takings Clause of the Fifth Amendment. As discussed above and in Parts VII.C.2. and VII.C.3. of this preamble, we agree.

Other commenters who favored either the takings standard or the ownership and authority standard noted that both we and the courts have frequently stated or implied that a principal purpose of the VER exception in section 522(e) is to avoid compensable takings. This statement is true. However, the expressions of opinion in the court decisions cited by the commenters are not binding, either because this particular question was not at issue in the cases before the courts or because the court declined to rule on the merits of the issue. Furthermore, both our prior statements suggesting that Congress included the VER exception in section 522(e) to avoid compensable takings (see, for example, 44 FR 14992, March 13, 1979, col. 1) and similar expressions of opinion in court decisions relied upon the colloquy between Congressmen Udall and Roncalio concerning VER under section 601 of the Act. *See* 123 Cong. Rec. H12878 (April 29, 1977).

We now believe that this colloquy has little if any relevance to the meaning of VER under section 522(e). Section 601 relates only to the mining of minerals and materials other than coal on *Federal* lands, while section 522(e) relates to surface coal mining operations on both Federal and non-Federal lands. Given this distinction and the references in section 601 to withdrawal of public lands from mineral entry or leasing, we believe that it is reasonable to conclude that the VER provision in section 601 refers to rights under the General Mining Law, the Mineral Leasing Act, and similar Federal statutes concerning the management and disposition of Federal lands and minerals. As discussed in Part VIII of this preamble, the concepts of VER under other Federal statutes are not readily translatable to VER under section 522(e).

And, most importantly, under the canons of statutory construction, the colloquy deserves little weight as a statement of congressional intent. The quoted exchange is an extemporaneous discussion between two legislators, reflecting their individual concerns and perceptions, and it does not appear in any form in any congressional report. Thus, it cannot be relied upon or accorded substantial weight as an expression of congressional intent concerning VER under section 522(e). *See PSMRL I,* 627 F.2d 1346, 1362 (D.C. Cir. 1980) *reh. den.* July 10, 1980, quoting *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921), and referencing 2A Sutherland, Statutory Construction, § 48.13 (4th ed. 1973), which states that legislative debates ''are not a safe guide * * * in ascertaining the meaning and purpose of the law-making body'' because they are merely ''expressive of the views and motives of individual members.''

One commenter argued that a takings standard would be more restrictive and environmentally protective than a good faith/all permits standard in situations in which application of the prohibitions would not constitute a compensable taking even though a good faith effort to obtain all permits had been made. While this situation is theoretically possible, the environmental impact statement for this rulemaking predicts that, on balance, the good faith/all permits standard would be more environmentally protective than a takings standard.

5. Why Did We Reject the Ownership and Authority Standard?

Many commenters argued that the legislative history of SMCRA, in combination with court decisions concerning section 522(e) of the Act and its implementing regulations, compel the adoption of an ownership and authority standard for VER as the only effective means of complying with the expressed intent of Congress to preserve property rights and avoid infringement on State property law. Commenters also noted that the ownership and authority standard has some of the favorable characteristics that we ascribed to the good faith/all permits standard. In particular, they stated that the ownership and authority standard is a bright-line standard, easy to understand and administer, and more objective than the takings standard.

We agree with the commenters that the ownership and authority standard is a relatively bright-line standard, relatively easy to understand and administer, and arguably more objective than the takings standard. However, these characteristics are not the primary factors that we considered in selecting the good faith/all permits standard. As discussed in part VII.C.2. of this preamble, we believe that the good faith/all permits standard best comports with the intent of Congress in enacting section 522(e).

While the legislative history of SMCRA could be construed in a manner consistent with an ownership and authority standard for VER under section 522(e), we do not concur with the commenters' assertions that the legislative history and judicial remarks concerning that history *compel* the adoption of an ownership and authority standard. Indeed, one of the cases frequently cited, *NWF* v. *Hodel,* 839 F.2d 694 (1988), states: ''Neither the statutory language nor the legislative history elaborate on the meaning of the phrase ''valid existing rights'' (''VER'').'' *Id.* at 749.

The legislative history of section 522(e) provides little clear or dispositive guidance on the purpose or meaning of the VER exception apart from the statement in both the Senate and House Committee reports that the phrase ''subject to valid existing rights'' in section 522(e) is intended to clarify that the prohibition on strip mining in the national forests is subject to previous State court interpretations of VER, such as the *Polino* decision in West Virginia. The congressional reports further state that this phrase is ''in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.'' H. R. Rep. No. 95–218, at 95 (1977) and S. Rep. No. 95–128, at 94–95 (1977).

Commenters interpreted these passages, in combination with the separate views that Congressman Lujan attached to the House report, as meaning that Congress intended an ownership and authority standard for VER. In his statement of separate views, Congressman Lujan argued that:

> As the Committee Report indicates, this section's limitation that the prohibition is ''subject to valid existing rights'' is not intended to open up national forest lands to strip mining when previous legal precedents have prohibited stripping. Naturally, the bill's language is also subject to the corollary that it is not intended to preclude mining where the owner of the mineral has the legal right to extract the coal by surface mining method[s].

H.R. Rep. No. 95–218, at 189 (1977).

However, the interpretation that Congressman Lujan insists is a corollary to the House committee report language appears only in his statement of separate views. If a majority of the committee concurred with his views, this corollary presumably would have appeared in the committee report. Because the committee report does not endorse Congressman Lujan's corollary, we are not persuaded that his interpretation of the committee report and the bill's language is a legitimate expression of the intent of Congress as a whole.

In addition, the interpretation advanced by Congressman Lujan and endorsed by the commenters likely would negate the section 522(e) prohibitions in most situations except those involving unleased Federal coal. This result would be inconsistent with the frequently expressed desire of Congress to prevent new surface coal mining operations in the areas listed in section 522(e), with certain exceptions. *See, e.g.,* S. Rep. No. 95–128, at 55 (1977).

Therefore, we believe that the repeated legislative history discussions of the *Polino* case and property rights on national forest lands are best read as expressing Congress' intent that the VER clause not be construed in a manner that would ignore limitations under State property law. We believe that our reading receives support from the statement in the committee reports that the VER clause in section 522(e) is ''in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.'' H.R. Rep. No. 95–218, at 95 (1977) and S. Rep. No. 95–128, at 94–95 (1977). And, regardless of which reading is correct, there is no clear indication that Congress intended these discussions to apply to lands other than the ones listed in section 522(e)(2) (Federal lands in national forests). *See, e.g.,* 5 J. Min. L. & Pol'y 585, 591, 592, 596 (1990).

Some commenters cited a colloquy between Congressmen Delbert Latta and Morris Udall during floor debate on the 1975 version of SMCRA as supporting an ownership and authority standard for VER under section 522(e). In this colloquy, Congressman Latta asked ''whether this legislation affects in any way the rights of an owner of mineral rights situated below land owned by the Federal Government.'' 121 Cong. Rec. H 6679 (March 14, 1975). After a lengthy discussion, the colloquy concludes with the following exchange:

> Mr. LATTA. * * * [I]f I understood what you said, this bill does not deal with the situation propounded in my question, meaning where a private citizen has sold the surface to the Federal Government and has retained the mineral rights. This bill would not in any way affect the mineral rights of that private citizen?
>
> Mr. UDALL. This is a bill that deals with how one mines coal in that situation and every other situation, but we do not attempt to change property rights in the situation the gentleman talks about and thus the mineral rights are not affected.

121 Cong. Rec. H 6679 (1975).

Although this colloquy does not specifically mention section 522(e) or VER, some commenters interpret Congressman Udall's concluding response as equating property rights under State law with VER under section 522(e). However, we believe that his response is better read as expressing the congressman's opinion that those provisions of SMCRA that govern how and where one may mine coal do not change mineral or other property rights. In any event, as discussed in part VII.C.4. of this preamble, legislative debates cannot be relied upon or accorded substantial weight as an expression of congressional intent. *See PSMRL I,* 627 F.2d 1346, 1362 (D.C. Cir. 1980) *reh. den.* July 10, 1980.

Furthermore, in 1975, the House rejected an amendment that would have replaced the phrase ''subject to valid existing rights'' in section 522(e) with a provision allowing surface coal mining operations on Federal lands in national forests and grasslands whenever the deeds conveying lands to the United States reserved the coal and specifically provided for the use of surface mining methods. 121 Cong. Rec. H 7048–50 (March 18, 1975). We find the House's rejection of an amendment providing an express ownership and authority standard for VER on Federal lands in national forests to be strongly suggestive of congressional intent. That is, we believe that this rejection suggests that Congress did not intend an ownership and authority standard for VER.

Except for lands with unleased Federal coal, an ownership and authority standard would offer no significant protection to section 522(e) lands beyond that independently afforded by the right-of-entry provisions of SMCRA's permitting requirements. Those permitting requirements apply to all surface coal mining operations on all lands. We find it unlikely that Congress intended the VER exception to be so broad that the prohibitions and restrictions of section 522(e) would afford only marginal and duplicative protection to most lands listed in that section. See the statements emphasizing the importance of protecting these lands in S. Rep. No. 95–128, at 54–55 and 94 (1977).

Industry argues that the ownership and authority standard would still give meaning to the prohibitions of section 522(e) because it would prohibit surface coal mining operations on those lands in section 522(e) for which the Federal Government owns the mineral interests. We do not agree with the commenters' argument. Federal coal leases in existence at the time that land comes under the protection of section 522(e) and 30 CFR 761.11 might convey sufficient property rights to satisfy an ownership and authority standard. Furthermore, we do not believe that Congress intended to restrict the prohibitions in this fashion. If it did, Congress could have achieved this result in a far more straightforward manner by prohibiting any future leases of Federal coal interests for the lands listed in section 522(e). In fact, Congress did just that with respect to Federal lands designated as unsuitable for all or certain types of surface coal mining operations pursuant to section 522(b) of the Act. In addition, if this were Congress' sole intent in creating section 522(e), Congress would have had little reason to enact the prohibitions of paragraphs (e)(3) through (e)(5) of that section, since these paragraphs apply primarily to non-Federal lands.

Commenters favoring the ownership and authority standard and opposing the good faith/all permits standard cite various Federal court decisions involving the application of SMCRA requirements as supporting their position. These cases include *Meridian Land & Mineral Co.* v. *Hodel*, 843 F.2d 340, 346 (9th Cir. 1988); *Ainsley* v. *U.S.*, 8 Cl.Ct. 394, 401 (1985); *Otter Creek Coal Co.* v. *U.S.*, 231 Ct. Cl. 878, 880 (1982); *Sunday Creek Coal Co.* v. *Hodel*, C.A. No. C–2–88–0416 (S.D. Ohio June 2, 1988); and *Belville Mining Co.* v. *U.S.*, 763 F. Supp. 1411, 1420 (S.D. Ohio 1991) and 999 F.2d 989, 992 (6th Cir. 1993) (*''Belville II''*). However, apart from *Sunday Creek*, which lacks precedential effect outside the Southern District of Ohio, these cases do not involve a challenge to the validity of the good faith/all permits standard for VER. Indeed, except for *Belville II* and *Sunday Creek*, the decisions do not even involve VER determinations. Therefore, to the extent that the judicial opinions cited by the commenters theorize on the meaning of VER under section 522(e), those statements of theory are properly regarded as dicta because that question was not properly before the court in any of these cases.

Furthermore, the theoretical discussions in these opinions generally center on the colloquy between Congressmen Udall and Roncalio concerning VER under section 601 of the Act. *See* 123 Cong. Rec. H 12878 (1977) (April 29, 1977). We believe that the colloquy, which does not concern surface coal mining operations or section 522(e), has little relevance to the meaning of VER under section 522(e). As discussed in part VII.C.4. of this preamble, it cannot be relied upon or accorded substantial weight as an expression of congressional intent concerning VER under section 522(e). *See PSMRL I*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) *reh. den.* July 10, 1980 (citations omitted).

In *Belville II,* the courts did not consider any regulatory definition of VER in determining whether Belville had the right to conduct surface coal mining operations on Federal lands within the Wayne National Forest. Instead, they proceeded directly to an examination of property rights under State law, finding that Belville had VER under SMCRA whenever it had authority under State property law to conduct surface coal mining operations. However, these decisions lack precedential effect outside the Sixth Circuit.

For the reasons discussed above and in other portions of Part VII.C. of this preamble, we decline to adopt the rationale advanced in the *Belville II* decisions. We believe that the legislative history of SMCRA either supports or is not demonstrably inconsistent with adoption of a good faith/all permits standard for VER. In addition, we believe that the good faith/all permits standard is the most reasonable policy choice for a VER standard consistent with the purposes of section 522(e) as discussed in part VII.C.2. of this preamble.

Commenters also point to the decision of the U.S. Court of Appeals for the Federal Circuit upholding the portion of the 1983 VER definition that extended VER to existing operations on lands that

come under the protection of section 522(e) after August 3, 1977. In its opinion, the court stated that:

> The legislative history, however, is of some help. Although it does not answer the specific question before us, it does suggest that Congress did not intend to infringe on valid property rights or effect takings through section 522(e).

NWF v. *Hodel,* 839 F.2d at 750 (1988) (footnote omitted).

However, the court did not identify any element of the Act's legislative history that supports this conclusion. And its opinion also states: ''Neither the statutory language nor the legislative history elaborate on the meaning of the phrase 'valid existing rights' (''VER'').'' *Id.* at 749. Finally, we note that the entire VER definition was not before the court—only the issue of VER for operations in existence on lands coming under the protection of the Act after August 3, 1977. Therefore, we cannot agree with the commenters that the court's decision provides clear guidance concerning the meaning of VER under section 522(e).

D. Paragraph (b)(2): ''Needed for and Adjacent'' Standard.

1. What Is the History of This Standard

The needed for and adjacent standard first appears in the definition of VER promulgated on March 13, 1979 (44 FR 14902, 15342); we did not include it in the 1978 proposed rule that preceded the 1979 final rule. The 1979 definition provided that a permit applicant with a property right to produce coal by surface coal mining operations as of August 3, 1977, possessed VER if the coal was both needed for and immediately adjacent to an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977. The preamble provides the following explanation of the basis for this standard:

> In analyzing the value of the property, the courts have distinguished an owner's value in an ongoing operation which must be halted, as compared with value that an owner has paid for some future operation that will be restricted. The taking cases reflect less sympathy for property owners who are denied some future opportunity to exploit their property interests based on prior beliefs that the property would be available for development; but most courts express concern over government interference with an ongoing operation which causes a 100 percent diminution in value unless it is a harmful use and falls within the noxious use category. This distinction suggests that VER could be defined differently for owners of coal which is essential to continue an ongoing mine, as compared to property rights in coal for a potential new mine.

44 FR 14992, March 13, 1979, col. 2.

The National Wildlife Federation challenged this standard as unduly expanding the scope of the VER exception beyond that intended by Congress. However, the court upheld the standard, finding it to be ''a rational method of allowing mining when denial would gravely diminish the value of the entire mining operation, thereby constituting a taking under Supreme Court declarations.'' *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) at 1091–92 (1980).

On September 14, 1983 (48 FR 41312, 41349), we promulgated a revised definition of VER that modified the needed for and adjacent standard by deleting the requirement for a demonstration that the property right to remove the coal by surface coal mining operations existed as of August 3, 1977 (although our response to a comment concerning this issue at 48 FR 41316 suggests that the deletion may have been unintentional). In that rulemaking, we also defined ''needed for'' as meaning that the extension of mining to the coal in question is essential to make the surface coal mining operation as a whole economically viable.

The National Wildlife Federation challenged these changes as being both procedurally and substantively improper. The U.S. District Court for the District of Columbia agreed in part, finding that we had failed to comply with the Administrative Procedure Act (5 U.S.C. 553) by not affording the public adequate notice and opportunity for comment on these two changes. The court did not rule on the merits of the revised standard. *See PSMRL II, Round III–VER,* 22 Env't Rep. Cas. (BNA) at 1566–67.

On November 20, 1986 (51 FR 41952, 41961), we suspended paragraph (c) of the 1983 definition of VER. In the preamble to the suspension notice, we stated that, pending adoption of a new rule, we would rely upon the approved State program definition in primacy States. In non-primacy States, the suspension had the effect of restoring the 1979 version of the needed for and adjacent standard, which did not contain a definition of ''needed for.'' *See* 51 FR 41954–55, November 20, 1986.

On July 18, 1991 (56 FR 33152, 33164), we proposed to revise the 1983 definition by reinstating the property rights demonstration requirement and by removing the sentence defining the ''needed for'' component of the standard. In the preamble to that proposed rule, we stated that the explanation of ''needed for'' in the 1983 definition did not substantively clarify the meaning or application of the needed for and adjacent standard. In addition, we proposed to replace the requirement that both the operation and the property rights to expand the operation onto adjacent lands have been in existence on August 3, 1977, with a requirement that both have been in existence on the date that the land for which the exception is sought came under the protection of 30 CFR 761.11 and section 522(e) of the Act. The latter change reflects the concept embodied in paragraph (d)(1) of the former (1983) definition, which was upheld in *NWF* v. *Hodel*, 839 F.2d at 750 (1988).

2. How Did We Propose To Revise This Standard in 1997?

On January 31, 1997 (62 FR 4836, 4860), we proposed a needed for and adjacent standard similar to the one proposed in 1991, with a few modifications. In addition to the changes in the property rights demonstration component (see Part VII.B. of this preamble), the 1997 proposed rule specified that the standard would apply to land, not just coal, needed for an existing operation. Under State law, a permittee or operator may have legitimate property interests in land apart from the coal itself. Land may be essential to the operation for reasons other than the coal it contains. For example, an operator has little leeway in the location of ventilation shafts for underground mines. Part VII.B. of this preamble contains a more extensive discussion of this issue.

The definition proposed in 1997 also attempted to eliminate any ambiguity caused by use of the term ''ongoing surface coal mining operation'' in the 1979 and 1983 rules. In 1991, we essentially proposed to replace ''ongoing'' with ''existing.'' However, comments received on that proposal indicated some uncertainty as to whether ''ongoing'' or ''existing'' included operations that are fully approved but inactive or unstarted. Accordingly, in 1997, we proposed to define this standard to include land needed for and adjacent to surface coal mining operations for which all permits had been obtained, or a good faith effort to obtain such permits had been made, before the land came under the protection of 30 CFR 761.11 and section 522(e) of the Act. The preamble to the proposed rule explained that we could find no rational basis for differentiating between active operations and those that are approved but inactive or unstarted. Both categories of operations engender the same type of investment-backed expectations. Both involve situations in which the permittee has

made significant resource outlays in an effort to realize those expectations.

3. How Does the Standard in the Final Rule Differ From the One That We Proposed in 1997?

After evaluating the comments received, we are adopting the needed for and adjacent standard as proposed in 1997, with several substantive and editorial changes. To establish VER under the needed for and adjacent standard in paragraph (b)(2) of the definition of VER in the final rule, a person must (1) make the property rights demonstration required by paragraph (a) of the definition, and (2) document that the land is both needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of 30 CFR 761.11 and section 522(e) of the Act.

In addition, we are adding the following language to the rule in response to comments:

To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of § 761.11 or 30 U.S.C. 1272(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made.

In evaluating whether a person meets this standard, the agency making the determination may consider factors such as:

(i) The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of § 761.11 depend upon use of that land for surface coal mining operations.

(ii) The extent to which plans used to obtain financing for the operation before the land came under the protection of § 761.11 rely upon use of that land for surface coal mining operations.

(iii) The extent to which investments in the operation before the land came under the protection of § 761.11 rely upon use of that land for surface coal mining operations.

(iv) Whether the land lies within the area identified on the life-of-mine map submitted under § 779.24(c) or § 783.24(c) of this chapter before the land came under the protection of § 761.11.

As stated in the preamble to the proposed rule, abandoned sites and sites with expired or revoked permits, including permits that have expired under section 506(c) of SMCRA, do not qualify as operations that could form the basis for a VER determination under the needed for and adjacent standard. Nor do long-inactive facilities for which no permit was required before SMCRA and which would have to be substantially or completely reconstructed before usage could resume. Allowing defunct operations such as those listed above to qualify as existing or authorized operations would contradict the plain meaning of that term and would be inconsistent with the congressional intent to prohibit, with certain exceptions, new surface coal mining operations on the lands identified in section 522(e). *See,* for example, S. Rep. No. 95–128, at 55 (1977).

4. What Comments Did We Receive on the Proposed Standard and How Did We Dispose of Them?

Some commenters opposed reinstatement of any type of requirement for a property rights demonstration as part of the needed for and adjacent standard, arguing that Congress intended the exception for existing operations in section 522(e) to apply to all lands needed by existing surface coal mining operations, regardless of whether those operations had the legal right to mine those lands when the land came under the protection of section 522(e). We have revised the definition in the final rule in a manner that will allow the needed for and adjacent standard to be met even if the operation for which the land is needed and to which it is adjacent does not yet own the requisite property rights for the land. However, in that situation, the property right to conduct the type of surface coal mining operations intended must exist at the time that the land comes under the protection of 30 CFR 761.11 or section 522(e), and the property rights demonstration required by paragraph (a) of the definition must be made as part of the request for a VER determination.

One commenter expressed concern that the proposed rule did not explicitly address ''the misconception that the land for which VER is claimed must be 'immediately adjacent' to an area covered by a permit issued or applied for before the enactment of SMCRA.'' The commenter noted that many large mining operations include sufficient reserves to operate for 20 to 50 years, even though, at least in pre-SMCRA times, most did not seek a permit for these lands that far in advance of mining. Because of the investments in reserves, land, equipment, and long-term coal supply contracts made on the assumption that these reserves would be available for surface coal mining operations, the commenter argued that all such lands should be considered part of, or at least needed for, the surface coal mining operation in existence at the time that the land came under the protection of 30 CFR 761.11 and section 522(e).

As the commenter implicitly acknowledges, section 506(b) of SMCRA authorizes the issuance of a permit with a term in excess of 5 years when the applicant demonstrates a need for the longer term to obtain necessary financing. Even if the applicant does not qualify for a ''life-of-mine'' permit term, nothing in SMCRA prohibits a company from seeking a permit with a normal term for the entire area upon which it plans to conduct operations for the life of the mine. Section 506(d) of the Act provides that any valid permit has the right of successive renewal upon expiration for lands within the permit area at that time. Once a valid permit exists for an area, that area becomes part of an existing operation and thus qualifies for the exception for existing operations under 30 CFR 761.12. Therefore, we do not believe that the commenter's concerns are valid with respect to post-SMCRA operations, because the operator or permittee can avoid these problems with proper planning.

However, we recognize the possibility that operations that started before SMCRA may have a legitimate concern. Therefore, we have added language to the definition to clarify that, in evaluating whether a person meets the needed for and adjacent standard, the agency making the determination may consider factors such as:

- The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of section 522(e) or 30 CFR 761.11 depend upon use of that land for surface coal mining operations.
- The extent to which plans used to obtain financing for the operation before the land came under the protection of section 522(e) or 30 CFR 761.11 rely upon use of that land for surface coal mining operations.
- The extent to which investments in the operation before the land came under the protection of section 522(e) or 30 CFR 761.11 rely upon use of that land for surface coal mining operations.

We believe that these provisions will adequately protect the interests of companies that acquired contiguous

reserves for a pre-SMCRA operation with the expectation of being able to obtain permits for those reserves in a sequential fashion.

One commenter also urged deletion of the ''immediately adjacent'' portion of the standard since, to meet market specifications, companies may need coal of a different quality for an operation if the coal immediately adjacent to the existing operation does not satisfy a customer's demands. We do not agree that changing market conditions provide a basis for VER under the needed for and adjacent standard. This situation represents the normal risks of the marketplace—and we do not believe that failure to anticipate changing market conditions entitles an operation to protection from the prohibitions of 30 CFR 761.11 and section 522(e).

However, there may be situations in which the company has included the coal in its mining plans but, for legitimate reasons, has been unable to obtain a permit for that area before the land came under the protection of section 522(e) and 30 CFR 761.11 despite efforts to do so. Therefore, we have revised the definition to include language that would allow the agency making the determination to consider lands within the area identified on the life-of-mine map submitted under 30 CFR 779.24(c) or 783.24(c) before the land came under the protection of 30 CFR 761.11 and section 522(e) to be adjacent to the original operation on a case-by-case basis. By adding this language, we do not intend to imply that all lands within the area identified on the life-of-mine map automatically qualify for the VER exception under the needed for and adjacent standard. The agency responsible for the VER determination must evaluate each situation on its merits and determine whether the request meets all requirements of the needed for and adjacent standard, including a demonstration that prohibiting expansion of the operation onto those lands would unfairly impact the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

In addition, there is some flexibility in the term ''adjacent,'' which ''Black's Law Dictionary'' defines as:

> Lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated; though they may not actually touch, * * * while adjoining imports that they are so joined or united to each other that no third object intervenes.

Certainly, an intervening road, pipeline, stream, or power line would not preclude land from being considered immediately adjacent to an existing operation's permit boundaries. Beyond that point, application of the needed for and adjacent standard is of necessity a judgment call, best decided on a documented, case-by-case basis by the agency responsible for the VER determination. In making this determination, the agency must consider both the ''needed for'' and ''immediately adjacent to'' components of the standard. That is, a determination that the land is immediately adjacent to an existing operation, or an operation for which a good faith effort has been made to obtain all necessary permits, is not sufficient to find that the operation may proceed onto those lands under the VER exception. As stated in the final rule, the agency also must find that prohibiting expansion of the operation onto those lands would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e).

Several commenters argued that the scope of the needed for and adjacent standard should be coextensive with that of the prime farmland grandfather exemption in section 510(d)(2) of the Act. According to one commenter, if an area has been determined to be part of an existing surface coal mining operation for purposes of the prime farmland grandfather exemption, then that area must qualify for the VER exception under the needed for and adjacent standard. We do not agree. The needed for and adjacent standard is part of the VER exception in section 522(e), not the exception for existing operations. Furthermore, the needed for and adjacent standard is created by rule, not by statute. Therefore, the argument that Congress must have intended similar terms to have similar meanings is not applicable, as Congress did not devise the needed for and adjacent standard.

Some commenters asserted that because the needed for and adjacent standard requires the existence of an operation for which all permits have been obtained or a good faith effort to obtain all permits has been made, this standard should be a component of the exception for existing operations rather than the definition of VER. We disagree. Section 522(e) does not define either VER or the exception for existing operations, apart from describing the latter exception as including ''surface coal mining operations which exist on the date of enactment of this Act.'' Therefore, we have considerable latitude in developing a final rule to implement these provisions of the Act. We believe that the final rule is a reasonable interpretation of both the VER exception and the exception for existing operations.

In developing the 1997 proposed rule and this final rule, we endeavored, for practical reasons, to limit the exception for existing operations to those situations in which the operator has full authorization to conduct surface coal mining operations on the lands in question before those lands came under the protection of section 522(e) and 30 CFR 761.11. In other words, the exception for existing operations applies in those circumstances in which the regulatory authority does not need to take any additional action before the operator may continue or commence surface coal mining operations on the newly protected lands. In contrast, a person planning to conduct surface coal mining operations under the VER exception in the final rule must (1) demonstrate the existence of VER, and (2) obtain a permit from the regulatory authority before initiating surface coal mining operations on protected lands. There is some overlap between the two exceptions in that persons who have obtained all necessary permits and authorizations to operate before the land comes under the protection of 30 CFR 761.11 and section 522(e) may either request a VER determination or avail themselves of the exception for existing operations.

Some commenters argued that the needed for and adjacent standard functioned purely as a transitional device between pre-SMCRA and post-SMCRA regulatory schemes. Since that transition is now complete, commenters assert that the standard is obsolete and should be removed or at least limited to surface coal mining operations in existence on August 3, 1977, the date of enactment of SMCRA. According to the commenters, the Constitution provides no protection to speculative investments. In addition, the commenters argue that the passage of SMCRA placed all parties on notice that surface coal mining operations in certain areas would be prohibited in the future, and that operators therefore should have planned their operations and acquired property and mining rights with a view to the existence of those prohibitions. In other words, the commenters assert that there is no longer any basis for anyone to have a reasonable expectation that properties outside the boundary of a mining permit could be incorporated into the permit area or mining plan.

As discussed earlier in this section of the preamble, the Act's provisions allowing life-of-mine permit terms and granting a right of successive renewal to permits with normal terms should minimize the need for the needed for and adjacent standard for mines that begin operations after August 3, 1977. However, we do not agree that this standard has no post-transitional value. Nor do we agree that the standard should be limited to operations in existence on August 3, 1977. The commenters' argument that the needed for and adjacent standard is purely a transitional device for persons who did not anticipate the enactment of SMCRA is true only if one assumes that no one would have a reasonable expectation of being able to conduct surface coal mining operations under the VER exception in section 522(e).

Since SMCRA does not define VER, this assumption is not necessarily correct. In particular, we do not agree with the commenters that, after the enactment of SMCRA, a person had a reasonable expectation of conducting surface coal mining operations on the lands listed in section 522(e) only if those lands were already under permit on August 3, 1977. The history of our attempts to define VER by regulation provides some basis for persons to anticipate that the VER exception sweeps more broadly than the good faith/all permits standard. And in 1983, we adopted a standard for ''continually created VER,'' which provided for the determination of VER on the basis of rights and documents in existence as of the date that the land came under the protection of section 522(e) and 30 CFR 761.11 rather than as of August 3, 1977. The courts subsequently recognized this approach as valid. *See PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1564 (1985), and *NWF* v. *Hodel,* 839 F.2d at 749–751 (1988). Adoption and judicial affirmation of this standard created the expectation that the VER exception would not be limited to lands under permit on August 3, 1977, or to operations in existence on that date. Similarly, our approval of a takings standard for VER as part of the West Virginia program in 1983 and as part of the Illinois program in 1989 may have created the expectation, at least in those States, that the VER exception is not limited to the good faith/all permits standard and that a person may have the right to conduct surface coal mining operations in protected areas even if an operation was not in existence on August 3, 1977.

Therefore, the final rule retains the needed for and adjacent standard and, as proposed, it extends that standard to lands needed for and immediately adjacent to surface coal mining operations in existence when those lands came under the protection of section 522(e) after August 3, 1977. Extension of the standard to these lands is a fair means of addressing the expectations discussed above. In addition, it is consistent with the purpose of the continually created VER standard that we adopted in 1983.

Some commenters challenged our extension of this standard to lands needed for and immediately adjacent to operations for which a good faith attempt had been made to obtain all necessary permits. They argued that the standard should apply only to operations that had already received all necessary permits since only those operations could legitimately be considered existing operations. We do not agree. The scope of the VER exception is not restricted by the scope of the exception for existing operations in 30 CFR 761.12. We believe that the needed for and adjacent standard should apply to lands needed for and immediately adjacent to an operation for which a good faith attempt has been made to obtain all necessary permits since there is no question that such an operation has VER under paragraph (b)(1) of the definition of VER in the final rule. Accordingly, we believe that inclusion of a good faith component in the needed for and adjacent standard is appropriate because it provides fair treatment of reasonable expectations while avoiding significant impairment of the prohibitions of section 522(e).

In the preamble to the proposed rule, we stated that, to avoid subverting the congressional prohibitions in section 522(e), we believed that VER determinations under the needed for and adjacent standard must be based on an analysis of how denial of the claim would affect the value, as of the date that the land came under the protection of 30 CFR 761.11 and section 522(e), of the operation as a whole from the time it began operation, not merely whether the additional land or coal would prolong the operation's life or provide increased profits. Otherwise, we stated, this standard could be used to justify unlimited expansion of operations adjoining protected areas, which could effectively nullify the prohibition. We suggested that this approach receives implied support in *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) at 1091–92 (1980), in which the court upheld the needed for and adjacent standard as a reasonable means of avoiding compensable takings:

> The need and adjacent [*sic*] component of the Secretary's definition is consonant with Supreme Court declarations regarding taking of property. This test allows the grant of a valid existing right exemption when extension of mining to an adjacent area is necessary to maintain, as a whole, the value of the mining operation. Stated otherwise, the need and adjacent test requires a valid existing right exemption when denial of mining on the adjacent area will rob the mining operation, as a whole, of its value. See *Penn Central, supra,* 438 U.S. 130 at 130–31; *Goldblatt* v. *Hempstead,* 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). The need and adjacent test is thus a rational method of allowing mining when denial would gravely diminish the value of the entire mining operation, thereby constituting a taking under Supreme Court declarations.

In the preamble to the proposed rule, we requested comment on whether the rule language should be revised to explicitly incorporate this interpretation. Most commenters did not respond to this request. Of those who did, some favored codification of our preamble interpretation as a welcome limit on the scope of the exception. Others opposed this interpretation as too restrictive, too burdensome, and inconsistent with our arguments in favor of the good faith/all permits standard and against the takings standard. One commenter stated that it is disingenuous for us to argue, on the one hand, that Congress did not intend to define the VER exception in terms of avoiding compensable takings, and then to propose to define or interpret the needed for and adjacent standard in a manner that resembles a takings standard.

One commenter asserted that the interpretation in the preamble to the proposed rule ignores the court's direction in *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) at 1091–92 (1980), and is impermissibly ambiguous. According to this commenter, the only legal interpretation is the ''gravely diminish'' standard that the court cited in the decision quoted above. We disagree. The court's reasoning does not require or suggest that we apply a takings analysis in determining whether a VER claim meets the needed for component of the needed for and adjacent standard. The court merely found that the 1979 needed for and adjacent standard was consistent with existing takings jurisprudence.

After evaluating all comments received, we have decided not to codify or otherwise adopt the interpretation of ''needed for'' that we set forth in the preamble to the proposed rule. We believe that this determination is best made on a case-by-case basis by the agency responsible for the VER

determination, relying upon all available information. However, in response to those commenters who expressed concern that the lack of a definition of ''needed for'' would lead to abuse, we have revised the rule to specify that the requester must demonstrate that prohibiting expansion of an operation onto the land in question would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e). We also added a list of examples of the type of factors that the agency should consider in evaluating whether the land is needed for and immediately adjacent to the existing operation. This list is not exhaustive and it does not exclude consideration of other appropriate factors.

Finally, in response to comments that the needed for and adjacent standard was too broad, we have added a sentence to the definition to clarify that, except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of 30 CFR 761.11 and section 522(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made. We believe that this clarification is appropriate because the operator or permittee would have no reasonable expectation of being able to conduct surface coal mining operations on those lands.

E. Paragraph (c): VER Standards for Roads

Paragraph (c) of the definition of VER in the final rule provides that a person has VER for the use or construction of a road included within the definition of ''surface coal mining operations'' in 30 CFR 700.5 and section 701(28) of the Act if one or more of the following circumstances listed in paragraphs (c)(1) through (c)(4) of the definition exist:

- The road existed when the land upon which it is located came under the protection of 30 CFR 761.11 or section 522(e), and the person has a legal right to use the road for surface coal mining operations.
- A properly recorded right of way or easement for a road in that location existed when the land came under the protection of 30 CFR 761.11 or section 522(e), and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations.
- A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of 30 CFR 761.11 or section 522(e).
- A person has VER under paragraphs (a) and (b) of the definition of VER.

With the exception of the modifications discussed below, the first three standards resemble those in both the proposed rule and the previous (1983) definition.

The last standard, which we have added as proposed, reflects the fact that the definition of surface coal mining operations in section 701(28) of the Act and 30 CFR 700.5 includes ''all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage.'' Therefore, if a person demonstrates VER for surface coal mining operations in general under the standards in paragraphs (a) and (b) of the definition, there is no reason why that person should have to separately demonstrate VER to use or construct roads on that land, since those roads are part of the operations for which he or she has already demonstrated VER. The standards in paragraphs (a) and (b) are of equal or greater rigor when compared with those in paragraphs (c)(1) through (c)(3). Accordingly, we have added paragraph (c)(4) to the definition to clarify that a person has the option of using the criteria and standards in paragraphs (a) and (b) of the definition to demonstrate VER for roads.

One commenter found the phrase ''as of'' in paragraphs (b)(2) and (b)(3) of the proposed rule confusing. We have revised the wording of these paragraphs, which the final rule redesignates as paragraphs (c)(2) and (c)(3), to clarify that a properly recorded right of way or easement, or a valid permit, must have existed when the land came under the protection of section 522(e) and 30 CFR 761.11.

As proposed, the final rule modifies the 1983 definition by incorporating the concept that VER for lands coming under the protection of section 522(e) or 30 CFR 761.11 after August 3, 1977, will be determined on the basis of the circumstances that exist when the land comes under the protection of section 522(e) and 30 CFR 761.11, not the circumstances that exist on August 3, 1977. Some commenters supported this change, but others opposed it as inconsistent with section 522(e) of SMCRA, which references the date of enactment (August 3, 1977). As the commenters noted, the courts have held that SMCRA does not compel adoption of this approach. However, the same courts also have ruled that this approach is a reasonable interpretation of SMCRA. *See PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1564 (1985), and *NWF* v. *Hodel,* 839 F.2d at 749–751 (1988). Also, we believe that requiring that the road, easement, right of way, or permit be in place when the land comes under the protection of section 522(e) and 30 CFR 761.11 is more reasonable and consistent with the principles of basic fairness than requiring that the road, easement, right of way, or permit be in place on August 3, 1977, as the commenters advocate.

One commenter opposed this change because it ''would doom all new homeowners in coalfield areas to having their rights intruded upon by the use of their roads as haul and access roads.'' The commenter apparently was operating under the erroneous belief that the 300-foot buffer zone for occupied dwellings under section 522(e)(5) and proposed 30 CFR 761.11(a)(5) [now 30 CFR 761.11(e)] would prohibit use of these roads in the absence of VER. We have never interpreted section 522(e)(5) as prohibiting a surface coal mining operation from using a public road that lies within 300 feet of an occupied dwelling.

The final rule differs from the previous and proposed definitions in that it expressly applies to all roads included within the definition of ''surface coal mining operations'' in 30 CFR 700.5 and section 701(28) of the Act. The 1979 and 1983 versions of this definition mentioned only haul roads. In the proposed rule, we used the term ''access or haul road.'' One commenter supported the proposed rule, noting that prior definitions were interpreted as including access roads. The commenter viewed the references to haul roads in those definitions as a product of draftsmanship, not intent. Another commenter requested, without elaboration, that we revise the rule to differentiate between access and haul roads to avoid future misunderstandings. After evaluating these comments and reviewing the language of the Act, we have decided to avoid any reference to either access or haul roads. Instead, paragraph (c) of the definition in the final rule applies to all roads included in the definition of surface coal mining operations in 30 CFR 700.5 and section 701(28) of the Act. We believe that this change is consistent with both the language of the Act and our historic approach to the regulation of roads

under the Act. We do not interpret SMCRA as affording differential treatment to roads based on whether they are access or haul roads.

The definition of surface coal mining operations in section 701(28) of the Act includes ''all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage.'' Section 522(e)(4) refers to ''mine access roads or haulage roads.'' Section 515(b)(18) refers to ''the construction of roads.'' We have always interpreted section 515(b)(17), which refers to ''the construction, maintenance, and postmining conditions of access roads into and across the site of operations,'' as including both access and haul roads since a haul road also provides access. No one has opposed this interpretation of section 515(b)(17), which, in part, provides authority for our regulations governing roads that are used or constructed as part of surface coal mining operations. Our regulations at 30 CFR 701.5 define ''road'' as including both ''access and haul roads,'' but they do not define ''access road'' or ''haul road.'' And our road classification system and performance standards at 30 CFR 816.150 and 817.150 do not distinguish between access roads and haul roads. Therefore, we see no reason to distinguish between access and haul roads when defining VER under section 522(e).

One commenter opposed adoption of a separate, potentially less rigorous standard for VER for roads. We find this comment untimely. Both the 1979 and 1983 definitions similarly included separate, potentially less rigorous standards for roads, but no one filed suit challenging our authority to establish separate standards in those rules. Furthermore, we did not propose to change, nor did we seek comments on, this aspect of the definition. Like the 1979 and 1983 rules, both the 1997 proposed rule and this final rule include separate standards for VER for roads.

Several commenters alleged that we improperly adopted the original standard for VER for roads in 1979 without providing adequate public notice and opportunity for comment as required by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* One commenter stated that justifying a VER standard on the basis of environmental impacts, as we did in the preamble to the portion of the 1979 definition pertaining to roads, is inappropriate. The commenter also argued that we failed to provide documentation in the record of that rulemaking for our claim that allowing VER for all existing roads would be less environmentally disruptive than constructing new roads. We find these comments untimely since the deadline for challenging the 1979 rules has passed.

One commenter asserted that there is no legal basis for providing a lower VER standard for roads than for any other aspect of a regulated surface coal mining operation because the statutory definition of surface coal mining operations draws no distinction between roads and the other activities and facilities that it includes. The commenter argued that the person claiming VER must demonstrate investment-backed expectations to use the road for surface coal mining operations. According to the commenter, if the mere existence of a property right to conduct surface coal mining operations does not suffice to demonstrate VER under paragraphs (a) and (b) of the definition, then the mere existence of a road should not suffice to demonstrate VER for a road under paragraph (c)(1) of the definition.

As discussed in Parts VII.A. through VII.D. of this preamble, we are not adopting a takings standard for VER. Hence, we do not agree that a person must demonstrate investment-backed expectations to qualify for VER. And, because the courts have held that the definition of surface coal mining operations does not exclude all public roads, we believe that a separate standard for VER for existing roads is essential as a practical matter. Unless otherwise provided by the agency with jurisdiction over the road, all persons have a right to use a public road for any legitimate purpose, including access and haulage associated with a surface coal mining operation.

One commenter noted that the concept of VER presupposes some claim of right to use of the road, which the existing and proposed rules did not require in all circumstances. The commenter further stated that the VER standard for roads should rely upon either the good faith/all permits standard or documentation that an existing road was actually in use as an access or haul road as of August 3, 1977. Finally, the commenter argued that the property rights demonstration required for demonstration of VER under paragraph (a) of the definition also should be a prerequisite for VER for roads.

The facets of the proposed definition to which the commenter objects (VER for existing roads, regardless of whether the road has ever been used for surface coal mining operations, and the lack of a property rights demonstration requirement for VER for roads) have remained essentially unchanged since we first adopted a definition of VER on March 13, 1979. The deadline for challenging the validity of that definition has passed. The proposed rule did not alter those facets of the definition to which the comments pertain, nor did we seek comment on whether they should be changed. Therefore, these comments are neither timely nor within the scope of this rulemaking, and there is no requirement to address them in this rulemaking.

However, we agree with the commenter that the concept of VER presupposes some claim of right to use of the road under applicable State law. Therefore, to avoid misapplication or abuse of the VER standards for roads, we have revised the definition in the final rule to clarify that, to qualify for VER under the existing road criterion in paragraph (c)(1) of the definition, a person must demonstrate a legal right to use the road for surface coal mining operations. In addition, we have revised paragraph (c)(2) of the definition to clarify that, to qualify for VER under the easement or right-of-way criterion, a person must demonstrate that, under the document creating the right of way or easement and under subsequent conveyances, that person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations. These changes merely make explicit an unstated assumption in both the existing and proposed rules.

The commenter also asserted that the proposed rule would effect an uncompensated taking by sanctioning physical intrusion through dust and noise on properties adjoining such roads. We do not agree. The VER standards for roads would not preclude any private remedy available to affected parties under State law, including State trespass and nuisance law. Therefore, this rule does not effect a facial taking.

F. How Does the Definition Address VER for Lands That Come Under the Protection of Section 522(e) After August 3, 1977?

As we proposed, each standard in the definition of VER in the final rule provides for determination of VER based on property rights and other conditions in existence on the date that the land comes under the protection of 30 CFR 761.11 and section 522(e) of the Act. This concept has sometimes been referred to ''continually created VER.'' We have included this concept in the definition of VER in the final rule because houses, churches, roads, parks, and other features protected by section 522(e) and 30 CFR 761.11 come into

existence and are expanded on an ongoing basis. In the interest of fairness, persons claiming VER for lands coming under the protection of the Act after the date of enactment should not have to demonstrate that they owned the requisite property rights on August 3, 1977, the date of enactment, as the 1979 definition required.

Some commenters opposed this change as being inconsistent with the express language of section 522(e) of SMCRA, which reads: ''After the enactment of this Act and subject to valid existing rights no surface coal mining operation except those which exist on the date of enactment of this Act shall be permitted'' on certain enumerated lands.

According to the commenters, this language means that the Act does not authorize use of a date other than the date of enactment (August 3, 1977) when determining exceptions from the prohibitions of section 522(e). Under this interpretation, VER must be determined on the basis of property rights and other conditions as they existed on August 3, 1977.

We disagree. The Act provides that the prohibitions of section 522(e) are subject to VER, but it neither defines VER nor specifies that VER must be determined on the basis of property rights and other conditions as they existed on the date of enactment. Because the lands and features protected by 30 CFR 761.11 and section 522(e) are continually changing, we believe that VER should be determined on the basis of the property rights and circumstances that exist at the time that lands come under the protection of section 522(e) and 30 CFR 761.11, not the date of enactment of SMCRA, which recedes ever further into history.

The commenters argue that this approach violates the purpose of section 522(e), which is to prohibit new surface coal mining operations on certain lands. They assert that an industry as pervasively regulated as coal mining had no reasonable expectation of being able to mine any lands without addressing the potential extension of protection to those lands once SMCRA became law. They state that the enactment of SMCRA placed operators and other interested persons on notice that certain lands are subject to the protections of section 522(e), even when the features triggering that protection do not come into existence until after the enactment of SMCRA. Therefore, according to the commenters, any investments after that date are made with full knowledge of that risk and are not entitled to protection from the prohibitions of section 522(e), regardless of when the features listed in section 522(e) come into existence.

One commenter argued that the only way to avoid the proscriptions of section 522(e) is to obtain a permit before the lands come under the protection of section 522(e). Alternatively, some commenters stated, persons conducting surface coal mining operations after the enactment of SMCRA should have immediately procured all necessary property rights (for example, purchased a 300-foot buffer around all planned minesites to preclude application of the prohibition on surface coal mining operations within 300 feet of an occupied dwelling) to avoid potential adverse impacts from the creation of new protected areas after August 3, 1977.

These arguments are identical to those advanced by the National Wildlife Federation in a challenge to paragraph (d) of the 1983 definition of VER, where this concept first appeared. The district court rejected those arguments:

> The court does not agree with plaintiffs that the legislative history they cite, or the language of the statute[,] requires a finding that the Secretary's concept of ''continually created VER'' is inconsistent with law. Given the language of the Act, and Congress' concern with takings, the court finds that ''continually created VER'' is in accord with law.

PSMRL II, Round III—VER, 22 Env't Rep. Cas. (BNA) at 1564 (1985).

The district court's decision was upheld on appeal. *See NWF* v. *Hodel,* 839 F.2d at 749–751 (1988). ''We find such a rule to be a reasonable interpretation of the Act, and thus affirm the decision of the district court upholding the Secretary's VER regulation.'' *Id.* at 751.

These court decisions focused on paragraph (d)(1) of the 1983 definition of VER. This paragraph established a ''continually created VER'' standard for existing operations. However, we believe that the rationale underlying this paragraph applies with equal force to all standards under the VER exception. In other words, when land comes under the protection of 30 CFR 761.11 and section 522(e) after August 3, 1977, we believe that it is not fair to determine VER for those lands on the basis of property rights and other conditions in existence on August 3, 1977. Rights under the VER exception should be no less important than rights under the exception for existing operations.

We previously endorsed this principle in adopting paragraph (d)(2) of the 1983 definition of VER. This paragraph provided that, when land comes under the protection of 30 CFR 761.11 and section 522(e) after August 3, 1977, we would determine VER using a takings standard based on the property rights that existed when the land came under the protection of section 522(e) rather than on the property rights that existed on August 3, 1977. The court subsequently remanded this portion of the rule because we failed to provide adequate notice and opportunity for comment on the takings standard. The court never reached a decision on the merits of this paragraph. However, in discussing the merits of paragraph (d) in general, the judge specifically rejected the argument that the word ''existing'' in the term valid existing rights means that those rights must have existed on August 3, 1977, the date of enactment of SMCRA. *See PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1564 (1985). And, in implementing the remand order, we suspended paragraph (d)(2) of the 1983 definition of VER only to the extent that it incorporated the takings standard. *See* 51 FR 41952, 41961, November 20, 1986.

One commenter argued that this concept is inconsistent with the decision in *M&J Coal* versus *United States,* 47 F.3d 1148 (Fed. Cir. 1995). The commenter argued that this case upheld the principle that persons have no legitimate expectation of the right to conduct surface coal mining operations on lands that come under the protection of the Act after August 3, 1977. We do not agree. In *M&J,* the court ruled that a person who acquires property after passage of a law restricting use of that property does not have sufficient legal basis to support a claim that the requirements of the law constitute a compensable taking. However, this case involved a situation in which a regulatory authority limited coal extraction from an underground mine to protect overlying structures from the damage that could result from subsidence caused by underground mining activities. It did not concern the applicability of the VER exception to lands that come under the protection of 30 CFR 761.11 and section 522(e) after August 3, 1977, the date of enactment. Therefore, we do not believe that this decision is relevant to this rulemaking.

History and Disposition of Former 30 CFR 761.5(d), the Original ''Continually Created VER'' Provision

On September 14, 1983 (48 FR 41312, 41349), we added paragraph (d) to the definition of VER to address situations where the prohibitions of section 522(e) become applicable to a particular site after August 3, 1977, the date of enactment of SMCRA. This paragraph provided that:

Where an area comes under the protection of section 522(e) of the Act after August 3, 1977, valid existing rights shall be found if—

(1) On the date the protection comes into existence, a validly authorized surface coal mining operation exists on that area; or

(2) The prohibition caused by section 522(e) of the Act, if applied to the property interest that exists on the date the protection comes into existence, would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

Paragraph (d)(1) extended the exception for existing operations to validly authorized surface coal mining operations in existence on the date that the land upon which they are located comes under the protection of section 522(e). Paragraph (d)(2) extended the takings standard for VER to property interests that existed on the date that the land came under the protection of section 522(e), rather than limiting its scope to property interests that existed on August 3, 1977.

In *PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1564 (1985), the district court upheld both paragraph (d)(1) and the concept of determining VER based upon property rights and conditions in existence on the date that land comes under the protection of section 522(e) rather than property rights and conditions in existence on August 3, 1977, the date of enactment of SMCRA. However, the court remanded paragraph (d)(2) because it incorporated the takings standard, which, the court held, had not been subject to proper notice and opportunity for comment under the Administrative Procedure Act. *See* 22 Env't Rep. Cas. (BNA) at 1564. The district court's decision was upheld on appeal. *See NWF* versus *Hodel*, 839 F.2d at 749–751 (1988). To comply with these decisions, we subsequently suspended paragraph (d)(2) to the extent that it incorporated the takings standard. *See* 51 FR 41961, November 20, 1986.

The VER definitions proposed on December 27, 1988, and July 18, 1991, would have deleted paragraph (d) in favor of replacing the reference to August 3, 1977, in each of the VER standards in the other paragraphs of the definition with a reference to the date that the lands came under the protection of section 522(e) of the Act. However, neither of the proposed definitions included a counterpart to paragraph (d)(1) of the 1983 definition. This omission would have had the effect of eliminating the VER standard for existing operations with respect to lands that come under the protection of section 522(e) after August 3, 1977. We did not intend this result. As stated in the preamble to the 1991 proposal, although paragraph (d) of the 1983 VER definition ''is rewritten and reorganized in this proposal, the basic intent and application are not changed.'' 56 FR 33156, July 18, 1991.

Therefore, we have revised the exception for existing operations, now located in 30 CFR 761.12, to incorporate language consistent with paragraph (d)(1) of the 1983 definition. Specifically, 30 CFR 761.12 provides that the prohibitions of 30 CFR 761.11 do not apply to (1) surface coal mining operations on land for which a valid permanent program permit exists when the land comes under the protection of 30 CFR 761.11 or section 522(e) of SMCRA, or, (2) for surface coal mining operations subject to the initial regulatory program in Subchapter B of 30 CFR Chapter VII, lands upon which validly authorized surface coal mining operations exist on that date. Further discussion of this change and the exception for existing operations appears in Part XVI of this preamble.

VIII. How Does Our Definition of VER Compare With VER Under Other Federal Statutes?

In the preamble to our proposed rule, we stated that the VER exception in section 522(e) of SMCRA differs from VER under other Federal laws because the section 522(e) VER exception applies to both Federal and non-Federal lands while VER provisions under other Federal laws apply only to lands in Federal ownership. Also, VER clauses and case law under other Federal statutes and executive orders typically relate to when a person may complete an already initiated process to obtain a property interest in public lands if there is a change in the laws or other requirements governing the vesting or perfecting of interests in those lands. In contrast, the preamble to the proposed rule explains, the VER exception in section 522(e) concerns a person's right to use land for a particular purpose (conducting surface coal mining operations) when that person already has fully vested property rights in the land. We arrived at this conclusion because, unlike other Federal statutes with VER provisions, section 522(e) of SMCRA does not involve a transfer of property rights or interests from the Federal government to another party. Instead, it prohibits surface coal mining operations on certain lands, generally without regard to who owns those lands.

Commenters disagreed with our explanation of the significance of the difference between SMCRA and other Federal laws. Specifically, one commenter argued that the only distinction is the source law used to determine the nature of property interests and whether they are entitled to protection as VER. According to the commenter, the source law for VER under Federal statutes other than SMCRA is the Federal statute that prescribes the requirements for creation of a non-Federal right or interest in public lands. Conversely, the commenter argued, the source law for VER under section 522(e) of SMCRA is State common law, at least for non-Federal lands. As discussed in more detail later in this section of the preamble, we cannot concur with this analysis because to do so would effectively negate the prohibitions of section 522(e) in most situations.

The commenter attacked the good faith/all permits standard for VER as ''an unlawful attempt to prevent not the mere acquisition of an additional interest, but [to] preclude the use or enjoyment of an existing property interest under state law.'' The commenter noted that many public lands statutes prescribe certain steps or conditions that are necessary to secure legal title, equitable title, or other forms of property rights to use public lands or resources. According to the commenter, the government, in its proprietary capacity, may preclude someone from acquiring an additional property interest in public lands if that person does not satisfy all necessary conditions, but the government cannot extinguish an existing property interest. The commenter further noted that the VER exception under section 522(e) of SMCRA generally pertains to property rights under State law that are fully perfected and vested and that are not conditioned upon the satisfaction of any new requirements. Hence, the commenter argues, since VER provisions under other Federal statutes have ''historically protected unvested property rights in order to allow persons to perfect a vested property interest against the United States in its *proprietary* capacity, surely the same principles apply with more force to preserve superior vested rights against impairment when the United States acts, as it does under SMCRA, in its *regulatory* capacity.''

We do not find the commenter's arguments persuasive. As discussed in more detail in Part VII.C. of this preamble, the definition of VER in this final rule does not extinguish any property rights. We agree with the commenter that, at least for non-Federal properties, State law is the appropriate source law to determine property rights when making a VER determination

under section 522(e) of SMCRA. But, as discussed below, we do not agree that the VER inquiry should end with the property rights demonstration.

We continue to believe that VER under section 522(e) of SMCRA is not analogous to VER under other Federal statutes. We found no definitions of VER in other Federal statutes. Our review of these statutes, applicable case law, and the literature discussing them indicates that the VER provisions in these laws and pertinent executive orders usually protect an expectation or property interest that arose under an earlier law, which is normally a Federal public lands law but may occasionally be State law. Generally, the protected interest is less than vested title and is asserted against Federal title. *See, e.g.,* Laitos, *The Nature and Consequences of ''Valid Existing Rights'' Status in Public Land Law,* 5 J. Min. L. & Pol'y 399, 416–18 (1990).

As a commenter noted, the Supreme Court interpreted the phrase ''valid existing claims'' in a VER exception in an executive order concerning the homestead laws in the following manner:

> Obviously, this means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title.

Stockley v. *United States,* 260 U.S. 532, 544 (1923).

As another example of the meaning of VER under other Federal statutes, we offer the following excerpt from one of the court decisions cited by several commenters:

> We conclude that ''valid existing rights'' does not necessarily mean vested rights. Under the [Alaska Native Townsite] Act before its repeal, a municipality, and all individuals who had occupied specific lots within the subdivision limits, had a legitimate claim for municipal control of any unoccupied lots * * *. It is rational to conclude that when the Congress repealed the law and enacted a savings clause for ''existing rights,'' that this claim would be preserved. The term ''valid existing rights'' does not necessarily mean present possessory rights, or even a future interest in the property law sense of existing ownership that becomes possessory upon the expiration of earlier estates. Legitimate expectations may be recognized as valid existing rights, especially where the expectancy is created by the government in the first instance. * * * A government is most responsible when it recognizes as a right that which is not strictly enforceable but which flows nevertheless from the government's own prior representations. That in essence is what the Secretary has done here. The Secretary's reading of the words ''valid existing rights'' to mean something other than ''vested'' is reasonable.

Aleknagik Natives Ltd. v. *U.S.*, 806 F.2d 924, 926–27 (9th Cir. 1986).

Thus, under Federal laws other than section 522(e) of SMCRA, the term VER typically refers to the set of circumstances under which persons who have unvested or incompletely vested interests or expectations in Federal lands or minerals will be allowed to vest or complete those interests or expectations as property rights against the United States as the fee owner. In general, the VER provisions of those statutes, or case law concerning VER under those statutes, apply to situations in which the Federal government withdraws land from the operation of a public lands statute or changes the eligibility criteria or other requirements for vesting or completing of property rights. In these cases, the term VER refers to the point at which a person who has taken some action toward vesting or completing a property interest in Federal lands or minerals has the right to complete the process regardless of any statutory or regulatory changes to the contrary.

In some instances, the courts have indicated that Congress intended for VER provisions under other Federal laws to operate as a means of avoiding compensable takings. *See Cameron* v. *United States,* 252 U.S. 450 (1920) and *Utah* v. *Andrus,* 486 F. Supp. 995, 1011 (D. Utah 1979). However, there is no consensus that this principle is always true or even usually true. *See, generally,* 5 J. Min. L. & Pol'y No. 3. We conclude that the record does not clearly establish that Congress always intended avoidance of compensable takings to be an underlying principle for all VER provisions. If Congress had this intent, VER provisions would protect only those property rights that are protected under the Fifth Amendment. However, the purpose of a VER provision may be to protect expectations or interests that are not property for purposes of the Fifth Amendment, or to preserve the status quo for preexisting interests. *See Arnold* v. *Morton,* 529 F.2d 1101 (9th Cir. 1976); Solicitor's Opinion M–36910 (Supp.), 88 I.D. 909, 913 (Oct. 5, 1981); *Sierra Club* v. *Hodel,* 848 F.2d 1068, 1087–88 (10th Cir. 1988); and *Beard Oil Co.*, 111 IBLA 191 (1989).

For the reasons discussed below and in the first paragraph of this portion of the preamble, we do not find that the meaning of VER under other Federal laws provides useful guidance in determining the meaning of VER for surface coal mining operations under section 522(e) of SMCRA. First, section 522(e) and the VER exception in that section apply to both Federal and non-Federal lands. Neither section 522(e) nor the VER exception in that section involves a transfer of a property right from the Federal government or a vesting of a property right vis-a-vis the Federal government. As discussed in Part VII.C.2. of this preamble, the VER exception in section 522(e) of SMCRA concerns a person's eligibility to obtain a permit to conduct surface coal mining operations when vested property rights already exist. In short, the VER exception in section 522(e) differs from VER under other Federal laws because SMCRA has a fundamentally different nature than the other Federal laws to which the commenters refer. Unlike those laws, SMCRA regulates the use of non-Federal lands.

Second, the section 522(e) VER exception applies in the context of a regulatory program that already imposes a requirement that a permit applicant demonstrate the property right to mine the coal by the method intended. Thus, to provide that a person who has the necessary property rights under State law is exempt from the prohibitions and restrictions of section 522(e) would render the VER exception surplusage, or at best insignificant, in relation to the independent permitting requirements in the Act. Further, except in situations involving unleased Federal coal, this interpretation would effectively render the protections of section 522(e) void or insignificant. A fundamental principle of statutory construction provides that '' 'effect must be given, if possible, to every word, clause and sentence of a statute' * * * so that no part will be inoperative or superfluous, void, or insignificant.'' *PSMRL I,* 627 F.2d at 1362, citing 2A Sutherland, *supra,* at § 46.06.

Third, a VER standard that is primarily intended to determine whether, under Federal law, property rights may vest against the Federal government, arguably would be irrelevant or inappropriate in the circumstances to which section 522(e) applies. Property rights for the lands listed in section 522(e) are already vested under State law. Furthermore, application of this type of VER standard would be inappropriate because SMCRA is not a statute under which Congress intended to resolve title disputes or change the process for vesting real property rights.

IX. Are VER Transferable?

In general, we view VER as transferable because, unless otherwise

provided by State law, the property rights, permits, and operations that form the basis for VER determinations are transferable. There is one significant exception to this principle. If an operation with VER under the needed for and adjacent standard divests itself of the land to which the VER determination pertains, the new owner does not have the right to conduct surface coal mining operations on those lands under the prior VER determination. That determination is no longer valid because it was based on a representation that the lands were needed for the operation. Of course, if the sale involves the entire operation (as opposed to a portion of its reserves), the VER determination would retain validity since there is no change in the operation's need for the land.

However, the right to alienate or transfer real or personal property is not absolute. Certain property interests such as leases, licenses, and contracts may be inherently nontransferable or of limited transferability, either by their terms or by operation of State law. If a person's property interests are of this nature, then any VER resting on those interests also would be nontransferable.

The VER exception in section 522(e) may be considered analogous to a zoning variance, which, in the interest of equity, allows an otherwise prohibited use to occur under certain fact-specific circumstances even though that use was not in existence on the land in question at the time that the zoning ordinance took effect. Zoning variances typically convey with the title to the property even if the rights conferred by the variance have not been exercised.

Some commenters objected strongly to our statements in the preamble to the proposed rule that characterize VER as attaching to the property interests. They argue that VER should attach only to the person, and that these rights should expire if the person does not exercise them. We do not find this argument persuasive. VER determinations are based on property rights, permits, and/or operations, depending upon the standard that applies. To the extent that State law and the conveyances in question either authorize or do not prohibit the transfer of these property rights, permits, and operations, we see no reason to prohibit the transfer of any associated VER. Furthermore, as specified in section 505(a) of the Act, SMCRA does not supersede any State law or regulation unless the State law or regulation is inconsistent with the Act. Since SMCRA does not address the transferability of VER, we have no authority under the Act to limit the operation of State laws related to or affecting transferability of VER.

In adopting this rule, we do not intend to create rights that do not already exist in State law or expand upon those that do. Individual States may prohibit VER transfers to the extent that they have the authority to do so under State law. One commenter argued that any State law or regulation that prohibits the transfer of VER would constitute the taking of private property without compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. We do not find it appropriate or necessary to respond to this theoretical argument, which lies outside the scope of SMCRA and is best left to the courts to address if the situation materializes.

One commenter argued that VER is not a property right, but a recognition of some equitable consideration that Congress intended to afford to persons whose mine plans were in substantial stages of development on the date of enactment of SMCRA. According to the commenter, VER should not be transferable because they are personal rights intended to protect the legitimate expectations of the property owner. The commenter expressed concern that allowing transfer of VER would elevate an equitable consideration into an estate in land or a property right. However, the commenter failed to cite any supporting documentation for these arguments and characterizations of Congressional intent regarding VER.

As summarized and excerpted in Part V of this preamble, the legislative history of the VER exception in section 522(e) is quite sparse; there is no passage that supports the commenter's claims. And we are aware of no basis for the commenter's belief that VER are personal rights and that allowing transfer of VER would convert an equitable consideration into a property right. But, even if the commenter is correct, we do not see how this distinction would preclude transfer of VER. Unless otherwise specified by agreement of the parties, a personal right to use property for a particular purpose or in a particular manner may also be transferable if State law so provides.

The commenter also argued that allowing individual States to determine transferability of VER would result in disparate levels of protection for both public and private lands. The commenter provided no basis for this assertion. We know of no reason to expect that there will be any significant difference in terms of disturbance of protected lands between States that allow transferability and those that do not. However, to the extent that a difference may exist, we do not find any conflict with SMCRA. Section 505(a) of the Act provides that:

> No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

Because SMCRA does not address the transferability of VER, we believe that deferral to State law is appropriate.

The commenter also argued that to the extent that we allow transfer of VER, we should restrict transfers in the same manner as zoning law limits the transfer of a non-conforming use. According to the commenter, the right to a non-conforming use generally lapses unless exercised on a continuous basis. We do not accept the commenter's argument. There is no indication in SMCRA, its legislative history, or elsewhere that Congress intended the VER exception in section 522(e) to operate as a nonconforming use does under zoning law. We see no compelling reason to restrict transfer of VER in this fashion. And, as previously discussed, restricting transfer in the manner advocated by the commenter may run afoul of section 505(a) of the Act, which preserves State law unless it is inconsistent with SMCRA.

One commenter expressed the fear that allowing transfer of VER would expand the scope of the VER exception to the point where nearly anyone with a backhoe could access protected lands in a devastating fashion. We do not agree that allowing transfer of VER would create the result feared by the commenter. The definition of VER in the final rule provides appropriate limitations on the scope of the VER exception.

Finally, one commenter asserted, without further elaboration, that transfer of VER is not permissible under current law, and that our rule would create a new right contrary to law and in excess of our authority. We disagree. Both SMCRA and its implementing regulations are silent on the question of transferability.

X. Sections 740.4, 745.13, and 761.14(a): Who Is Responsible for VER Determinations for Non-Federal Lands Within Section 522(e)(1) areas?

A. Statutory Background and Rulemaking History

SMCRA does not directly address responsibilities for VER determinations. However, section 503(a) of the Act

specifies that States with surface coal mining and reclamation operations on non-Federal lands may assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within their borders, except as otherwise provided in section 521 (Federal oversight of State regulatory program implementation), section 523 (Federal lands), and Title IV of the Act (reclamation of abandoned mine lands). In addition, section 101(f) of the Act asserts that ''the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations subject to this Act should rest with the States.'' In accordance with these principles, former 30 CFR 761.4, as published on March 13, 1979 (44 FR 15341), assigned the responsibility for VER determinations for non-Federal, non-Indian lands to the regulatory authority, with the Secretary retaining responsibility for VER determinations for Federal lands.

On February 16, 1983 (48 FR 6935), we revised the Federal lands regulations at 30 CFR 740.4 by adding paragraph (a)(4). This paragraph narrowed the Secretary's responsibility for VER determinations by restricting it to proposed surface coal mining operations that would be located on Federal lands within the boundaries of any areas listed in section 522(e)(1) or (e)(2) of the Act. In the same rulemaking, we added paragraph (o) to 30 CFR 745.13 to specify that the Secretary may not delegate the responsibility for making VER determinations on Federal lands within any areas listed in section 522(e)(1) or (e)(2) to the State in a cooperative agreement for the regulation of surface coal mining and reclamation operations on Federal lands. The preamble to that rulemaking explains that exclusive authority for VER determinations involving those lands is an integral component of the Secretary's commitment to protect the areas listed in section 522(e)(1) and (e)(2) in accordance with congressional direction and to prevent mining on Federal lands within the National Park System. See 48 FR 6917, col. 2, February 16, 1983.

On September 14, 1983 (48 FR 41312), we removed 30 CFR 761.4 because we found it unnecessary in view of the provisions added to 30 CFR 740.4 and 745.13 on February 16, 1983. Citizen and environmental groups filed a challenge to the removal. They also used this occasion as an opportunity to argue that SMCRA requires that the Secretary make VER determinations in all cases involving lands within the boundaries of section 522(e)(1) areas, regardless of ownership. The court rejected the plaintiffs' arguments, noting that section 503(a) of the Act ''permits States to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands.'' *PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1566 (1985). The court also noted that nothing in section 523(c) of the Act, which prohibits the Secretary from delegating to the States his authority to designate Federal lands as unsuitable for mining under section 522 of the Act, ''persuades the court to the contrary.'' *Id.*

However, in oral arguments defending against the challenge, counsel for the Government stated that:

> [I]n those situations where surface mining on private inholdings will affect federal lands, that kicks in the Federal Lands Program, and under the Federal Lands Program, the Secretary makes the VER determination, so there may be circumstances where you have a private inholding within the protected area, in which the Secretary would make the VER determination, but he can't in the abstract know when he's going to be required to make that determination, until he knows what land is going to be mined, and what potential impact that might have on federal lands.

Transcript of Oral Argument, Dec, 21, 1984, at 46; quoted in *PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1566 (1985).

The court did not address the validity or interpretation of this argument, which, taken at face value, would extend the reach of the Federal lands program to lands in which there is no element of Federal ownership.

On November 20, 1986 (51 FR 41952–62), we suspended a number of regulations. Among other things, that **Federal Register** document, which is known as the 1986 suspension notice, partially suspended the VER definition published on September 14, 1983. In the preamble discussion of the impact of this suspension on the Federal lands program, we announced that the Secretary would make VER determinations for non-Federal lands within the boundaries of the areas listed in section 522(e)(1) whenever surface coal mining operations on those lands would affect the Federal interest (51 FR 41955). This policy is known as the ''affected by'' standard. However, the notice did not suspend or modify 30 CFR 740.4(a)(4) or any other rule to reflect this policy. (Section 740.4(a)(4) (1983) provides that the Secretary is responsible for VER determinations for Federal lands, but it does not extend that responsibility to non-Federal lands.)

The 1986 suspension notice does not explain the basis or origin of the ''affected by'' standard. However, it appears to arise from the Government's oral argument in *PSMRL II, Round III—VER,* as quoted in the decision at 22 Env't Rep. Cas. (BNA) 1566 (1985). This argument apparently derives from and expands upon language in the court's earlier decision in *In re Permanent Surface Mining Regulation II, Round I,* No. 79–1144 (D.D.C. July 6, 1984), slip op. at 11–15 (hereinafter ''*PSMRL II, Round I*''). In that decision, the court noted that the definition of ''surface coal mining operations'' in section 701(28) of the Act includes a broad ''affected by'' test and that under section 523(a) of SMCRA and the definition of ''Federal lands program'' in section 701(5) of the Act, all surface coal mining and reclamation operations on Federal lands are subject to the Federal lands program.

B. What Alternatives Did We Consider?

In the preamble to the proposed rule published on January 31, 1997 (see 62 FR 4838–40), we requested comment on four alternatives with respect to responsibility for VER determinations for non-Federal lands within the areas protected by section 522(e)(1):

(1) Reaffirming the 1983 version of 30 CFR 740.4(a)(4), which would mean that we would be responsible for making all VER determinations for Federal lands in section 522(e)(1) areas and that the regulatory authority (which may be either OSM or the State) would be responsible for making all determinations for non-Federal lands.

(2) Reaffirming the 1983 version of 30 CFR 740.4(a)(4) and revising Part 761 to provide that the regulatory authority must obtain the concurrence of the pertinent land management agency before finding that a person has VER for any lands within the boundaries of the areas listed in 30 CFR 761.11(a) and section 522(e)(1) of the Act. Under this alternative, if the proposed operation would be located on land within the boundaries of an area listed in section 522(e)(1), the agency statutorily responsible for management of the protected lands would have to concur with the regulatory authority's VER determination before the determination could take effect.

(3) Revising 30 CFR 740.4(a)(4) and Part 761 to codify the ''affected by'' standard, which is the policy established in the 1986 suspension notice. This alternative relies upon the theory that the scope of the Federal lands program is not necessarily limited to lands included in the definition of Federal lands in section 701(4) of the Act; i.e., lands in which the Federal

government has a property interest. Under this theory, the Federal lands program would extend to include non-Federal lands within the boundaries of section 522(e)(1) areas if surface coal mining operations on those lands could affect the Federal interest by adversely impacting the values for which the lands were designated as protected areas.

(4) Revising 30 CFR 740.4(a)(4) and Part 761 to require that we make all VER determinations for both Federal and non-Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a) and section 522(e)(1) of the Act. This alternative relies upon the same theory as the ''affected by'' standard, with the additional argument that because Congress or the President established the boundaries of the areas identified in section 522(e)(1), all lands within those boundaries must possess values of national significance or interest. Therefore, surface coal mining operations on any lands within those boundaries would automatically affect the Federal interest in some way.

C. Which Alternative Are We Adopting?

Commenters divided sharply on which alternative we should adopt. After evaluating the comments and reviewing the Act, we have decided to adopt the first alternative, which means that we are not making any substantive changes to 30 CFR 740.4(a)(4). (We are making a few editorial changes to reflect plain language principles and update cross-references to other rules.) Under the final rule, the regulatory authority has the responsibility for making VER determinations for all non-Federal lands, including those within the areas listed in section 522(e)(1) of the Act.

Many commenters supported this alternative as the only one that is fully consistent with SMCRA's provisions for State primacy in the regulation of surface coal mining operations on non-Federal lands. We agree. Section 101(f) of the Act asserts that ''the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations subject to the Act should rest with the States.'' In relevant part, section 503(a) provides that, once a State meets certain conditions, it has the right to assume ''exclusive jurisdiction'' over the regulation of surface coal mining and reclamation operations on non-Federal lands within its borders, with the exception of the Federal oversight and enforcement authority reserved under section 521 of the Act. Other sections of the Act grant us specific, limited, additional authority in States with primacy, such as the right to conduct oversight inspections under section 517, but these rights and authorities do not extend to making VER determinations on non-Federal lands in those States.

Commenters who supported this alternative opposed the second alternative because it would effectively grant the Federal surface management agency veto authority over all VER determinations for section 522(e)(1) areas. They argued that nothing in SMCRA supports this alternative and that Congress would have included a specific concurrence requirement if it believed that one was needed, as it did with respect to State program approval in section 503(b), compatibility findings under section 522(e)(2), and joint agency approval under section 522(e)(3). One commenter noted that delays in decision-making as a result of the concurrence requirement could increase the Government's exposure to compensable takings claims. On balance, we find that these arguments, while not necessarily fatal, militate against adoption of the second alternative, the concurrence requirement.

These commenters also opposed the third and fourth alternatives as inconsistent with section 503(a) of SMCRA, because those alternatives would require us to make VER determinations on some or all non-Federal lands within section 522(e)(1) areas. In contrast, section 503(a) of the Act establishes a mechanism by which States may assume ''exclusive jurisdiction'' over surface coal mining and reclamation operations on non-Federal lands within their borders. As discussed at length in this portion of the preamble, we concur with this comment.

Opponents of the alternative that we are adopting argue that reserving VER determination authority for all lands listed in section 522(e)(1) to the Secretary would ensure national consistency and may result in more favorable consideration of arguments advanced by the Federal surface management agency with jurisdiction over the protected site. However, the commenters offered no empirical evidence to support this theory. Nor do we find it persuasive in view of SMCRA's emphasis on State primacy.

Some commenters argued that the alternative that we are adopting would provide insufficient protection for lands of national significance, such as units of the National Park Service. In support of this argument, the commenters cite various provisions of SMCRA's legislative history in which Congress expresses dissatisfaction with the quality of State regulation prior to the enactment of SMCRA.

We also find these arguments unpersuasive. Subchapter C of 30 CFR Chapter VII provides that State regulatory programs must be no less stringent than the Act and no less effective than the Federal regulations in meeting the requirements of the Act. We conduct oversight of the implementation of State regulatory programs to ensure that each State is properly administering and enforcing its approved program. The final rule requires that the regulatory authority use the Federal definition of VER whenever it is making determinations for non-Federal lands within section 522(e)(1) areas, so both we and the States will use the same decision criteria for all lands within these areas. Hence, there should be no significant difference in the degree of environmental protection regardless of whether we or the States make the VER determination.

The degree to which States failed to control the environmental impacts of surface coal mining operations or engaged in lax enforcement practices before the approval of permanent State regulatory programs under section 503 of SMCRA is not relevant because, before that time, States did not have to meet Federal standards. In addition, there was no back-up Federal enforcement authority, apart from the brief dual enforcement arrangement of the initial regulatory program under section 502 of SMCRA. Furthermore, States and local communities generally value national parks and the other areas protected under section 522(e)(1) of the Act. We have no reason to anticipate that States will be less than conscientious in administering the VER determination provisions of their approved programs.

Opponents of the alternative that we are adopting also express concern that allowing State regulatory authorities to make VER determinations for non-Federal inholdings within section 522(e)(1) areas, in combination with their authority under former 30 CFR 761.12(f) [now redesignated as 30 CFR 761.17(d)] to determine whether surface coal mining operations would adversely affect features (including publicly owned parks) protected under section 522(e)(3), would leave the protection of Federal lands in the hands of State agencies. According to the commenters, these agencies are likely the least knowledgeable of the proper management of those lands and least able to determine whether mining would cause an adverse effect. The commenters argue that the agencies that

manage the Federal lands are in the best position to determine whether surface coal mining operations will adversely affect those lands, and that only the Federal surface management agency has the expertise to evaluate whether surface coal mining operations will adversely affect the values for which the land was designated as a protected area. The commenters further state that responsibility for VER determinations for private inholdings should reside with the agency that Congress designated to manage Federal lands within the protected area. According to the commenters, Congress would not have extended categorical protection to the areas in section 522(e) only to leave the protection of those lands in the hands of State regulatory authorities.

We disagree with these comments. First, it is a matter of settled law that the regulatory authority has the responsibility for determining whether a proposed operation would adversely affect a publicly owned park or historic place under section 522(e)(3) of the Act. We adopted this provision as part of 30 CFR 761.12(f), now redesignated as 30 CFR 761.17(d), on September 14, 1983. The National Park Service expressed an interest in revisiting that version of 30 CFR 761.12(f) and the section 522(e)(3) adverse effect determination process. However, this rulemaking is not the proper vehicle to do so since we did not propose changes to, or request comment on, former 30 CFR 761.12(f).

Second, as already discussed, we disagree with the commenters' unsubstantiated assertions concerning the capability of State regulatory authorities and the integrity of their decision-making procedures. Under section 503 of SMCRA, we may not approve State programs unless they demonstrate possession of the technical expertise necessary to administer all facets of the regulatory program, including decisions relating to designation of lands as unsuitable for surface coal mining operations under section 522 of the Act. See 30 CFR Parts 731 and 732. In addition, State regulatory authorities deal with surface coal mining operations and their impacts on a daily basis, while most agencies with management responsibility for the features protected by section 522(e) rarely encounter such operations. Therefore, we believe that State regulatory authorities will likely have more technical expertise and greater familiarity with surface coal mining operations and their environmental impacts than the agency with jurisdiction over the protected feature.

Furthermore, the environmental impacts of any potential surface coal mining operations are not germane to determining whether a person has VER. Under the standards in the definition of VER that we are adopting today, this decision is a strictly legal determination in which the potential impacts of mining play no role. The regulatory authority must address the impacts of any proposed surface coal mining operations as part of the permitting process and during inspection and enforcement activities.

Third, the commenters err in stating that Congress could not have intended State regulatory authorities to determine whether a person has VER for non-Federal lands within section 522(e)(1) areas. Section 503(a) of SMCRA clearly provides a mechanism for a State to assume exclusive jurisdiction for the regulation of surface coal mining operations on non-Federal lands within its borders. Congress did not exclude either VER determinations for section 522(e)(1) areas or adverse effect determinations under section 522(e)(3) from the reach of section 503(a).

For the reasons discussed at length above, we reject the argument advanced by one commenter that section 102(a) of the Act obligates us to reserve the authority to make VER determinations for non-Federal inholdings within section 522(e)(1) areas. Section 102(a) provides that one of the purposes of the Act is ''to protect society and the environment from the adverse effects of surface coal mining operations.'' The commenter asserts that we must have authority over all lands within the boundaries of section 522(e)(1) areas to effectuate this purpose, since OSM authority is the only practical remedy for a wide range of violations of the Act. The commenter claims that reservation of this authority to the Secretary is consistent with the Supreme Court's description of SMCRA's regulatory structure as one of cooperative federalism:

> The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

Hodel v. *VSMRA,* 452 U.S. at 289 (1981).

We strongly disagree with these comments. For the reasons discussed above, we believe that States are fully capable of implementing the Act. Commenters provided no evidence to support their inference that States either cannot or will not protect section 522(e)(1) areas to the extent required under SMCRA. The alternative that we have selected is fully consistent with both section 102(a) of SMCRA and the Supreme Court's description of the Act in *Hodel* v. *VSMRA, supra*, as establishing a program of cooperative federalism in which the States enact and administer their own regulatory programs within limits established by federal minimum standards. *Id.* at 289. And the commenters fail to take notice of section 102(g) of the Act, which clearly indicates that Congress envisioned that States would develop and implement ''a program to achieve the purposes of the Act,'' (including the purpose in section 102(a)); section 101(f), in which Congress declares that ''the primary governmental responsibility'' for the regulation of surface coal mining operations ''should rest with the States;'' and section 503(a), in which Congress provides that States may assume ''exclusive jurisdiction'' over the regulation of surface coal mining operations on non-Federal lands.

To ensure that the interests of the Federal surface management agency and other surface owners are taken into consideration, we have added a provision to 30 CFR 761.16(b)(1) to require that each person seeking a VER determination first notify and request comments from the surface owner. Any comments received must be submitted as part of the request for a VER determination. In addition, under 30 CFR 761.16(d)(2), the agency responsible for making the VER determination must independently notify and provide opportunity to comment to both the surface owner and, when applicable, any agency with primary jurisdiction over the values or features that caused the land to come under the protection of 30 CFR 761.11. Under 30 CFR 761.16(e)(1), when making a decision on the request for a VER determination, the agency must consider all comments received.

We also disagree with the commenters' argument that the National Park Service Organic Act, 16 U.S.C. 1, prevents adoption of the alternative that we selected. The commenters represent this act as requiring the Secretary to ''promote and regulate'' units of the National Park System ''to conserve the scenery and the nature and historic objects and the wild life therein and * * * leave them unimpaired for the enjoyment of future generations.'' However, 16 U.S.C. 1 assigns this responsibility to ''the service thus established,'' not the Secretary. Thus, by its own terms, this provision of the Organic Act applies only to the National

Park Service. It does not extend to other programs and other bureaus within the Department. We believe that if Congress had intended the National Park Service to have concurrent decision-making authority for VER determinations for non-Federal lands within units of the National Park System, it would have amended either the Organic Act or SMCRA to provide the Service with this authority. We acknowledge that, as the commenters note, the courts have held that the Organic Act and related statutes provide the Park Service with broad rulemaking authority. *Wilkenson* v. *Dept. of Interior,* 634 F. Supp. 1265, 1278–79 (D. Colo. 1986). However, we do not agree with the commenters' argument that the reach of the Organic Act extends beyond the Park Service or that it governs rulemakings that interpret and implement other statutes for other bureaus within the Department.

We find nothing in the Organic Act that would allow us to override the VER exception provided in section 522(e) of SMCRA or the State primacy provisions of section 503(a) of the Act, which allow States to assume exclusive jurisdiction for the regulation of surface coal mining and reclamation operations on non-Federal lands within their borders. Paragraphs (e)(1) and (e)(3) of section 522 of SMCRA provide special protection for units of the National Park System, but there is no indication that Congress intended to grant either the Federal land management agency or us exclusive or concurrent authority for VER determinations for non-Federal inholdings within those units. Whenever Congress intended other Federal agencies to have a concurring role in decisions made under SMCRA, it specifically provided for this role in the Act. See, for example, section 501(a), which requires the concurrence of the Environmental Protection Agency with respect to certain rulemaking activities, and section 515(f), which requires the concurrence of the U.S. Army Corps of Engineers with respect to regulations governing coal mine waste impoundments. Furthermore, if Congress had intended to subordinate SMCRA to the provisions of the Organic Act, it would have included that statute in section 702(a) of SMCRA, which lists the Federal laws to which SMCRA is subordinate. And, as previously discussed, we find no basis for the assumption that States will be lax in protecting units of the National Park System.

Several commenters argue that the Property Clause of the U.S. Constitution provides us with the authority to reserve VER determination responsibilities on non-Federal lands within section 522(e)(1) areas to the Secretary. The Property Clause (article IV, section 3, clause 2) provides that ''Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States.'' We agree with the commenters that there is extensive case law supporting an expansive interpretation of the Property Clause as it relates to the ability of the Federal government to regulate activities on Federal lands. However, SMCRA is not a public lands statute and OSM is not a Federal land management agency. Therefore, we find no basis for reliance upon the Property Clause as authority for rulemaking under SMCRA. As previously discussed, in *Hodel* v. *VSMRA,* 452 U.S. at 275–283 (1981), and *Hodel* v. *Indiana,* 452 U.S. at 321–329 (1981), the Supreme Court upheld Congress' authority to enact SMCRA under the Commerce Clause.

Furthermore, our authority to regulate non-Federal lands under section 522(e)(1) is not at issue in this rulemaking. That authority is a matter of settled law under the two 1981 *Hodel* cases cited in the preceding paragraph. The issue is whether, under SMCRA, that authority, including the responsibility for VER determinations on non-Federal lands, is properly delegated to States with primacy. Therefore, the commenters' arguments concerning the meaning of the Property Clause are not helpful or relevant to this rulemaking.

For the reasons discussed above, we believe that the alternative that we have adopted in the final rule is the alternative that is most consistent with SMCRA's emphasis on State primacy for the regulation of surface coal mining operations on non-Federal lands. See sections 101(f), 102(g), and 503(a)) of the Act. As previously discussed, we believe that this alternative will provide an appropriate level of protection to these lands since, under 30 CFR 732.15(a) and 730.5, State regulatory programs must be no less effective than the Federal regulations in meeting the requirements of SMCRA. And, as discussed above and in Part XI of this preamble, we believe that the final rule provides for consistency in VER determinations for these lands by requiring use of the Federal definition of VER in all cases.

One commenter argued that section 102(m) of SMCRA obligates us to adopt an alternative that reserves to the Secretary the right to make VER determinations on non-Federal inholdings within section 522(e)(1) areas. The paragraph that the commenter cites provides that one of the purposes of the Act is to ''wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.'' The commenter noted that under *United States* v. *Vogler,* 859 F.2d 638, 641 (9th Cir. 1988), *cert. denied,* 488 U.S. 1006 (1989), those constitutional powers include the power to protect public lands from ''trespass and injury.'' As discussed above, we believe that States are fully capable of protecting the public interest to the extent required by SMCRA. And we believe that the alternative that we have adopted in the final rule is the alternative that is most consistent with SMCRA's emphasis on State primacy for the regulation of surface coal mining operations on non-Federal lands. See sections 101(f), 102(g), and 503(a)) of the Act. Therefore, we do not agree that section 102(m) of SMCRA requires adoption of the alternative favored by the commenter.

One commenter argued that the decisions in *PSMRL II, Round I,* No. 79–1144 (D.D.C. July 6, 1984), slip op. at 11–15, and *PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1566 (1985), compel adoption of an ''affected by'' standard. We disagree.

PSMRL II, Round I, supra, has no applicability here because the issue that was before the court concerned Federal lands. In deciding that case, the court struck down 30 CFR 740.11(a)(3) (1983) only to the extent that that rule did not apply to the Federal lands program to all Federal lands. Specifically, the court held that, with respect to the jurisdiction of the Federal lands program, the Secretary is ''powerless to limit'' the statutory definition of ''surface coal mining operations'' in section 701(28) and that, ''if surface mining activities take place on Federal lands, the Secretary is powerless to exclude them from the Federal lands program.'' *PSMRL II, Round I, supra,* at 14–15. The court rejected the Secretary's argument, as stated in the preamble to the 1983 rulemaking, that,

> because of the interaction of the State primacy provision, section 503 of the Act, with section 523 of the Act, the Federal lands program can be interpreted to exclude State or privately-owned surface overlying Federally-owned coal where the operation will not involve mining the Federally-owned coal and where there will be no disturbance of the Federally-owned estate.

48 FR 6921, February 16, 1983.

Nothing in the court's decision would compel extension of the Federal lands program to lands in which there is no

Federal property interest, *i.e.,* lands in which both the surface and mineral estates are entirely in non-Federal ownership. There is no indication that the court contemplated using the ''affected by'' test in section 701(28) to extend the Federal lands program to lands in which there is no Federal property interest. The court noted that ''[w]hen Congress discussed state administration of the Act, it virtually always referred to *non-federal lands.*'' *PSMRL II, Round I, supra,* at 14. Furthermore, when we repromulgated 30 CFR 740.11(a) in 1990 to address the judicial remand of the 1983 version of this rule in *PSMRL II, Round I, supra,* we rejected a commenter's argument that the court had explicitly endorsed an ''affected by'' test to determine the jurisdiction of the Federal lands program. In declining to adopt an ''affected by'' standard, we stated that:

> An ''affected by'' test would be very difficult to administer. A determination that the Federal interest would or would not be affected would have to be made on a case-by-case basis, and could be subject to different interpretations.

55 FR 94001, March 13, 1990.

In *PSMRL II, Round III–VER,* 22 Env't Rep. Cas. (BNA) at 1566 (1985), the other decision cited by the commenters as supporting adoption of an ''affected by'' standard, the court did not review the merits of the ''affected by'' standard suggested in oral argument by Government counsel. Hence, the court's mention of the Government's representation at oral argument concerning the applicability of an ''affected by'' standard is purely dictum. Furthermore, the ''affected by'' standard outlined in the Government's oral arguments as quoted in the court's decision refers to section 701(28)(B) of the Act, which specifies that ''all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site and for haulage'' are included within the definition of surface coal mining operations. Nothing in this definition differentiates between Federal and non-Federal lands or addresses which agency is responsible for regulating surface coal mining operations on those lands. Nor does it suggest use of an ''affected by'' standard to extend the scope of the Federal lands program to include non-Federal lands within section 522(e)(1) areas.

Therefore, we find no merit to the commenters' arguments in favor of an ''affected by'' standard. In addition, we do not believe that this standard is consistent with section 503(a) of SMCRA, which provides for exclusive State jurisdiction over the regulation of surface coal mining operations on non-Federal lands.

Under the final rules adopted today, we retain exclusive authority for making VER determinations for Federal lands within the boundaries of the areas listed in 30 CFR 761.11(a) and for Federal lands within any national forest [the lands listed in 30 CFR 761.11(b)]. The regulatory authority has sole responsibility for VER determinations for all non-Federal lands, regardless of whether we or the State are the regulatory authority. If a State has a regulatory program approved under section 503 of SMCRA, but does not have a Federal lands cooperative agreement pursuant to 30 CFR Part 745, we are responsible for making VER determinations under the State program counterparts to 30 CFR 761.11(c) through (g) for Federal lands. In States with a Federal lands cooperative agreement, the State regulatory authority is responsible for making VER determinations under the State program counterparts to 30 CFR 761.11(c) through (g) for Federal lands not listed in 30 CFR 761.11(a) or (b), unless the cooperative agreement specifies otherwise.

One commenter opposed any rule that would require that we make VER determinations for Federal lands on which the State is otherwise the regulatory authority under a cooperative agreement approved under 30 CFR Part 745 and section 523(c) of the Act. In the commenter's view, section 523(c) grants States with cooperative agreements exclusive authority to regulate surface coal mining and reclamation operations on Federal lands, except as specifically provided to the contrary in the Act. We disagree with the commenter's interpretation of the Act. While section 523(c) specifies certain functions that the Secretary may not delegate to a State, we find nothing in this section that expressly requires delegation of all other, unlisted functions. This interpretation forms the basis for the regulations governing cooperative agreements in 30 CFR part 745.

XI. Sections 740.11 and 761.14(a): Which VER Definition (State or Federal) Applies to Lands Listed in Section 522(e)(1) and (e)(2) of the Act?

As proposed, the final rule modifies 30 CFR 740.11 by revising paragraph (a) and adding paragraph (g) to specify that the Federal definition of VER will apply to all VER determinations for the lands listed in 30 CFR 761.11 (a) and (b), regardless of whether we or the State are responsible for making the determination. Application of the Federal definition will ensure that requests for VER determinations involving lands of national interest and importance, as listed in 30 CFR 761.11 (a) and (b) and section 522(e)(1) and (2) of the Act, are evaluated on the basis of the same criteria.

The final rules differ from the 1990 version of 30 CFR 740.11(a), which required use of the State program definition in place of the Federal definition. However, the new rules differ from the 1990 rules only with respect to the lands listed in 30 CFR 761.11 (a) and (b). We will continue to use the approved State program definition when making VER determinations for Federal lands under the State program counterparts to 30 CFR 761.11 (c) through (g). Similarly, in States that assume responsibility for VER determinations under a Federal lands cooperative agreement, the State regulatory authority will continue to use the State program definition when making VER determinations under the State program counterparts to 30 CFR 761.11 (c) through (g) for Federal lands not listed in 30 CFR 761.11 (a) or (b).

We received few comments on this issue, but those persons who did comment generally supported the approach adopted in the final rule. One commenter opposed the change, arguing that all existing State program VER definitions are illegal or improper and that we must require that States amend their programs to adopt an ownership and authority standard. As previously discussed, we do not agree that the Act mandates adoption of an ownership and authority standard for VER under section 522(e).

In addition, we disagree with the commenter's assertion that, because the court remanded the 1979 and 1983 Federal definitions of VER, State VER definitions based on those Federal definitions are illegal or improper. We are not aware of any ruling of this nature that is still in effect. The commenter may be referring to the initial *Belville* decision in Ohio, but, in September 1992, the court modified its order by vacating the portion of its ruling concerning the validity of State program definitions of VER in States other than Ohio.

XII. What Other Changes Are We Making in the Federal Lands Program Regulations in 30 CFR Parts 740 and 745?

We have revised 30 CFR 740.4(a)(5) and 30 CFR 745.13(p) to incorporate references to the provisions of 30 CFR part 761 that correspond to section 522(e) of SMCRA. In addition, to conform with the language of section

522(e) of the Act, which refers only to surface coal mining operations, we are replacing the term ''surface coal mining and reclamation operations'' in 30 CFR 740.4(a)(4) and 745.13(o) with ''surface coal mining operations.'' This change is consistent with the policy established in the preamble to a final rule published on April 5, 1989 (54 FR 13814). In that preamble, we specify that SMCRA does not require a permit or other regulatory authority approval as a prerequisite for conducting reclamation work alone. In other words, this change in the terminology of the final rule clarifies that the prohibitions and restrictions of 30 CFR 761.11 and section 522(e) do not apply to reclamation activities such as the restoration of abandoned mine lands and bond forfeiture sites.

Some commenters objected to this clarification, stating that reclamation work performed on abandoned mine lands or bond forfeiture sites must be done in accordance with plans approved by the abandoned mine land reclamation agency or the regulatory authority. We agree that reclamation work performed under a contract executed by the abandoned mine land reclamation agency under Title IV of the Act must adhere to contract plans and specifications. Similarly, we agree that any bond forfeiture reclamation activity conducted under 30 CFR 800.50 or its State counterpart must adhere to plans approved by the regulatory authority. However, neither the reclamation of abandoned mine lands nor the reclamation of bond forfeiture sites is a surface coal mining operation as 30 CFR 700.5 and section 701(28) of the Act define that term. Therefore, as discussed at 54 FR 13814–18 (April 5, 1989), there is no requirement for a permit for these reclamation activities. For similar reasons, there is no requirement that these reclamation activities comply with 30 CFR Part 761 or section 522(e) of the Act, which apply only to surface coal mining operations. Also, third parties that rely upon funds other than Title IV grants or bond forfeiture proceeds may perform reclamation work without any approval or involvement by the regulatory authority or the abandoned mine land reclamation agency. Reclamation activities of this nature are beyond the scope of SMCRA.

The commenters also sought clarification that this change would not exempt reclamation work on illegally mined sites from the supervision and approval of the regulatory authority. We agree that the regulatory authority must monitor reclamation work performed by or for the illegal miner in response to an enforcement action. Nothing in this rule alters that responsibility. However, for the reasons discussed in the preceding paragraph, other parties may reclaim the site without the approval or involvement of the regulatory authority.

XIII. Why Are We Removing the Definition of ''Surface Coal Mining Operations Which Exist on the Date of Enactment'' From 30 CFR 761.5?

For the reasons discussed in Part XVI of this preamble, we are revising 30 CFR 761.12 to clarify that the statutory exception for existing operations in section 522(e) of the Act applies to all surface coal mining operations in existence before the land comes under the protection of section 522(e) and 30 CFR 761.11. Under the previous rule, this exception applied only to operations in existence on the date of enactment of SMCRA. As a result of this change, the term ''surface coal mining operations which exist on the date of enactment'' no longer appears in the final rule or elsewhere in part 761. Therefore, we are revising 30 CFR 761.5 to delete the definition of this now-obsolete term.

One commenter opposed the deletion as contrary to the express language of the Act, based on the mistaken impression that we were eliminating the exception for existing operations in section 522(e) and merging it with the definition of VER. In reality, the final rule maintains separate exceptions for both VER and existing operations, as does the Act. Any operation that would qualify for the exception for existing operations under the Act or the previous rules would continue to qualify for this exception under the revised rules.

XIV. Why Are We Adding Definitions of ''We'' and ''You'' and Their Grammatical Forms to 30 CFR 761.5?

We are adding definitions of ''we'' and ''you'' and their grammatical forms because we have revised the other sections of part 761 to reflect plain language principles, one of which requires the use of ''we'' and ''you'' whenever practicable. ''We,'' ''us,'' and ''our'' refer to the Office of Surface Mining Reclamation and Enforcement. ''You'' and ''your'' refer to a person who claims or seeks to obtain an exception or waiver authorized by 30 CFR 761.11 and section 522(e) of the Act. In all other cases, we specifically identify the person or agency to whom we are referring.

XV. How Have We Revised 30 CFR 761.11, Which Is the Regulatory Counterpart to the Prohibitions and Limitations of Section 522(e) of the Act?

We have reorganized and revised this section to incorporate plain language principles, improve clarity, maintain consistency with revisions to other sections of 30 CFR Part 761, and add informational cross-references to 30 CFR 761.12 through 761.17 as appropriate. The provisions concerning the exception for existing operations, which originally appeared in the introductory language of this part and which we proposed to revise and recodify as 30 CFR 761.11(b), now appear in revised form in 30 CFR 761.12. (See part XVI of this preamble.) Except for the removal of former paragraph (h) (see the discussion in part XVII of this preamble), there are no other substantive changes from the 1983 version of this section.

XVI. Section 761.12: Which Operations Qualify for the Exception for Existing Operations?

The exception for existing operations formerly appeared in the introductory language of 30 CFR 761.11. The 1997 proposed rule would have revised and recodified the exception as 30 CFR 761.11(b). To better adhere to plain language principles, the final rule recodifies this exception as a separate section, 30 CFR 761.12, and clearly distinguishes between initial program operations and permanent program operations. The exception for existing operations subject to the permanent regulatory program appears as paragraph (a) of that section, while the exception for existing operations subject to the initial regulatory program appears in paragraph (b) of that section.

Paragraph (a) of the final rule provides that the prohibitions of 30 CFR 761.11 do not apply to surface coal mining operations for which a valid permanent regulatory program permit exists when the land comes under the protection of 30 CFR 761.11 or section 522(e) of the Act. The rule further clarifies that this exception applies only to lands within the permit area as it exists when the land comes under the protection of 30 CFR 761.11.

To address situations in existence before completion of the transition between the initial and permanent regulatory programs, paragraph (b) of the final rule further specifies that, with respect to operations subject to subchapter B of 30 CFR chapter VII, the exception applies to all lands upon which validly authorized surface coal mining operations exist when the land comes under the protection of section 522(e) of the Act or 30 CFR 761.11. This provision has no prospective applicability apart from one remaining active initial program mine on Indian lands.

As proposed, the exception for existing operations in the final rule incorporates paragraph (d)(1) of the 1983 definition of VER. This paragraph provided that validly authorized surface coal mining operations in existence on the date that land comes under the protection of section 522(e) after August 3, 1977, automatically have VER. For this reason and the reasons discussed below and in part VII.F. of this preamble, we believe that this former VER standard more properly resides with the exception for existing operations.

As stated in the preamble to the proposed rule, illegal (''wildcat'') operations and operations for which the permit has expired or been revoked do not qualify as existing operations under 30 CFR 761.12(b). Because no valid permit exists in those situations, there are no validly authorized surface coal mining operations. Similarly, the exception does not apply to sites for which the regulatory authority has terminated jurisdiction under 30 CFR 700.11(d)(1) or its State program counterpart.

On-site activity or physical disturbance of the protected land is not a prerequisite for the exception. This interpretation is consistent with the underlying language in section 522(e), which excludes surface coal mining operations ''which exist on the date of enactment of this Act'' from the prohibitions of that section. Nothing in the Act or the term ''exist'' requires on-site activity or physical disturbance as opposed to legal existence. Therefore, the final rule recognizes any validly authorized operation as eligible for the exception for existing operations regardless of whether the permittee has actually begun to conduct surface coal mining operations on the site.

The exception for existing operations does not extend to abandoned or reclaimed operations. As discussed in part VII.C.2. of this preamble, in enacting section 522(e), Congress intended to prohibit new surface coal mining operations on the lands listed in that section, with certain exceptions. We believe that both that intent and the express language of section 522(e) extends to the prohibition of new operations on lands upon which surface coal mining operations permanently ceased before the lands came under the protection of section 522(e). Any person seeking to reactivate an abandoned mine or facility or to remine an abandoned or reclaimed site must comply with the prohibitions and limitations of section 522(e) and 30 CFR 761.11 as a prerequisite for obtaining a permanent program permit. Allowing abandoned or reclaimed operations to qualify for the exception for existing operations would be inconsistent with both the purpose of section 522(e) and the accepted meaning of ''existing.''

The proposed rule would have limited the scope of the exception for existing operations to lands for which the permittee or operator had the right under State property law, as demonstrated in accordance with 30 CFR 778.15, to enter and conduct surface coal mining operations as of the date that the land in question came under the protection of 30 CFR 761.11 or section 522(e) of SMCRA. By limiting the exception for existing operations in this fashion, the proposed rule effectively required that the permittee seek and obtain a VER determination before initiating surface coal mining operations on any lands within the permit area for which no right of entry had been obtained before the land came under the protection of section 522(e).

After evaluating the comments received, we have decided not to include this provision in the final rule. In implementing other requirements of SMCRA, we consider lands within the permit area for which the permittee has not yet obtained right of entry to be distinct from other lands within the permit area only in one respect: the permittee may not disturb those lands before obtaining right of entry. After obtaining right of entry, the permittee may enter those lands and conduct surface coal mining operations to the extent authorized under the permit.

We anticipate that this change from the proposed rule will have little practical effect in terms of the actual right to mine. The final rule specifies that the exception for existing operations includes all lands covered by an approved permanent program permit at the time that the lands come under the protection of 30 CFR 761.11. However, nothing in SMCRA, its implementing regulations, or the permit authorizes the permittee to disturb lands within the permit area before obtaining proper right of entry. Therefore, if the permittee is unable to procure right of entry for the lands within the permit area covered by the exception for existing operations, there will be no surface coal mining operations on those lands.

The final rule that we are adopting today is consistent with paragraph (d)(1) of the 1983 VER definition, its preamble, and the rationale used by the courts in upholding the concept of ''continually created VER.'' In particular, the 1983 preamble states that paragraph (d)(1) of the 1983 definition was intended to prevent the disruption of mining or deprivation of the right to mine after the permittee made the substantial investments required to obtain a permit. By way of explanation, the preamble stated that to do otherwise would be totally inconsistent with the framework of protection that SMCRA provides to both permittees and citizens:

> Without the protection provided by this provision, it would be possible, for instance, for a person who objected to a mining operation to move a mobile home to the edge of the property adjoining a mine, and occupy it, thereby forcing the operator to cease all operations within 300 feet of this occupied dwelling. OSM does not believe that this is the intended result of section 522(e) of the Act. Congress provided the public ample opportunity to review and make objections to any proposed mining operation through the permitting process. The regulatory authority is required to seek and consider the views of the public [before] it issues or denies a permit. To allow any person the opportunity to take extraordinary means to disrupt mining or deprive the operator of a right to mine after the operator has made the substantial investments required to obtain a permit and begin operations is totally inconsistent with the framework of protection the Act gives to both operators and citizens.

48 FR 41315, September 14, 1983.

We relied upon the same rationale to develop the 1997 proposed rule and this final rule.

In upholding paragraph (d)(1) of the 1983 definition, the U.S. Court of Appeals for the District of Columbia Circuit relied primarily on language in the legislative history of section 522 indicating that Congress intended to allow the continuance of mines already in existence at the time that land is determined to be unsuitable for surface coal mining operations. The court held that this principle ''should apply equally to mines in existence as of August 3, 1977, or to mines subsequently started on lands which have permits approved for mining.'' *NWF* v. *Hodel*, 839 F.2d at 750 (1988). The court ruled that the operative principle in determining whether an operation is exempt from the section 522(e) prohibitions is whether it had been ''lawfully established'' before the land came under the protection of section 522(e). *Id.* at 750–51. Although the court did not fully explain the meaning of ''lawfully established,'' we believe that its characterization of industry arguments is significant because it ultimately ruled in favor of industry:

> Industry, supporting the district court, argues that * * * once a permit has been validly issued the permit area is insulated from subsequent unsuitability designations.

Id. at 750.

Furthermore, once a permit is issued, there is no legal impediment to initiating surface coal mining operations on the permit area, apart from any restrictions imposed as permit conditions.

Therefore, the final rule considers an operation to be lawfully established upon issuance of a permanent program permit. This approach is consistent with 30 CFR 774.13, which provides that the regulatory authority cannot summarily revise or revoke an approved permanent program permit. Therefore, when lands covered by an approved permanent program permit come under the protection of 30 CFR 761.11 and section 522(e) after permit issuance, the permittee has the right to continue to operate on those lands under the exception for existing operations unless the regulatory authority orders the permittee to revise the permit to remove those lands from the permit area in accordance with the procedures and criteria of 30 CFR 774.13. A person who believes that a permit has been improperly issued because a protected feature came into existence before rather than after permit issuance has the option of either filing a timely challenge to approval of the permit application or submitting a complaint to the regulatory authority in accordance with the State program counterpart to 30 CFR 842.12 or to us under 30 CFR 842.12. If the permit is ultimately found to be defective, the regulatory authority must require that the permittee revise the permit in accordance with 30 CFR 774.13.

With respect to initial program operations (operations subject to Subchapter B of 30 CFR Chapter VII), the exception for existing operations includes all lands covered by whatever permit existed when the land came under the protection of section 522(e) or 30 CFR 761.11. However, except for one operation on Indian lands, we and the State regulatory authorities have completed the repermitting of initial program operations as required by 30 CFR 773.11 and section 502(d) of the Act. All initial program surface coal mining and reclamation operations on non-Indian lands that remain subject to the initial regulatory program are now abandoned, reclaimed, or in the process of reclamation. Under 30 CFR 773.11(a), no further coal removal or additional disturbance of these sites for purposes of conducting surface coal mining operations is permissible unless the person first obtains a permanent program permit under Subchapter G of 30 CFR Title VII or its State program counterpart.

In addition, all States with the potential for coal production in the foreseeable future now have either a permanent State regulatory program approved under section 503 of SMCRA or a Federal regulatory program approved under section 504 of SMCRA. Therefore, we do not anticipate that there will be any new surface coal mining operations under the initial regulatory program. For all practical purposes, the rules that we are adopting today will be applied only to operations with permanent program permits.

Some commenters argued that by its very terms, the phrase ''existing operation'' applies only to mines for which at least some site preparation work has occurred. For the reasons discussed above, we do not agree.

Some commenters argued that the exception for existing operations should apply to all lands that the permittee contemplates mining as part of the operation. Under this rationale, the exception would not be restricted to lands under permit before the land comes under the protection of section 522(e) and 30 CFR 761.11. We believe that such an expansive interpretation of the exception for existing operations runs contrary to the purpose for which Congress enacted section 522(e). To foreclose the possibility of this interpretation, we have added language to 30 CFR 761.12(a) to clarify that the exception applies only to lands under permit at the time that the land comes under the protection of 30 CFR 761.11.

XVII. Why Are We Removing the Prohibitions in Former 30 CFR 761.11(h)?

As proposed, we are removing former 30 CFR 761.11(h), which provided that no coal exploration or surface coal mining operations would be licensed or permitted on Federal lands within the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, or National Recreation Areas unless specifically authorized by acts of Congress. We published this provision on September 14, 1983 (48 FR 41349), in response to numerous comments from persons concerned that mining or drilling would occur in national parks and other areas protected under section 522(e)(1) of the Act.

Industry challenged the rule on both procedural and substantive grounds. Upon review, the court remanded the rule to the Secretary because it found that he had failed to provide adequate notice and opportunity for comment under the Administrative Procedure Act, 5 U.S.C. 553. The court also noted that there appeared to be no rational basis for distinguishing between Federal and non-Federal lands in this context since section 522(e)(1) of the Act prohibits surface coal mining operations on any lands within the statutorily protected areas listed in 30 CFR 761.11(h). *See PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1565 (1985).

We subsequently suspended 30 CFR 761.11(h) to comply with the court's order. *See* 51 FR 41952, 41956, November 20, 1986.

On September 22, 1988, the Department of the Interior issued a policy statement explaining the actions that the Department would take to prevent surface coal mining operations on lands protected under section 522(e)(1) of the Act. The policy statement commits the Department, subject to appropriation, to use available authorities (including exchange, negotiated purchase and condemnation) to seek to acquire mining rights within the areas listed in section 522(e)(1) whenever a person attempts to exercise VER. Unlike 30 CFR 761.11(h), the policy applies to all lands within the areas listed in section 522(e)(1), not just to Federal lands.

We published this policy statement in the **Federal Register** on December 27, 1988 (53 FR 52384), in conjunction with a previous proposed rule concerning VER. The policy remains in effect even though we subsequently withdrew the proposed rule on July 21, 1989.

Contrary to the expectations of some commenters on our 1997 proposed rule, the policy statement will not, and is not intended to, provide protection equivalent to that afforded by former 30 CFR 761.11(h). As the court noted in its decision remanding paragraph (h), ''an absolute proscription on any mining, permitting, licensing or exploration within the 522(e)(1) protected areas might run directly contrary to the statute's language that such proscriptions are subject to VER.'' *PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1565 (1985). Furthermore, section 522(e) only applies to surface coal mining operations, which section 701(28) of the Act specifically defines as excluding coal exploration.

Therefore, we believe that it would be inappropriate to repromulgate the prohibitions in paragraph (h). The 1988 policy statement expresses the Secretary's intent to acquire privately held coal interests in areas of national significance to the extent financial or other resources are available to do so. Any further commitment would, in

most cases, exceed the Secretary's legal authority since most land acquisition actions are subject to congressional authorization and appropriation.

Some commenters questioned the utility of the policy since the Department's discretionary funds for land acquisition are extremely limited, there is little Federal land in the East available for exchange, and the Federal Land Policy and Management Act places severe constraints on the exchange of Federal coal for non-Federal coal across State lines. The commenters also noted that most Federal lands in the East are in the National Forest System, which is under the jurisdiction of the Department of Agriculture and thus not available to the Secretary for exchange purposes. We acknowledge these limitations. If adequate funds or suitable exchange lands are not available, nothing in the policy obligates the Secretary to acquire lands for which a person has demonstrated VER.

Other commenters argued that the policy should be extended to cover all lands protected under section 522(e), not just those areas listed in paragraph (e)(1). We understand the commenters' interest in protecting buffer zones for homes, schools, roads, and other features listed in paragraphs (e)(3) through (e)(5) of section 522 of the Act. However, the Secretary has neither the resources nor the authority to acquire these lands without specific congressional authorization or appropriation. Furthermore, in publishing the proposed rule, we did not seek comments on the policy or propose any changes to the policy. Therefore, both the policy and comments suggesting revision of the policy are outside the scope of this rulemaking.

XVIII. Why Did We Reorganize Former 30 CFR 761.12 as §§ 761.13 Through 761.17 and 762.14?

Former § 761.12 included a number of mostly unrelated provisions under the heading ''Procedures.'' Plain language principles encourage the use of multiple short sections with informative headings that address a single topic in preference to long, less focused sections with headings that convey relatively little information about their contents. We also determined that former 30 CFR 761.12(g), which addressed the eligibility of lands listed in section 522(e) for designation as unsuitable for surface coal mining operations under 30 CFR Parts 762, 764, and 769, would be better placed in 30 CFR Part 762, which contains the criteria for designating lands as unsuitable for mining pursuant to those parts of our regulations.

Therefore, we are reorganizing and recodifying former § 761.12 as shown in the following table:

Previous citation	New citation
761.12(a)	761.17(a)
761.12(b)(1)	761.17(b)
761.12(b)(2)	761.17(c)
761.12(c)	761.13
761.12(d)	761.14
761.12(e)	761.15
761.12(f)	761.17(d)
761.12(g)	762.14
761.12(h)	761.16(f)

In addition, we are consolidating all procedural requirements related to VER determinations into a new § 761.16 and expanding those requirements to cover all steps of the VER determination process. The portion of former 30 CFR 761.12(b)(2) that pertains to notification of the National Park Service and the U.S. Fish and Wildlife Service no longer appears as a separate requirement because the general notification requirements of new 30 CFR 761.16(d) subsume this provision.

As proposed, we are removing the portion of former 30 CFR 761.12(h) that provided for administrative appeals of existing operation determinations. The exception for existing operations in 30 CFR 761.12 does not require any affirmative action or decision on the part of either the permittee or the regulatory authority. As explained in Part XVI of this preamble, the exception for existing operations merely allows an already permitted operation to continue operating within the permit boundaries in existence at the time that the land comes under the protection of section 522(e) and 30 CFR 761.11. Hence, there is no action or decision to appeal.

XIX. Section 761.13: How Have We Revised the Procedural Requirements for Compatibility Findings for Surface Coal Mining Operations on Federal Lands in National Forests?

This new section revises and replaces former 30 CFR 761.12(c). No commenters opposed the changes that we proposed. Nor did any commenter suggest revisions to the proposed rule.

Paragraph (a) of the final rule provides that, if you intend to rely upon the compatibility exception in 30 CFR 761.11(b) to conduct surface coal mining operations on Federal lands in national forests, you must request that we obtain the Secretarial findings required by 30 CFR 761.11(b). This paragraph does not differ substantively from the corresponding sentence in the proposed rule.

Paragraph (b) of the final rule clarifies that you may submit a request for these findings before you prepare and submit an application for a permit or boundary revision. As we noted in the preamble to the proposed rule, our experience has shown that evaluation of the entire permit application is not essential to preparation of the requested findings. In addition, this clarification is consistent with 43 CFR 4.1391(b)(1), which provides for administrative review of compatibility findings that are made independently of a decision on a permit application.

If your request is part of a permit application, that application will usually include all the information that we and the U.S. Forest Service need to determine compatibility.

However, if you seek a compatibility finding before preparing and submitting a permit application, we will not have access to the information normally included in the application. Therefore, paragraph (b) of the final rule also specifies that, if you submit a request independently of a permit application, your request must include sufficiently comprehensive information about the proposed operation to enable the U.S. Forest Service and us to properly evaluate the request and prepare adequately documented determinations and findings.

To provide better guidance as to the meaning of this requirement, the final rule fleshes out the proposed rule, which required ''information about the nature and location of the proposed surface coal mining operations,'' by requiring that you submit a map of the proposed operation and an explanation of how the proposed operation would not damage the values listed in the definition of ''significant recreational, timber, economic, or other values incompatible with surface coal mining operations' in 30 CFR 761.5. (Under 30 CFR 761.11(b), one of the findings that the Secretary must make before the regulatory authority may approve a permit application is that there are no significant recreational, timber, economic, or other values that may be incompatible with the proposed surface coal mining operations.) Finally, paragraph (b) of the final rule specifies that we may request that you provide any additional information that we determine is needed to make the required findings. We believe that our authority to request this information is inherent in our responsibility to make the findings.

Paragraph (c) of the final rule provides that, when a proposed surface

coal mining operation or a proposed boundary revision for an existing surface coal mining operation includes Federal lands within a national forest, the regulatory authority may not issue the permit or approve the boundary revision before the Secretary makes the findings required by 30 CFR 761.11(b). This paragraph does not differ substantively from the corresponding sentence in the proposed rule. As proposed, the final rule clarifies that this provision applies to all types of permit applications that involve the addition of new acreage, including incidental boundary revisions.

XX. How Do 30 CFR 761.14 and 761.15, Which Concern Waivers for Buffer Zones for Public Roads and Occupied Dwellings, Differ From Former 30 CFR 761.12(d) and (e)?

Sections 761.14 and 761.15 establish procedures for obtaining a waiver from the prohibitions of 30 CFR 761.11(d) and (e) concerning public roads and occupied dwellings. We did not propose any substantive revisions to these rules, which previously appeared in 30 CFR 761.12(d) and (e). However, one commenter expressed a general concern that the proposed rule and its preamble did not clearly specify that the VER exception, the exception for existing operations, and the variance and waiver provisions of 30 CFR 761.11(c) through (e) operate independently of each other; *i.e.,* that a person who qualifies for one type of exception or waiver does not need to comply with the requirements for other types of exceptions or waivers. To address this concern, we have added a new paragraph (a) to 30 CFR 761.14 and 761.15 to clarify that a person need not obtain a waiver or variance under those sections if the VER exception or the exception for existing operations applies. Section 761.14(a)(3) also recognizes that, under the conditions specified in 30 CFR 761.11(d)(2), a person need not obtain a waiver or variance under 30 CFR 761.14(b) to use or construct an access or haul road that joins a public road. Similarly, 30 CFR 761.15(a)(3) recognizes that, consistent with 30 CFR 761.11(e)(2), a person need not obtain a waiver or variance under 30 CFR 761.15(b) to use or construct an access or haul road that joins a public road on the opposite side of the public road from an occupied dwelling.

There are no other substantive changes from the previous rules. We have made some organizational and editorial changes to more closely adhere to plain language principles and to reflect the addition of the term ''you'' to the definitions in 30 CFR 761.5.

XXI. Section 761.16: What Are the Submission Requirements for Requests for VER Determinations and How Will These Requests Be Processed?

We are adding this new section to codify submission and processing requirements for requests for VER determinations under section 522(e) of the Act. Apart from a few provisions transferred from former 30 CFR 761.12(b)(2) and (h), this section has no counterpart in the previous (1983) version of Part 761. In the proposed rule, this section appeared in somewhat different form as 30 CFR 761.13.

SMCRA does not contain procedural requirements for VER determinations under section 522(e), nor does it expressly require the development of regulations establishing such requirements. However, section 201(c)(2) of the Act provides sufficient authority for adoption of these regulations. This provision requires that we ''publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act.'' The regulations in 30 CFR 761.16 provide the procedural framework necessary to ensure that the prohibitions of 30 CFR 761.11 and section 522(e) of the Act are fully and properly implemented in the manner intended by Congress. These rules are intended to ensure that all affected persons receive equitable treatment and have adequate notice and opportunity to participate in the decision-making process, consistent with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and section 102(i) of SMCRA, which states that one of the purposes of SMCRA is to assure that appropriate procedures are provided for public participation. Many of the requirements in these regulations, especially those pertaining to notice and comment, also address section 102(b) of SMCRA, which states that one of the Act's purposes is to ''assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from [surface coal mining] operations.''

Most commenters either supported the addition of rules establishing VER determination procedures or did not oppose such rules in principle. However, some commenters took issue with individual aspects of the proposed rules. As a result of these comments, the final rule contains a number of substantive, editorial, and format changes from the proposed rule.

I. In What Major Ways Does the Final Rule Differ From the Proposed Rule?

1. Role of Federal Surface Management Agencies

If the coal interests have been severed from other property interests and the surface estate is in Federal ownership, proposed 30 CFR 761.13(b)(2) would have required a person requesting a VER determination for those lands to first obtain a title opinion or other official statement from the Federal surface management agency confirming that the requester has the property right to conduct the type of surface coal mining operations intended. This proposed requirement was intended to ensure that the requester and the Federal surface management agency reach agreement on the underlying property rights, or, if there is a dispute, that the parties obtain proper adjudication of the dispute without involving the agency responsible for processing VER determination requests.

Several commenters attacked this provision as effectively providing the Federal surface management agency with veto authority over the VER determination in violation of the principle of State primacy under SMCRA. They argued that nothing in section 522(e) or other provisions of SMCRA either requires or authorizes a decision-making role for the Federal surface management agency in the VER determination process. One commenter further noted that the proposed rule may be inconsistent with section 510(b)(6) of the Act, which does not necessarily require surface owner consent to a surface coal mining operation. Under that section of the Act, the permit applicant has the option of demonstrating the right to conduct surface coal mining operations either under the terms of the instrument of conveyance or under State law pertaining to interpretation of property conveyances.

We agree that the commenters' arguments have some validity. In addition, SMCRA may provide insufficient basis for the proposed rule's disparate treatment of Federal and non-Federal surface owners of lands protected under section 522(e). When presented with a very similar controversy involving 30 CFR 761.11(h) in the 1983 rules, the court noted that there appeared to be no rational basis for distinguishing between Federal and non-Federal lands in the context of section 522(e)(1) because Congress did not incorporate this distinction into that provision of the Act. *See PSMRL II, Round III—VER,* 22 Env't Rep. Cas. (BNA) at 1565 (1985). Therefore, we are

replacing proposed 30 CFR 761.13(b)(2)(vi) with two new paragraphs in 30 CFR 761.16. The new paragraphs apply to all situations in which the coal rights have been severed from the surface estate, not just to those situations in which the surface estate is in Federal ownership.

New paragraph (b)(2)(viii) of 30 CFR 761.16 provides that, if the coal interests have been severed from other property interests, the request for a VER determination must include documentation that the requester has notified and provided reasonable opportunity for the owners of all other property interests to comment on the validity of the rights claimed by the requester. New paragraph (b)(2)(ix) provides that the request must include copies of all comments received in response to this solicitation. Under the final rule, any person requesting a VER determination for Federal lands must seek and submit the views of the Federal surface management agency, but, unlike the proposed rule, the final rule does not require submission of a title opinion or other official statement confirming the property rights claimed by the requester. In other words, the final rule requires consideration of information provided by the Federal surface management agency, but, unlike the proposed rule, it does not provide that agency with a veto authority over the VER determination process.

Some commenters expressed a desire for rules that would be more protective of Federal lands than of other lands, based on the argument that the national interest in Federal lands justifies special treatment of those lands. We find nothing in section 522(e) to support this argument. Congress did not provide for greater protection of the Federal lands listed in that section relative to the non-Federal lands listed therein. We believe that the final rule protects all section 522(e) lands in an equitable manner.

The final rule provides ample notice and comment opportunity to all surface owners, including Federal surface management agencies. First, under 30 CFR 761.16(b)(1)(viii) and (ix), the person requesting the VER determination must seek comment from the surface owner and other persons with a property interest in the land; any comments received must be submitted as part of the request. Second, under 30 CFR 761.16(d)(2), upon finding that a request is administratively complete, the agency responsible for the VER determination must notify both the surface owner and, when applicable, any agency with primary jurisdiction over the feature or values causing the land to come under the protection of 30 CFR 761.11. Under 30 CFR 761.16(d)(3), the agency responsible for the VER determination must provide a 30-day comment period to all persons notified under 30 CFR 761.16(d)(2), with a minimum of another 30 days available upon request. And, under 30 CFR 761.16(e)(1), the agency responsible for the VER determination must evaluate the merits of all comments received and the information presented by the requester before making a decision. Finally, the surface owner or any other person with an interest in the land has the option of filing a quiet title action in the appropriate administrative or judicial forum at any time. Under 30 CFR 761.16(e)(3)(i), when such an action is filed before or during the comment period on a request for a VER determination, the agency making the VER determination must find that the requester has not demonstrated VER, pending a final decision in the litigation process.

One commenter argued that providing concurrence or veto authority to another Federal agency would expose the government to liability for both temporary or permanent takings claims under the Fifth Amendment to the Constitution. As discussed above, the final rule does not provide concurrence or veto authority to any other Federal agency, including the surface management agency. While we will continue to seek input from these agencies and consider all comments received, we will no longer suspend processing of a request for a VER determination solely because the surface management agency advises us that it does not concur with the requester's property rights claims. In reaching a decision on the request, we will evaluate the merits of all information in the record, including that supplied by the requester and the surface management agency.

2. Handling of Situations Involving Property Rights Disputes

In establishing right-of-entry requirements for permit applications for surface coal mining operations, section 507(b)(9) of SMCRA provides that ''nothing in this Act shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes.'' Similarly, in setting forth the findings that the regulatory authority must make before approving a permit application, section 510(b)(6)(C) of SMCRA provides that ''nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.''

In deference to these provisos, proposed 30 CFR 761.13(d)(2) would have required deferral of a decision on a request for a VER determination if the underlying property rights are in dispute. The preamble contained the following discussion of the meaning of the proposed rule:

> The deferral would remain in effect until the parties resolve the dispute in the proper venue, which is normally the State courts. To do otherwise would constitute *de facto* adjudication of the property rights dispute in favor of one of the parties, a result that would violate the prohibition on such adjudication in section 510(b)(6)(C) of SMCRA. In addition, deferral of a decision in situations involving property rights disputes is consistent with section 102(b) of SMCRA, which states that one of the Act's purposes is to ''assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from [surface coal mining] operations.''
>
> OSM does not interpret section 510(b)(6)(C) of SMCRA as requiring deferral of a decision if there is only a mere allegation of a property rights dispute. For example, if the parties to the alleged dispute are not diligently pursuing resolution of the disagreement in the proper venue, then, depending on the facts of the case, the agency processing the request for a VER determination might reasonably conclude that the lack of any serious attempt to resolve the dispute means that no *bona fide* dispute exists and, therefore, that no deferral is necessary.

62 FR 4851, January 31, 1997, col. 3.

One commenter argued that because sections 510(b)(6) and 507(b)(9) concern permitting requirements, their prohibitions on regulatory authority adjudication of property rights disputes are not applicable to VER determinations under section 522(e). We disagree. The sections of the Act that the commenter references specifically provide that ''nothing in this Act'' authorizes regulatory authorities to adjudicate property rights disputes. Clearly, Congress did not intend to limit the scope of the prohibition to sections 507 and 510 of the Act, as the commenter asserts. Furthermore, VER determinations are precursors to the permitting process and they may be made as part of the permitting process in situations in which the regulatory authority and the agency responsible for the VER determination are the same.

Some commenters supported the proposed rule and its preamble discussion. Others argued that, in view of Congress' expressed interest in section 102(b) in protecting the rights of surface owners, we should extend the deferral requirement to include all situations in which the surface owner or other parties disagree with the property rights claims made by the requester. For the reasons discussed later in this

section, we no longer believe that deferral is appropriate or necessary.

Many commenters opposed the proposed deferral requirement, arguing that deferring a decision is an abdication of our decision-making responsibilities under SMCRA. One commenter expressed concern that deferral would deprive persons of the right to a reasonably timely decision under the Administrative Procedure Act (APA). At 5 U.S.C. 555(b), the APA provides that ''[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.'' Some commenters argued that unreasonable delays in the decision-making process would expose the government to temporary or permanent takings claims.

Several commenters stated that property rights disputes do not relieve the Secretary or the regulatory authority of the duty to render a final decision on a matter before the agency. These commenters argue that administrative decisions on requests for VER determinations would not violate the statutory prohibition on adjudication of property rights disputes because an aggrieved party still has the opportunity to file a quiet title action in the appropriate forum even after a VER determination is made. As discussed in greater detail later in this section, the final rule requires that the agency make a decision on each request for a VER determination. That decision must be made on the merits of the information in the record unless the property rights are the subject of pending litigation in an appropriate legal forum. If there is pending litigation, we believe that the statutory prohibitions on adjudication of property rights disputes apply. Therefore, in those cases, the final rule at 30 CFR 761.16(e)(3)(i) requires that the agency find that the requester has not demonstrated VER. This decision will be subject to administrative and judicial review, and it will be made without prejudice, meaning that the request may be refiled once the property rights dispute is finally adjudicated.

Several commenters expressed concern that deferrals would deprive persons requesting a VER determination of the opportunity for administrative and judicial review. One commenter stated that the effect of a refusal to process a request for a VER determination is the same as a negative determination, with one important distinction: unlike a negative determination, a deferral or other cessation of processing means that there is no final agency action subject to judicial review. As discussed in greater detail later in this section, these comments have some merit and we have revised the rule accordingly. The final rule at 30 CFR 761.16(e) requires that the agency make a decision on each request for a VER determination that the agency receives. The requester will always have the opportunity to pursue administrative and judicial review of that decision.

One commenter argued that when a Federal surface management agency asserts a title defect, the only vehicle to evaluate the merits of property rights disputes is a decision on whether the requester has demonstrated VER. We do not agree. Any person with a valid legal interest has the right to file a timely quiet title action in a court of competent jurisdiction to resolve a property rights dispute with a Federal surface management agency, provided the statute of limitations has not expired. There is no statutory or case law requiring an administrative VER determination as a prerequisite for such action.

Other commenters argued that deferrals would violate the statutory prohibition on adjudication of property rights disputes. According to the commenters, a deferral is a *de facto* adjudication of the property rights dispute in favor of the surface owner because it effectively denies the requester the right to conduct surface coal mining operations. These commenters advocated revising the rule to require that the agency make an administrative decision on each request. They noted that any person with standing who disagrees with the agency's decision on the VER determination has the right to seek judicial review of the decision.

For reasons discussed in greater detail later in this section, the final rule at 30 CFR 761.16(e) requires that the agency make a decision on each request for a VER determination that the agency receives. We are not adopting the proposed rule that would have authorized deferral of a decision under some circumstances. However, we do not agree with the commenters that a deferral would be a *de facto* adjudication of the property rights dispute in favor of the surface owner. Under the proposed rule, the agency would have had to make a decision on the request for a VER determination once the property rights dispute was properly adjudicated or ceased to exist. Therefore, a deferral would only temporarily delay a decision on whether the requester has demonstrated the property right to conduct surface coal mining operations.

One commenter stated that we should revise the proposed rule to authorize the deferral, or dismissal without prejudice, of a request for a VER determination only for situations in which the property rights are currently the subject of pending litigation. The commenter argued that section 507(b)(9) of the Act implies that this is the only circumstance under which Congress did not envision that we or the regulatory authority would make a decision purely on the basis of a *prima facie* demonstration of property rights by the requester. As discussed in greater detail later in this section, we concur that section 507(b)(9) may reasonably be read in this manner. For this and other reasons, final 30 CFR 761.16(e) provides that, unless the underlying property rights are in litigation, the agency responsible for the VER determination must make that determination based on the merits of the information in the record. If the property rights are in litigation, final 30 CFR 761.16(e)(3)(i) requires that the agency find that the requester has not demonstrated VER. The final rule specifies that this decision must be made without prejudice, as the commenter suggested.

One commenter expressed concern that, under the proposed rule, persons with no legal standing could allege a property rights dispute and thus preclude a decision on the request for a VER determination. The commenter urged that, at a minimum, we incorporate the preamble restrictions on the meaning of the term ''property rights disputes'' into the rule itself. As discussed below, we have revised the final rule to address the commenter's concerns.

Most commenters opposing the proposed rule and its deferral requirement cited two Federal court decisions from the Eastern District of Kentucky, *Akers* v. *Baldwin,* No. 84–88 (February 28, 1985) and *Akers* v. *Bradley,* No. 84–88 (June 1988) as supporting their position. Both decisions concern the same case, which dealt with the issue of what action the regulatory authority could and should take on a permit application while a property rights dispute is pending resolution in State court. In its opinion, the court included the following discussion of the meaning of the section 510(b)(6)(C) prohibition on regulatory authority adjudication of property rights disputes:

> The court finds itself simply unable to accept the arguments of the state defendants and intervening defendants that Congress did not intend that the state agency regulating surface mining not be required to make a determination whether the permit

application reflects a *prima facie* right under state law to engage in surface mining.

Such argument flies in the face of the plain and unambiguous language of the statute and also its context and history. Thus, 30 U.S.C. § 1260(b)(6) [section 510(b)(6) of SMCRA] requires the mining company applicant for a permit to demonstrate in one of three ways that it has the right to surface mine. This may be done by furnishing the written consent of the surface owner, a conveyance expressly granting the right to surface mine, or a deed which when considered with applicable state law will reflect such right.

The state and intervening defendants argue that for the state agency to construe a deed in the light of state law is to engage in the resolution of a property dispute in violation of the language of the federal statute. This construction is not borne out by the legislative history.

* * * * *

Proper principles of statutory construction require the court to construe the statute as a whole giving effect to all of its language. [Citation omitted.] The only construction of 30 U.S.C. 1260(b)(6) which meets this criterion is that * * * Congress intended that the state regulatory authority reviewing the permit application administratively ascertain that a *prima facie* showing of the right to surface mine under state law has been properly documented by the applicant. *To this extent, the agency is required to make a legal determination.* This is subject, of course, to the right of the parties to resort to the courts for a final determination, which the state agency must then respect.

The court concludes that the language so heavily relied upon by the state and intervening defendants appearing at the end of § 1260(b)(6)(C)—

''Provided, That nothing in this [Act] shall be construed to authorize the regulatory authority to adjudicate property rights disputes''—means only that the regulatory agency would not have power to determine whether any given conveyance had been obtained by fraud, whether the consent obtained was signed by the proper heirs to a particular tract of land, whether there was a boundary line or other dispute concerning the realty's description, and other such individualized matters.

Akers v. *Baldwin*, C.A. No. 84–88 (E.D. Ky, Feb. 28, 1985), slip op. at 9–12, emphasis added.

The court noted that, under SMCRA, the regulatory authority has no administrative procedures for ruling on boundary line or fraud claims, on who is the proper heir to a particular tract of real estate, or other individualized disputes of similar nature. The court further stated its belief that the regulatory authority could not prohibit permit issuance on the basis of disputes of this nature. According to the court, construing the Act in this manner ''could prevent issuance of a permit even where a deed expressly granted the right to surface mine,'' a result which the court found to be inconsistent with Congressional intent. *Akers* v. *Baldwin*, *supra*, at 15.

In a June 20, 1988 decision finally disposing of this case, now entitled *Akers* v. *Bradley*, the court reiterated its conclusion in *Akers* v. *Baldwin*, *supra*, that ''[30] U.S.C. § 1260(b)(6) [section 510(b)(6) of SMCRA] and the legislative history reflect a congressional intent that the regulatory authority reviewing the permit application make an administrative determination that the language of the severance instrument is construed under state law to authorize surface mining.'' The court also rejected plaintiffs' argument that the regulatory authority must withhold or suspend the permit if the agency receives an objection disputing the applicant's right to mine coal by surface methods: ''The court finds no clear indication that Congress intended the permit process to be suspended in this circumstance * * *.'' *Akers* v. *Bradley*, unpaginated slip op.

After considering the *Akers* court's analysis of the meaning of the statutory prohibition on adjudication of property rights, commenters' arguments concerning the deferral provisions of the proposed rule, and the language of the Act, we have decided against adoption of proposed 30 CFR 761.13(d)(2)(ii), which would have required deferral of a decision on a request for a VER determination whenever the underlying property rights are in dispute. Our decision not to proceed with the approach in the proposed rule also receives support from *Helmick* v. *United States*, No. 95–0115 (N.D. W.Va. 1997), in which the court ordered us to make a decision on a VER determination request even though the surface and mineral owners disagreed about the proper interpretation of the deeds for the property.

By requiring that the agency make an appealable decision on every request, the final rule is consistent with the public policy interest in expeditious decision-making. And, by requiring that the agency find that the requester has not demonstrated VER if the property rights are the subject of pending litigation, the final rule properly balances that public policy interest with the need to protect the interests of surface landowners and other persons with a legal interest in the property, as directed by section 102(b) of SMCRA. In addition, the final rule is consistent with the Interior Board of Land Appeals' interpretation of section 510(b)(6)(C) of SMCRA in *Marion A. Taylor,* 125 IBLA 271, 277 (February 19, 1993), as discussed later in this portion of the preamble.

The final rule that we are adopting today requires that the agency make a decision on every request for a VER determination that it receives. Under 30 CFR 761.16(e)(3)(i), the agency must determine that the requester has not demonstrated VER whenever the property rights claimed by the requester are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. That determination must be subject to administrative and judicial review and it must be made without prejudice, meaning that the requester may refile the request once the property rights dispute is finally adjudicated. In all other cases involving property rights disagreements, the final rule, at 30 CFR 761.16(e)(3)(ii), requires that the agency evaluate the merits of the information in the record, including all comments received, and determine whether the requester has demonstrated that the requisite property rights exist in accordance with paragraph (a), (c)(1), or (c)(2) of the definition of VER. In the absence of pending litigation, the agency may not defer a decision on the merits of the request merely because the surface owner, the surface management agency, or other persons oppose the request or disagree with the validity of the property rights claimed by the requester.

We believe that the final rule reflects good administrative practice by reducing the lengthy delays that sometimes result from deferring decisions until property rights disagreements are fully resolved. The rule is responsive to those comments arguing for a more expedited, understandable, and predictable decision-making process in situations that involve property rights disagreements. The rule also is consistent with commenters' desire for decisions that are subject to administrative and judicial review. And it provides ample opportunity for persons who disagree with the requester's property rights claims to initiate legal action contesting those claims and thus activate the provision of the rule that requires the agency to find that the requester has not demonstrated VER, pending final adjudication of the dispute.

We believe that 30 CFR 761.16(e)(3)(i), which requires that the agency determine that the requester has not demonstrated VER whenever the property rights claimed by the requester are the subject of pending litigation, is consistent with section 102(b) of SMCRA. That section states that one of the Act's purposes is to ''assure that the rights of surface landowners and other

persons with a legal interest in the land or appurtenances thereto are fully protected from [surface coal mining] operations.'' Section 102(m), which states that another purpose of SMCRA is ''protection of the public interest,'' provides further support for this rule.

The final rule also is consistent with the court's assertion in the *Akers* decision that the regulatory authority should not issue mining permits prior to the conclusion of litigation concerning the interpretation of property rights conveyances for lands within those permit applications. In reaching this decision, the court found that:

> [T]he public interest dictates that the physical integrity of the surface lands be preserved until the constitutionality of the statute discussed herein [relating to broad form deeds] has been finally determined. The mining companies can always do their mining after the statute is declared unconstitutional, if such is the result. The lands, once strip mined, cannot be restored to their pristine state.

Akers v. *Baldwin*, No. 84–88 (E.D. Ky. 1985), slip op. at 14–15.

We believe that a similar rationale should apply to VER determinations under section 522(e), since these determinations are precursors to permitting actions, and may be made as part of the permitting process.

In addition, the final rule is consistent with the Interior Board of Land Appeals' interpretation of section 510(b)(6)(C) of SMCRA in *Marion A. Taylor*, 125 IBLA 271, 277 (February 19, 1993). In that case, the Board held that, if the regulatory authority receives notice of a legal dispute concerning the validity of property rights, but nonetheless allows the applicant or permittee to conduct surface coal mining operations on the disputed area, the regulatory authority has effectively adjudicated the property rights dispute in favor of the applicant or permittee in violation of section 510(b)(6)(C) of the Act. The Board found that the existence of a legitimate ongoing legal dispute means that the permit applicant was unable to demonstrate—and the regulatory authority was unable to find—that the applicant had the legal right to mine the coal by the method intended. VER determinations are precursors to permitting actions, and may be made as part of the permitting process. Therefore, the Board's rationale also would apply to VER determinations in situations involving property rights disputes that are pending resolution in a court of competent jurisdiction or other appropriate legal venue.

However, we do not interpret the proviso in section 510(b)(6)(C) of SMCRA as applying to situations in which there is only a mere allegation of a property rights dispute. As stated in the preamble to the proposed rule, if the parties are not diligently pursuing resolution of their disagreement in the proper administrative or judicial venue, then the agency processing the request for a VER determination may reasonably conclude that the lack of any serious attempt to resolve the disagreement in the appropriate legal venue means that no *bona fide* dispute exists. We believe that the threshold that 30 CFR 761.16(e)(3)(i) establishes for property rights disputes is a reasonable approach that will comply with the requirements of the Act while avoiding the potential disruption of the permitting process and mining industry that could result from a lower threshold that countenances unsupported or frivolous allegations. This threshold also should resolve a commenter's concern that, under the proposed rule, persons with no legal standing could allege a property rights dispute and thus preclude a decision on the request for a VER determination.

Further, as one commenter noted, applying the statutory prohibition on adjudication of property rights disputes only to those disputes pending resolution in the appropriate legal venue is consistent with section 507(b)(9) of the Act. This section, which, like section 510(b)(6)(C), contains a prohibition on regulatory authority adjudication of property title disputes, provides that a permit applicant must identify whether the claimed right of entry is the subject of pending court litigation. Although not necessarily conclusive, this provision does suggest that Congress did not consider a property rights dispute to be *bona fide* in the absence of litigation.

Finally, in *Akers* v. *Bradley*, *supra*, the court held that there is no indication that Congress intended section 510(b)(6)(C), the other provision of SMCRA that contains a prohibition on adjudication of property rights disputes, to be interpreted as requiring that the regulatory authority withhold or suspend the permit whenever the agency receives an objection disputing the applicant's right to mine coal by surface methods.

Some commenters argued that a mere allegation of a property rights dispute should suffice to invoke the prohibition on adjudication of property rights disputes in section 510(b)(6)(C) of the Act because many persons would likely become aware of a potential dispute only upon receipt of the notice required by the rule. We recognize that the situation posited by the commenters is likely to occur. However, we believe that the final rule provides persons with legitimate property rights concerns ample opportunity to initiate the appropriate legal or administrative action during the comment period on the VER determination request.

For clarity, we have revised the public notice content requirements in 30 CFR 761.16(d)(1) by adding a new paragraph (iv) to require that the notice include a statement specifying that the agency will not make a decision on the merits of the request if, by the close of the comment period on the request, a person with a legal interest in the property initiates appropriate legal action to resolve the property rights dispute in the proper venue. But even if a person is unable to take legal action during this time, the property rights adjudication prohibition of section 510(b)(6)(C) means that subsequent initiation of litigation to resolve the property rights dispute can prevent regulatory authority approval of any permit application that might follow the VER determination. See *Marion A. Taylor*, 125 IBLA 271 (February 19, 1993).

One commenter argued that an agency determination that a person has VER despite the presence of comments in the record that disagree with the requester's property rights claims would expose the agency to takings claims on the basis that the decision authorized physical intrusion. According to the commenter, it would constitute ''an official blessing of an improper usurpation of landowner and homeowner rights to uninterrupted possession and enjoyment of property.'' We are not aware of any case law supporting these assertions.

3. Action on Incomplete Requests

The proposed rule did not specify what action the agency responsible for the VER determination could or should take if the person requesting the VER determination does not respond to an agency request for additional information. Final 30 CFR 761.16(c)(4) and (e)(4) state that if you do not provide the necessary additional information in a timely fashion, the agency must issue a determination that you have not demonstrated VER.

The rules also specify that the agency must make these determinations without prejudice, meaning that you may refile the request at a later time if desired.

We are adding these provisions to the final rule in response to several comments urging us to streamline the decision-making process to minimize delays. One commenter requested that the final rules be revised to ''avoid the inefficient and unfair delays attendant to the agency's historic procedural

posturing to avoid disposition of issues critical to private property rights.'' The commenter stated that prompt issuance of final decisions also would reduce the agency's takings exposure and better comport with 5 U.S.C. 555(b), which provides that ''[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.''

We do not agree that the commenter has accurately characterized the agency's previous actions concerning VER determinations. However, we agree that prompt decisions are desirable. Accordingly, we are adding 30 CFR 761.16(c)(4) and (e)(4) to avoid decision-making delays resulting from incomplete submissions or failure to respond to agency requests for additional information. Under those rules, when a person does not supply the information requested by the agency under 30 CFR 761.16(b) or (e)(1) within the time specified, the agency must issue a determination that the person has not demonstrated VER. A person who receives this type of VER determination has the right to seek administrative and judicial review of the determination. In addition, the final rules specify that the agency must make these determinations without prejudice, meaning that the request may be resubmitted at any time.

We anticipate that this provision of the final rule will eliminate the lengthy delays in decision-making that sometimes have occurred in the past as a result of incomplete submissions. In addition, the final rule is consistent with *Helmick* v. *United States*, No. 95–0115 (N.D. W.Va. 1997), in which the court ordered us to issue a VER determination even though the requester had not supplied all requested information.

Whenever an agency issues a decision under 30 CFR 761.16(c)(4) or (e)(4), it will retain the materials submitted with the request. Those materials will become part of the administrative record for the decision. If the requester subsequently desires a new determination, the agency may, at its discretion, either require complete resubmission of the request or allow the requester to submit only the new materials together with a request for reconsideration of the previous determination.

4. Administrative Completeness Reviews.

When a person submits a request for a VER determination, the proposed rule would have required the agency responsible for the VER determination to initiate notice and comment procedures without first reviewing the request to determine whether it contained all components required under 30 CFR 761.13(b). We believe that this approach represents an inefficient use of resources on the part of both the agency and the requester because it could result in premature notice and comment.

Therefore, the final rule includes a new 30 CFR 761.16(c), which provides that, upon receipt of a request for a VER determination, the agency must conduct an initial review to determine whether the request includes all applicable components of the submission requirements of 30 CFR 761.16(b). This review addresses only the administrative completeness of the request, not its legal or technical adequacy.

Under the final rule, the agency must proceed to implement the notice and comment requirements of 30 CFR 761.16(d) if the request includes all necessary components. However, if the request does not include all necessary components, the rule requires that the agency notify the requester and establish a reasonable time for submission of the missing information. If the requester does not submit this information within the specified time or any subsequent extensions, the final rule requires that the agency issue a determination that the requester has not demonstrated VER. Under the final rule, the agency must issue this determination without prejudice, meaning that the requester may refile the request at any time after obtaining the missing information.

We believe that the addition of this step will streamline the decision-making process, as desired by several commenters. It also will promote more efficient use of resources by avoiding the expenses and delays associated with providing notice and comment on an incomplete request. And it is consistent with the permit application review requirements of 30 CFR 773.13(a), which do not require initiation of notice and comment procedures until the regulatory authority determines that the application is administratively complete. Since VER determinations are precursors to the permitting process, and may be made as part of that process, we believe that the use of similar review procedures is appropriate.

5. Notification Requirements for Lands Listed in 30 CFR 761.11(a)

As published on September 14, 1983, 30 CFR 761.12(b)(2) included a requirement that the agency responsible for the VER determination notify the National Park Service or the U.S. Fish and Wildlife Service of any request for a VER determination for lands within the boundaries of an area over which one of those agencies has jurisdiction. Proposed 30 CFR 761.13(c)(4) would have applied this requirement to all areas protected under section 522(e)(1) of SMCRA and 30 CFR 761.11(a), not just to those areas under the jurisdiction of the National Park Service or the Fish and Wildlife Service.

However, upon reconsideration, we find no basis for disparate treatment of section 522(e)(1) lands relative to other lands protected under section 522(e). In enacting section 522(e), Congress did not establish a hierarchy of protection or make any other substantive distinction among the lands protected under that section. Furthermore, this provision is largely duplicative of proposed 30 CFR 761.13(c)(1)(iv) and (2), which would have required that the agency provide notice and reasonable opportunity to comment to the owner of the structure or feature causing the land to come under the protection of 30 CFR 761.11.

Therefore, we are not adopting proposed 30 CFR 761.13(c)(4). Instead, we are modifying the notice and comment provisions of proposed 30 CFR 761.13(c)(1)(iv) and (2) to incorporate the minimum comment period requirements of proposed 30 CFR 761.13(c)(4) and the 1983 version of 30 CFR 761.12(b)(2). In the final rule, those requirements appear at 30 CFR 761.16(d)(1)(vi) and (vii), (2)(ii), and (3), which provide for a minimum initial comment period of 30 days from the date that the agency with primary jurisdiction over the values or feature causing the land to come under the protection of 30 CFR 761.11 receives the notice, with another 30 days automatically available upon request. We have also added a proviso to 30 CFR 761.16(d)(3) stating that the agency responsible for the VER determination may grant additional time for good cause upon request. The latter provision is intended to cover extenuating and unusual circumstances such as situations in which critical agency personnel or one or more persons listed in 30 CFR 761.16(d)(2) are legitimately absent or unavailable during the comment period. Another example would be a situation in which a surface owner or surface management agency is unable to complete the necessary legal research within 60 days despite reasonably diligent efforts to do so.

B. Paragraph (a): To Which Agency Must You Submit a Request for a VER Determination?

Final 30 CFR 761.16(a) provides that we will make all VER determinations for Federal lands within the areas listed in 30 CFR 761.11 (a) and (b). Those areas correspond to the areas listed in paragraphs (e)(1) and (e)(2) of section 522 of SMCRA. VER determinations for all other lands, including non-Federal lands within the areas listed in 30 CFR 761.11(a), are the responsibility of the regulatory authority. The final rule thus reflects the revised Federal lands regulations at 30 CFR 740.4(a)(4) and 745.13(o).

Consistent with revised 30 CFR 740.11(g), the final rule also specifies that the definition of VER in 30 CFR 761.5 applies to all VER determinations for lands protected under 30 CFR 761.11 (a) or (b), including non-Federal lands within the areas listed in 30 CFR 761.11(a), regardless of whether we or the State make the determination. For all other lands, both we and State regulatory authorities must use the definition of VER in the appropriate approved regulatory program. Within primacy States without a cooperative agreement under 30 CFR part 745, and in any State with a cooperative agreement that does not delegate VER determination responsibility to the State, we will apply the approved State program definition of VER when making VER determinations for Federal lands outside the areas listed in 30 CFR 761.11 (a) and (b), as required by 30 CFR 740.11(a).

In keeping with plain language principles and a request from a commenter, final 30 CFR 761.16(a) presents these requirements in tabular form:

Paragraph of § 761.11 that provides protection	Protected feature	Type of land to which request pertains	Agency responsible for determination	Applicable definition of valid existing rights
(a)	National parks, wildlife refuges, etc.	Federal	OSM	Federal.[1]
(a)	National parks, wildlife refuges, etc.	Non-Federal	Regulatory authority	Federal.[1]
(b)	Federal lands in national forests[3].	Federal	OSM	Federal.[1]
(c)	Public parks and historic places.	Does not matter	Regulatory authority	Regulatory program.[2]
(d)	Public roads	Does not matter	Regulatory authority	Regulatory program.[2]
(e)	Occupied dwellings	Does not matter	Regulatory authority	Regulatory program.[2]
(f)	Schools, churches, parks, etc.	Does not matter	Regulatory authority	Regulatory program.[2]
(g)	Cemeteries	Does not matter	Regulatory authority	Regulatory program.[2]

[1] Definition in 30 CFR 761.5.
[2] Definition in applicable State or Federal regulatory program in 30 CFR Chapter VII, Subchapter T.
[3] Neither section 522(e) of SMCRA nor 30 CFR 761.11 provides special protection for non-Federal lands within national forests. Therefore, this table does not include a category for those lands.

See Parts X and XI of this preamble for a discussion of the comments received on this aspect of the proposed rule.

C. May a Request for a VER Determination Be Submitted Separately From a Permit Application?

Paragraph (b) of 30 CFR 761.16 expressly states that you may submit a request for a VER determination before preparing and submitting a permit application, unless the applicable regulatory program provides otherwise. The final rule thus codifies existing policy, as stated in the preambles to the 1983 final rule (see 48 FR 41322, September 14, 1983) and the 1991 proposed rule (see 56 FR 33161, July 18, 1991), and removes language in conflict with that policy. It also is consistent with 43 CFR 4.1391(b)(1), which provides for administrative review of VER determinations that are made independently of a decision on a permit application.

Surface coal mining operations may not always be technically feasible, legally permissible, or economically viable in the absence of VER. Therefore, a requirement that requests for VER determinations be accompanied by a permit application may be unreasonably burdensome in that it could result in significant permit application preparation expenditures that would be futile if the agency ultimately determines that the requester does not have VER and consequently is ineligible to receive a permit. This is especially true of Federal lands within the areas specified in 30 CFR 761.11 (a) and (b), for which we have sole authority to process requests for VER determinations even when we are not the regulatory authority responsible for reviewing permit applications.

However, our adoption of this rule does not prevent States from requiring that requests for VER determinations be accompanied by a permit application. Sections 503 and 505 of SMCRA afford States considerable discretionary authority to adopt requirements that either have no Federal counterparts or are more stringent than their Federal counterparts in achieving the requirements and purposes of the Act. Furthermore, before reaching a decision on a request for a VER determination, we reserve the right to request information normally submitted as part of a permit application. We will make this request only if we determine, on a case-specific basis, that we need that information to properly evaluate the request for a VER determination.

D. Paragraph (b): What Information Must You Include in a Request for a VER Determination?

Paragraph (b) of 30 CFR 761.16 contains submission and content requirements for requests for VER determinations. As discussed in the preamble to the proposed rule, we derived these requirements primarily from provisions that we proposed as 30 CFR 761.12(a)(1) on July 18, 1991, which, in turn, are similar to guidelines in the preamble to the 1983 definition of VER. See 48 FR 41314, September 14, 1983. However, because the definition of VER that we are adopting today does not contain a takings standard, the final rule does not include items from the 1983 and 1991 documents that pertain only to that standard.

Paragraph (b)(1): Submission Requirements for Property Rights Demonstration

All requests for VER determinations for surface coal mining operations other than roads must include the information

required by 30 CFR 761.16(b)(1). The agency responsible for making the VER determination will use this information to evaluate whether you have met the property rights demonstration requirement of paragraph (a) of the definition of VER in 30 CFR 761.5.

Paragraphs (b)(1) (i) through (vi) of the final rule are substantively identical to paragraphs (b)(2) (i) through (v) and (vii) of 30 CFR 761.13 in the proposed rule. These paragraphs require a legal description of the land; complete documentation of the character and extent of the requester's current interests in the surface and mineral estates in question; a complete chain of title and discussion of any title instrument provisions concerning mining or mining-related surface disturbances or facilities; a description of the nature and ownership of all property rights for the surface or mineral estates in question as of the date that the land came under the protection of 30 CFR 761.11; and a description of the type and extent of surface coal mining operations planned, including the intended method of mining and any mining-related surface facilities, and an explanation of how the planned operations are consistent with State property law.

Some commenters opposed these information requirements as excessive, overly burdensome, and improper. They argue that the rule should require no more documentation of property rights than the right-of-entry information that must be submitted under 30 CFR 778.15 as part of a permit application. We do not agree. In enacting the prohibitions of section 522(e) of the Act, Congress clearly wished to minimize surface coal mining operations on the lands listed in that section. See the discussion in Part VII.C. of this preamble. Therefore, we and State regulatory authorities have an obligation to ensure that a person seeking to conduct surface coal mining operations on those lands provides complete documentation of the requisite property rights. It has been our experience that a simple *description* of the permit applicant's basis for claiming the right to enter and begin surface coal mining operations, which is all that 30 CFR 778.15 requires to obtain a permit, does not satisfy this obligation.

We believe that the requirements of 30 CFR 761.16(b)(1) are the minimum necessary to ensure that the agency has a record which accurately and completely documents that the necessary property rights exist. Property rights and related legal issues can be very complex. The previous rules provided little guidance on what information must be submitted as part of a request for a VER determination. We have found that persons requesting VER under those rules sometimes had difficulty understanding exactly what information was necessary or what legal issues needed to be addressed. Incomplete submissions resulted in repeated requests for additional information. These requests and the time required to collect and review the additional documentation sometimes caused significant delays in the decision process and occasionally the permitting process. Therefore, in this final rule, we are establishing specific information requirements in an attempt to ensure that a person knows what documentation must be submitted as part of a request for a VER determination. These requirements should expedite the decision-making process.

Proposed 30 CFR 761.13(b)(2)(vi) provided that, if the coal interests have been severed from other property interests and the surface estate is in Federal ownership, the request must include a title opinion or other official statement from the Federal surface management agency confirming that the requester has a property right to conduct the type of surface coal mining operations intended. However, several commenters opposed this provision of the proposed rule as improperly providing the Federal surface management agency with a veto authority over the VER determination in violation of the principle of State primacy under SMCRA.

For the reasons discussed in Part XXI.A.1. of this preamble, we are replacing proposed paragraph (b)(2)(vi) with two new paragraphs in the final rule. New 30 CFR 761.16(b)(1)(viii) provides that, if the coal interests have been severed from other property interests, the request for a VER determination must include documentation that the requester has notified and provided reasonable opportunity for the owners of all other property interests to comment on the validity of the property rights claimed by the requester. New 30 CFR 761.16(b)(1)(ix) provides that the request must include copies of all comments received in response to that solicitation.

Finally, in response to a request from a State regulatory authority, we are adding 30 CFR 761.16(b)(1)(vii) to clarify that the proposed rule's requirement for complete documentation of the nature and ownership of all property interests includes the names and addresses of all current owners of the surface and mineral estates in the land. As the commenter noted, the agency needs that information to comply with the notification requirements of 30 CFR 761.16(d)(2).

Paragraph (b)(2): Submission Requirements for Good Faith/All Permits Standard

Final 30 CFR 761.16(b)(2) provides that, if your request relies upon the good faith/all permits standard in paragraph (b)(1) of the definition of VER in 30 CFR 761.5, you must submit the property rights information required by 30 CFR 761.16(b)(1). In addition, the final rule requires that you submit the following information about permits, licenses, and authorizations for surface coal mining operations on the land to which your request pertains:

- Approval and issuance dates and identification numbers for any permits, licenses, and authorizations that you or a predecessor in interest obtained before the land came under the protection of 30 CFR 761.11 or section 522(e). [30 CFR 761.16(b)(2)(i)]
- Application dates and identification numbers for permits, licenses, and authorizations for which you or a predecessor in interest submitted an application before the land came under the protection of 30 CFR 761.11 or section 522(e). [30 CFR 761.16(b)(2)(ii)]
- An explanation of any other good faith effort that you or a predecessor in interest made to obtain the necessary permits, licenses, and authorizations as of the date that the land came under the protection of 30 CFR 761.11 or section 522(e). [30 CFR 761.16(b)(2)(iii)]

Relevant permits and authorizations may include, but are not limited to, State or Federal surface or underground coal mining permits, site-specific wetlands disturbance permits, zoning or other local governmental approvals, National Pollutant Discharge Elimination System permits, State air pollution control permits, Mine Safety and Health Administration authorizations, U.S. Forest Service special use permits, and (for some types of facilities such as coal preparation plants and ventilation housing for underground mines) building permits. This list is not exhaustive, nor does it imply that every surface coal mining operation will require each of these permits and authorizations.

Except for 30 CFR 761.16(b)(2)(iii), the requirements in the final rule are substantively identical to those that we proposed as 30 CFR 761.13(b)(2)(ix) in 1997. We have added the third item because, under the good faith/all permits standard, a good faith effort does not necessarily mean that an application has been filed for all

required permits, licenses, and authorizations. See Part VII.C.2. of the preamble to this rulemaking for a full discussion of what a good faith effort entails.

The agency responsible for the VER determination needs the information required by this rule to determine whether you have met the requirements of paragraph (b)(1) of the definition of VER in 30 CFR 761.5 and to establish a documented record of the basis for that determination.

Paragraph (b)(3): Submission Requirements for Needed for and Adjacent Standard

Final 30 CFR 761.16(b)(3), which we proposed as 30 CFR 761.13(b)(1)(viii), provides that, if your request relies upon the needed for and adjacent standard in paragraph (b)(2) of the definition of VER in 30 CFR 761.5, you must explain how and why the land is needed for and immediately adjacent to the operation upon which the request is based. This explanation must include a demonstration that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e). You also must supply the property rights information required by 30 CFR 761.16(b)(1). The agency responsible for the VER determination needs the information required by this rule to determine whether you have met the requirements of paragraph (b)(2) of the definition of VER in 30 CFR 761.5 and to establish a documented record of the basis for that determination.

The final rule contains three substantive differences from the proposed rule. First, the final rule applies to land needed for the operation. The proposed rule referred to coal needed for the operation. The change from coal to land ensures consistency with the revised definition of VER, which, in both the proposed and final rules, applies the needed for and adjacent standard to lands, not just coal reserves, that are needed for any activity or facility included in the definition of surface coal mining operations.

Second, the final rule requires an explanation of how and why the land is needed for and immediately adjacent to the operation upon which the request is based. The proposed rule only applied this requirement to the ''needed for'' component of the standard.

However, because paragraph (b)(2) of the definition of VER requires a demonstration that the land is both needed for and immediately adjacent to the operation upon which the request is based, we believe that a request for a VER determination under this standard must include an explanation of how and why the land meets both the ''needed for'' and ''immediately adjacent to'' components of the standard.

Third, the final rule adds the requirement that the explanation of how and why the land is needed for the operation upon which the request is based must include a demonstration that prohibiting expansion of the operation onto the land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e). This addition is consistent with paragraph (b)(2) of the definition of VER in 30 CFR 761.5, which establishes that requirement as part of the needed for and adjacent standard.

The new language also is responsive to those commenters who urged us to include a requirement that the requester explain how and why the land is needed to ensure the economic viability of the operation. However, we do not fully agree with the commenters' argument that the land must be necessary to ensure the economic viability of the operation. As provided in the final rule and discussed in Part VII.D.3. of the preamble to this rule, we believe that the ''needed for'' element of the needed for and adjacent standard may be satisfied by a demonstration that prohibiting expansion of the operation onto the land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 30 CFR 761.11 or section 522(e).

Paragraph (b)(4): Submission Requirements for Roads

The VER standards for roads in paragraphs (c)(1) through (c)(3) of the definition of VER in 30 CFR 761.5 do not include the property rights demonstration required by paragraph (a) of the definition of VER. Therefore, there is no need for requests for VER determinations for roads under those standards to include all information required to make that demonstration. Accordingly, the final rule establishes separate information requirements at 30 CFR 761.16(b)(4) for requests for VER determinations for roads. The final rule is substantively identical to the one that we proposed as 30 CFR 761.13(b)(1), except for the revisions needed to conform with the changes to the VER standards for roads in paragraph (c) of the definition of VER in 30 CFR 761.5, as discussed in Part VII.E. of this preamble.

If your request relies upon one of the VER standards for roads in paragraphs (c)(1) through (c)(3) of the definition of VER, you must submit satisfactory documentation that at least one of the following statements is true:

- The road existed when the land upon which it is located came under the protection of 30 CFR 761.11 and section 522(e), and you have a legal right to use the road for surface coal mining operations. [30 CFR 761.16(b)(4)(i)]
- A properly recorded right of way or easement for a road in that location existed when the land came under the protection of 30 CFR 761.11 and section 522(e), and, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations. [30 CFR 761.16(b)(4)(ii)]
- A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of 30 CFR 761.11 and section 522(e). [30 CFR 761.16(b)(4)(iii)]

Paragraph (c)(4) of the definition of VER in 30 CFR 761.5 provides that you may elect to demonstrate VER for roads by demonstrating VER under either the good faith/all permits standard or the needed for and adjacent standard under paragraph (b) of the definition of VER. Therefore, if your request relies upon the standard in paragraph (c)(4) of the definition, you must submit the information required by 30 CFR 761.16(b)(1), which relates to the property rights demonstration required under paragraph (a) of the definition. You also must submit the information required by either 30 CFR 761.16(b)(2) (for the good faith/all permits standard) or 30 CFR 761.16(b)(3) (for the needed for and adjacent standard).

E. Paragraph (c): How Will the Agency Initially Review My Request?

For the reasons discussed in Part XXI.A.4. of this preamble, the final rule includes a new 30 CFR 761.16(c). Under paragraph (c)(1) of this rule, upon receipt of your request for a VER determination, the agency must conduct an initial review to determine whether the request includes all applicable components of the submission requirements of 30 CFR 761.16(b). This review will address only the administrative completeness of your request, not its legal or technical adequacy. If your request includes all necessary components, paragraph (c)(3) of the final rule requires that the agency

implement the notice and comment requirements of 30 CFR 761.16(d).

Under paragraph (c)(2) of the final rule, if your request does not include all components required by 30 CFR 761.16(b), the agency must notify you of the missing components and establish a reasonable time within which you must submit this information. If you do not submit this information within the specified time or any subsequent extensions that the agency approves, paragraph (c)(4) of the final rule requires that the agency issue a determination that you have not demonstrated VER. The rule specifies that the agency will issue this determination without prejudice, meaning that you may refile the request at any time.

Whenever an agency issues a determination that you have not demonstrated VER, it will retain the materials that you submitted with the request. These materials will become part of the administrative record of the decision. If you subsequently desire a new determination, the agency may, at its discretion, either require complete resubmission of the request or allow you to submit only the new materials together with a request for reconsideration of the previous determination.

We believe that the addition of this step will streamline the decision-making process, as desired by several commenters. It also will promote more efficient use of resources by avoiding the expenses and delays associated with providing notice and comment on an incomplete request.

F. Paragraph (d): What Notice and Comment Requirements Apply to the VER Determination Process?

Paragraph (d) of 30 CFR 761.16 establishes notice and comment requirements and provisions for public participation in the VER determination process. We proposed those requirements as 30 CFR 761.13(c), but, because of organizational changes, they appear as 30 CFR 761.16(d) in the final rule.

As we noted in the preamble to the proposed rule, the notice and comment requirements in 30 CFR 761.16(d) generally parallel those that we previously used for VER determinations. We have tailored these requirements to minimize resource demands on affected persons while maintaining consistency with section 102(i) of SMCRA, which states that one of purposes of the Act is to assure that appropriate procedures are provided for public participation.

Under paragraph (d)(1) of the final rule, when the agency responsible for the VER determination finds that a request meets the requirements of 30 CFR 761.16(c)(3), the agency must publish a notice in a newspaper of general circulation in the county in which the land is located. The notice must invite comment on the merits of the request. In response to a comment, we have revised the final rule to clarify that the agency may require that the requester publish this notice and provide the agency with a copy of the published notice. As proposed, the final rule specifies that we will also publish the notice in the **Federal Register** if the request involves Federal lands listed in 30 CFR 761.11(a) or (b).

The final rule requires that the notice describe the location of the land involved, the type of surface coal mining operations planned, the applicable VER standard, and the procedures that the agency will follow in processing the request. See 30 CFR 761.16(d)(1)(i), (ii), (iii), and (v). It also requires that the notice include the name and address of the agency office at which a copy of the request is available for public inspection and to which comments should be sent, the closing date of the comment period, and a statement that an additional 30 days are available upon request. See 30 CFR 761.16(d)(1)(vi) through (viii). We added the portion of 30 CFR 761.16(d)(1)(viii) that requires the name and address of the agency office at which a copy of the request is available for public inspection in response to a comment expressing concern about the proposed rule's lack of a provision for public access to requests for VER determinations.

Proposed 30 CFR 761.13(c)(1)(iv) would have required that the comment period be of sufficient length to afford interested persons a reasonable opportunity to prepare and submit comments. However, for the reasons discussed in Part XXI.A.5. of this preamble, final 30 CFR 761.16(d)(1)(vi) and (vii) provide that the comment period must be a minimum of 30 days after the publication date, with another 30 days automatically available upon request.

As proposed, the final rule requires that the notice describe the property rights claimed and the basis for that claim. See 30 CFR 761.16(d)(1)(iii)(A). Because the definition of VER in 30 CFR 761.5 only requires a property rights demonstration as part of requests for VER determinations based upon one of the standards in paragraph (b) of the definition, we are restricting the scope of 30 CFR 761.16(d)(1)(iii)(A) to requests for VER determinations based upon the good faith/all permits standard or the needed for and adjacent standard under paragraph (b) of the definition of VER.

Certain property rights also may be a component of the VER determination process for requests based upon one of the standards for roads in paragraphs (c)(1) and (c)(2) of the definition of VER. Therefore, we are adding two paragraphs to the final rule to address these situations. Under 30 CFR 761.16(d)(iii)(B), if your request relies upon the standard in paragraph (c)(1) of the definition of valid existing rights, the notice must include a description of the basis for your claim that the road existed when the land came under the protection of 30 CFR 761.11 or section 522(e). In addition, the notice must include a description of the basis for your claim that you have a legal right to use that road for surface coal mining operations. Under 30 CFR 761.16(d)(iii)(C), if your request relies upon the standard in paragraph (c)(2) of the definition of valid existing rights, the notice must include a description of the basis for your claim that a properly recorded right of way or easement for a road in that location existed when the land came under the protection of 30 CFR 761.11 or section 522(e). In addition, the notice must include a description of the basis for your claim that, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations.

In response to commenters' concerns about property rights disputes, we have added 30 CFR 761.16(d)(1)(iv). This new paragraph requires that the notice include a statement that the agency will not make a decision on the merits of the VER determination request if, by the close of the comment period under this notice or the notice required by 30 CFR 761.16(d)(3), a person with a legal interest in the property initiates appropriate legal action to resolve the property rights dispute in the proper venue. See Part XXI.A.2. of this preamble for further discussion of the background of and reasons for this requirement. We are restricting this provision to requests for VER determinations based upon one or more of the standards in paragraphs (b), (c)(1), or (c)(2) of the definition of VER in 30 CFR 761.5 because only those standards have the potential for property rights disputes as part of the VER determination process.

We have combined proposed 30 CFR 761.13(c)(2) and (c)(3) into 30 CFR 761.16(d)(2) in the final rule. That paragraph requires that the agency promptly provide a copy of the notice required under 30 CFR 761.16(d)(1) to (i) all reasonably locatable owners of

surface and mineral estates in the land included in the request, and (ii) the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, to the agency with primary jurisdiction over that feature with respect to the values causing the land to come under the protection of 30 CFR 761.11. The final rule differs from the proposed rule in two respects.

First, paragraph (d)(2)(i) requires notification of all owners of surface and mineral estates in the land included in the request. The proposed rule would have only required notification of these owners if the land involved severed estates or divided interests. The final rule does not include this limitation because, upon further evaluation, we find no basis or reason for restricting notification in this fashion.

Second, paragraph (d)(2)(ii) requires notification of both the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, the agency with primary jurisdiction over that feature with respect to the values causing the land to come under the protection of 30 CFR 761.11. The proposed rule would have required notification of only the owner of the feature. The change from the proposed rule to the final rule recognizes that the agency with jurisdiction over the protected feature may not own the feature or certain lands within the feature. For example, many sites listed on the National Register of Historic Places are privately owned. Similarly, some lands within section 522(e)(1) areas, such as national parks and national wildlife refuges, are in non-Federal ownership. In situations such as these, we believe that, in the interest of fairness, the agency with jurisdiction over the protected feature also should receive notice and opportunity to comment. For lands and features owned by the United States or by a State, notification of the Federal or State agency with responsibility for managing the land or feature will fully satisfy the requirements of 30 CFR 761.16(d)(2)(ii).

One commenter expressed concern that the notification requirements of proposed 30 CFR 761.13(c)(3) could impose a significant burden on the agency responsible for the VER determination unless we revised the submission requirements to specify that the requester must provide names and addresses of all owners of interest. As discussed in Part XXI.D. of this preamble, we agree. Final 30 CFR 761.16(b)(1)(vii) requires that the requester supply current names and addresses of the owners of all property interests in the land. In adopting 30 CFR 761.16(b)(1)(vii) and 761.16(d)(2)(i), we do not intend to impose an unreasonable burden to locate owners of property interests if that information is not readily available from established sources. Therefore, the final rule provides that the notification requirements of 30 CFR 761.16(d)(2)(i) extend only to reasonably locatable owners. If comments received on the request or other available information indicates that the names and addresses supplied by the requester are either inaccurate or incomplete, the agency may either conduct its own title research or require the requester to correct the deficiencies in the original submittal.

Under final 30 CFR 761.16(d)(3), the letter transmitting the notice required under 30 CFR 761.16(d)(2) must clarify that the comment period for persons receiving notice is 30 days from the date of service of the notice, with another 30 days available upon request. At its discretion, the agency responsible for the VER determination may grant additional time for good cause upon request. These times originally appeared in proposed 30 CFR 761.13(c)(4), which would have applied only to requests for VER determinations involving land within an area under the protection of 30 CFR 761.11(a) and section 522(e)(1) of the Act. As discussed in Part XXI.A.5. of this preamble, we are not adopting proposed 30 CFR 761.13(c)(4). That paragraph of the proposed rule would duplicate the requirements of final 30 CFR 761.16(d)(1)(vi) and (vii), (2), and (3). In addition, we find no basis in SMCRA to establish notice and comment provisions that differ based upon which paragraph of section 522(e) protects the land.

G. Paragraph (e): How Will a Decision Be Made?

Paragraph (e), which we proposed as 30 CFR 761.13(d), contains procedural requirements and decision-making criteria for the evaluation of requests for VER determinations. Under paragraph (e)(1) of the final rule, the agency responsible for the VER determination must review the materials submitted with the request, the information received during the comment period, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. This language differs slightly from that of the proposed rule, which would have required a determination of whether the record was adequate to support a decision in favor of the requester. The new language reflects the fact that, under the Administrative Procedure Act, any agency decision must be supported by an adequate administrative record.

If the record is not sufficiently complete and adequate to support a decision on the merits of the request, paragraph (e)(1) of the final rule requires that the agency notify the requester in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the agency deems necessary to remedy the inadequacy. The proposed rule did not specify what action the agency responsible for the VER determination could or should take if the person requesting the VER determination does not respond to the request for additional information. However, under paragraph (e)(4) of the final rule, if the necessary information is not submitted within the time specified or as subsequently extended, the agency must issue a determination that the requester has not demonstrated VER. Under the final rule, the agency must issue these determinations without prejudice, meaning that the person could refile the request at a later time. See Part XXI.A.3. of this preamble for a discussion of the reasons and basis for this final rule.

Like the proposed rule, paragraph (e)(2) of the final rule provides that, once the record is complete and adequate, the agency must determine whether the requester has demonstrated VER. Under the rule, the decision document must explain how the requester has or has not satisfied all applicable elements of the definition of VER. Paragraph (e)(2) of the final rule also incorporates proposed 30 CFR 761.13(d)(2)(i). Like that paragraph of the proposed rule, the final rule requires that the decision document also set forth relevant findings of fact and conclusions and specify the reasons for the conclusions.

Paragraph (d)(2)(ii) of the proposed rule would have required that the agency defer a decision until all outstanding property rights disputes were resolved. For the reasons discussed in Part XXI.A.2. of this preamble, we are not adopting that paragraph of the proposed rule. Instead, the final rule includes a new paragraph (e)(3), which requires that the agency make a determination on the merits of the record unless the conflicting property rights claims are the subject of pending litigation in a court or administrative body of competent jurisdiction. If the property rights are the subject of such litigation, the final rule requires that the agency determine

that the requester has not demonstrated VER. The agency must make this determination without prejudice, meaning that the requester may refile the request at any time. See Part XXI.A.2. of this preamble for a more extensive discussion of this paragraph of the final rule. The final rule also clarifies that paragraph (e)(3) applies only to requests for VER determinations that rely upon one or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of VER in 30 CFR 761.5. Only requests based upon those standards have the potential for a property rights dispute as part of the VER determination process.

Under paragraph (e)(5)(i) of the final rule, which we proposed as 30 CFR 761.13(d)(3)(i), the agency must provide a copy of the determination to the requester, the owner or owners of the land to which the determination applies, to the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 30 CFR 761.11. The final rule differs from the proposed rule in two ways. First, the final rule includes a requirement to provide a copy of the determination to the owner or owners of the land to which the determination applies. We believe that, in the interest of fairness, landowners should receive the same notification as the requester and the agency with primary jurisdiction over the protected feature. Second, the final rule replaces the disjunctive ''or'' in the proposed rule with ''and'' to clarify that both the owner of the feature causing the land to come under the protection of 30 CFR 761.11 and any agency with primary jurisdiction over that feature must receive notification, not just one or the other as the proposed rule could have been read to mean. As with the first change, we believe that, in the interest of fairness, both the owner of the feature and the agency with primary jurisdiction over that feature should receive notification of the decision. In addition, the final rule adds a requirement that the agency provide an explanation of appeal rights and procedures along with a copy of the determination. We believe that this provision is necessary to ensure that all persons are aware of those rights and procedures.

Paragraph (e)(5)(ii) of the final rule, which we proposed as 30 CFR 761.13(d)(3)(ii), requires that the agency publish notice of the determination in a newspaper of general circulation in the county in which the land is located. At the request of a commenter, the final rule clarifies that the agency may require that the requester publish this notice and provide a copy of the published notice to the agency. When the request includes Federal lands within the areas listed in 30 CFR 761.11(a) or (b), the final rule requires that we publish the determination in the **Federal Register**. The final rule adds a requirement that both the notice of decision published in the newspaper and the determination published in the **Federal Register** must provide an explanation of appeal rights and procedures. We believe that this provision is necessary to ensure that all persons are aware of those rights and procedures.

H. Paragraph (f): How May a VER Determination Be Appealed?

Paragraph (f), which we proposed as 30 CFR 761.13(e), provides that VER determinations are subject to administrative and judicial review under 30 CFR 775.11 and 775.13, which contain administrative and judicial review requirements for permitting decisions. This provision is substantively identical to the appeal rights for VER determinations in both the 1979 and 1983 versions of 30 CFR 761.12(h).

Some commenters urged that we modify this provision to eliminate the requirement to exhaust administrative remedies before seeking judicial review of VER determinations. The commenters argued that these decisions are final for purposes of section 10(c) of the Administrative Procedure Act because SMCRA does not specifically require VER determinations. They also cite a series of Federal court decisions concerning SMCRA that have held that adherence to an administrative review process is a prerequisite to judicial review only when the Act expressly requires administrative review.

We do not agree with the commenters' arguments. VER determinations are a threshold requirement in the permitting process and an inherent component of the permit application approval finding required by section 510(b)(4) of SMCRA and 30 CFR 773.15(c)(3)(ii). Hence, VER determinations are appropriately subject to the same administrative and judicial review requirements as apply to any other type of permitting decision under the Act; in this case, the regulations at 30 CFR 775.11 and 775.13. In addition, providing the right of administrative review maximizes the opportunity for public participation in the VER determination process. Thus, the final rule is consistent with section 102(i) of SMCRA, which states that one of the purposes of the Act is to assure that appropriate procedures are provided for public participation.

II. Paragraph (g): To What Extent and in What Manner Must Records Related to the VER Determination Process Be Made Available to the Public?

Final 30 CFR 761.16(g) provides that, if a request for a VER determination is subject to the notice and comment requirements of 30 CFR 761.16(d), the agency responsible for processing the request must make a copy of that request available to the public in the same manner as the agency, when acting as the regulatory authority, must make permit applications available to the public under 30 CFR 773.13(d). The final rule also specifies that the agency must make records associated with that request and any subsequent determination under 30 CFR 761.16(e) available to the public in accordance with the requirements and procedures of either 30 CFR 840.14 or 30 CFR 842.16.

We added this paragraph to the final rule in response to a commenter who argued that requests for VER determinations should be placed on file in the local courthouse or other accessible office for public inspection and copying, just as 30 CFR 773.13(a)(2) and section 507(e) of the Act require for permit applications. We did not adopt the specific requirement sought by the commenter. Because requests for VER determinations are not complete permit applications, they are not necessarily subject to all statutory and regulatory provisions concerning permit applications.

However, requests for VER determinations are subject to section 517(f) of the Act, which requires that copies of any information that the regulatory authority obtains under Title V of SMCRA ''be made immediately available to the public at central and sufficient locations in the county, multicounty, and State area of mining so that they are conveniently available to residents in the areas of mining.'' Therefore, to address the commenter's concern, the final rule expressly requires that records associated with requests for VER determinations be made available for public review in accordance with the regulations that implement this statutory requirement: 30 CFR 773.13(d) and either 30 CFR 840.14 (when a State regulatory authority is responsible for the VER determination) or 842.16 (when we are responsible for the VER determination). Under those rules, the agency has the option of making copies of records available to the public by mail upon

request instead of placing them on file in a government or other public office in the county to which the records pertain.

We do not intend to require disclosure of proprietary information that is not otherwise available for public review as a matter of law. Requests for VER determinations may include information concerning property interests and the chemical and physical properties of coal. Under paragraphs (a)(12) and (b) of section 508 of SMCRA, with certain exceptions, the regulatory authority must hold that information in confidence unless it is on public file pursuant to State law. We see no reason why information should be treated differently when it is submitted as part of a request for a VER determination, especially since 30 CFR 761.16(b) allows a request for a VER determination to be submitted either as part of or in advance of a permit application. Therefore, under the final rule, the confidentiality provisions of 30 CFR 773.13(d)(3) also apply to requests for VER determinations under 30 CFR 761.16.

J. May the Regulatory Authority Reconsider VER Determinations During Review of a Subsequent Permit Application?

Commenters divided on the question of whether VER determinations made in advance of submission of a permit application would or should be subject to comment and reevaluation at the time of permit application review. As discussed in Part XXI.C. of this preamble and in the preamble to the proposed rule, the intent of the provision in the final rule authorizing advance VER determinations is to allow VER questions to be fully settled in advance of permit application preparation and review. We anticipate that advance VER determinations would be subject to reconsideration during a subsequent permit application review process only under exceptional circumstances, as discussed below and in the preamble to the proposed rule. The final rule establishes notice, comment, and public participation requirements for the submission and processing of requests for VER determinations. Therefore, the lack of opportunity for reconsideration of advance VER determinations during a subsequent permit application review process would not improperly abridge or violate the rights of citizens to participate in the permitting process, as some commenters alleged.

Circumstances that might justify reconsideration of an advance VER determination include, but are not limited to, a material misrepresentation of fact, discovery of new information that significantly alters the basis of the VER determination, or a substantial change in the nature of the intended operation (*e.g.,* a switch from underground mining methods to surface mining techniques).

Under 30 CFR 773.15(c)(3)(ii), the regulatory authority may not approve a permit application unless the agency first finds that the proposed permit area is not within an area subject to the prohibitions or limitations of 30 CFR 761.11. Therefore, when the permit application review process documents or provides reason to believe that the basis for a prior VER determination is false or inaccurate, the regulatory authority has an obligation to withhold approval of the application pending reevaluation of the VER determination by the agency responsible for that determination. Without VER, the application would not meet the criteria for permit approval in section 510(b)(4) of the Act (documentation that ''the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 522'') or 30 CFR 773.15(c)(3)(ii) (a demonstration that the permit area is not subject to the prohibitions and limitations of 30 CFR 761.11).

We recognize that the regulatory authority or the agency responsible for the VER determination may not become aware of a defective VER determination until after permit issuance. In these circumstances, the regulatory authority should refer the information to us, if we are responsible for the determination, or reconsider the determination, if the regulatory authority is responsible for the determination. Then, using any reconsidered VER determination, the regulatory authority should, based upon written findings and subject to administrative and judicial review, order that the permit be revised to correct any deficiencies. See 30 CFR 774.11(b) and (c).

A State regulatory authority may not reconsider or overturn a VER determination that we make for lands for which we have exclusive responsibility for VER determinations. However, the State may and should notify us of any concerns, changes in fact, or apparent errors in the determination. We will then reconsider the determination.

In the preamble to the proposed rule, we referred to reconsideration as *de novo* review. One commenter opposed allowing *de novo* review of advance VER determinations under any circumstances, arguing that to do so would violate the principles of res judicata. We do not agree. In *Belville Mining Co.* v. *U.S.*, 999 F.2d 989 (6th Cir. 1993), the court held that we have the authority to reconsider VER determinations:

> Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision.

Id. at 997 (citations omitted).

The court also found that section 201(c)(1) of SMCRA, which provides that the Secretary, acting through OSM, shall ''review and vacate or modify or approve orders and decisions * * *,'' expressly authorizes us to review and vacate erroneous VER determinations. *Id.*

Reconsideration may take one of several pathways. If the reason for reconsideration is an alleged misrepresentation of material facts, reconsideration might involve reopening the record to enter new information, investigating to determine whether misrepresentation of a material fact occurred, and issuing a reconsidered VER determination based on the record as supplemented by the new information. If the reason for reconsideration is discovery of new information that significantly alters the basis of the determination, reconsideration might involve reopening the record and issuing a reconsidered VER determination based on the record as supplemented by the new information. If the reason for reconsideration is a substantial change in the operation, such as a change from underground to surface mining, reconsideration might involve seeking comment on whether the person has demonstrated the property rights for that type of mining, reopening the record to enter new information, and issuing a reconsidered VER determination based on the revised record.

One commenter argued that a change in the type of mining would necessitate a completely new VER determination since each determination is specific to a particular type of mining. We agree that a change of this magnitude should involve a new notice and comment period. However, we do not agree that a person must submit a completely new request for a VER determination if there is a change in the type of surface coal mining operations planned for the site. There is no need to resubmit those parts of the original request and determination that are unaffected by the

change. Completely discarding the original record and determination could result in an unnecessary duplication of effort and waste of resources on the part of both the requester and the reviewing agency. We believe that the agency should determine the scope of the reconsideration on a case-by-case basis. This approach also is consistent with the goals established by the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

The commenter also stated that misrepresentation of a material fact does not justify *de novo* review, or, as we refer to it in this preamble, reconsideration, of a VER determination. Instead, in his view, the agency should seek judicial review, issuance of an injunction, and possibly prosecution for fraud. For the reasons discussed above, we do not agree that the agency is limited to these alternatives or that reconsideration of the VER determination is inappropriate. However, the alternatives listed by the commenter may be useful measures to prevent the harm that may otherwise result from an inaccurate or defective VER determination.

XXII. How Does New 30 CFR 761.17, Which Concerns Regulatory Authority Obligations at the Time of Permit Application Review, Differ From Its Predecessor Provisions in Former 30 CFR 761.12?

As discussed in Part XVIII of this preamble, we have revised and redesignated paragraphs (a), (b)(1), (b)(2), and (f) of former 30 CFR 761.12 as paragraphs (a) through (d), respectively, of new 30 CFR 761.17. This section identifies actions that the regulatory authority must take upon receipt of an application for a permit for surface coal mining operations.

Apart from minor organizational and editorial changes, paragraphs (a) through (c) of 30 CFR 761.17 are substantively identical to the rules that we proposed as 30 CFR 761.12(a) and (b) on January 31, 1997. Most of our revisions reflect plain language principles. In addition, we have corrected obsolete cross-references, added new cross-references for clarity, more accurately characterized the exception provided in 30 CFR 761.11(c), and modified these paragraphs to maintain consistency with the changes to the definition of VER in 30 CFR 761.5 and the exception for existing operations in 30 CFR 761.12.

To be consistent with changes in terminology adopted as part of the permitting rules published on September 28, 1983 (48 FR 44349), we have replaced the obsolete term ''complete application'' in paragraph (a) with its current equivalent, ''administratively complete application.'' We also are revising paragraph (a) to clarify that its requirements apply to both applications for new permits and all applications for permit revisions (including incidental boundary revisions) that involve the addition of acreage not previously included within the permit boundaries. Although we always have interpreted the somewhat ambiguous term ''application for a surface coal mining operation permit'' in 30 CFR 761.12 as including applications for all types of permit boundary revisions, this change will remove any question as to its meaning.

We did not propose to revise former 30 CFR 761.12(f), which we have now redesignated as 30 CFR 761.17(d). This paragraph of the rules establishes procedures that the regulatory authority must follow when it determines that a proposed surface coal mining operation will adversely affect a publicly owned park or a place listed on the National Register of Historic Places. However, one commenter expressed the general concern that the proposed rule and its preamble did not clearly specify that the VER exception, the exception for existing operations, and the waivers and exceptions authorized by 30 CFR 761.11(c) through (e) operate independently of each other; i.e., that a person who qualifies for one type of exception or waiver does not need to comply with the requirements for other types of exceptions or waivers. To address this concern, we have added paragraph (d)(3) to 30 CFR 761.17 to clarify that the joint approval requirements of 30 CFR 761.11(c) and the related procedural requirements of 30 CFR 761.17(d) do not apply to lands to which the VER exception or exception for existing operations applies.

Section 761.17(d) contains no other substantive changes from former § 761.12(f). We have made some editorial and organizational changes to more closely adhere to plain language principles.

XXIII. How and Why Are We Revising Part 762, Which Contains Criteria for the Designation of Lands as Unsuitable for Surface Coal Mining Operations?

Former 30 CFR 761.12(g) provided that, pursuant to petition, the regulatory authority could consider lands listed in section 522(e) of the Act for designation as unsuitable for surface coal mining operations under 30 CFR Parts 762, 764, and 769. As discussed in Part XVIII of this preamble, we determined that this paragraph would be more appropriately placed in 30 CFR Part 762, which contains criteria and other requirements for designation pursuant to the petition process. Therefore, we are redesignating former 30 CFR 761.12(g) as 30 CFR 762.14. To accommodate this addition to Part 762, we are redesignating former 30 CFR 762.14 as 30 CFR 762.15.

We have revised the language of new 30 CFR 762.14 for clarity and conformity with Part 762 and plain language principles. We intend no substantive changes from former 30 CFR 761.12(g).

XXIV. Section 772.12: What Are the Requirements for Coal Exploration on Lands Designated Unsuitable for Surface Coal Mining Operations?

Under 30 CFR 772.11(a) and 772.12(a), a person who intends to conduct any type of coal exploration on lands designated as unsuitable for surface coal mining operations under subchapter F of 30 CFR Chapter VII, which includes 30 CFR 761.11, must first obtain a permit in accordance with 30 CFR 772.12. These regulations do not require compliance with the prohibitions, restrictions, and procedural requirements of 30 CFR Part 761. On June 22, 1988 (53 FR 23532), we proposed a rule that would have required a VER demonstration as a prerequisite for approval or issuance of an exploration permit on the lands listed in 30 CFR 761.11 and section 522(e). However, we did not adopt that provision as part of the final rule published on December 29, 1988 (53 FR 52942). At 53 FR 52945, the preamble to that rule stated that we would reconsider the issue of VER demonstration requirements for coal exploration after we adopted a new definition of VER.

The National Wildlife Federation and other groups challenged our failure to adopt this provision of the proposed rule. Upon judicial review, the U.S. District Court for the District of Columbia held that we had failed to articulate a proper rationale for not adopting the proposed rule. *National Wildlife Fed'n* v. *Lujan*, Nos. 89–0504, 89–1221 and 89–1614, slip op. at 25–33 (D.D.C. September 5, 1990). In response, on July 18, 1991 (56 FR 33152), we proposed to add paragraph (b)(5) to 30 CFR 772.14 to require a VER demonstration as a prerequisite for approval of coal exploration activities on the lands listed in 30 CFR 761.11 and section 522(e) if coal is to be removed for sale or commercial use.

On January 31, 1997 (62 FR 4836), we withdrew the 1991 proposal. In its place, we proposed to add a new paragraph (b)(14) to 30 CFR 772.12, the

section that contains permitting requirements for exploration that will remove more than 250 tons of coal or that will occur on lands designated as unsuitable for surface coal mining operations. Under the proposed rule, a person planning to conduct exploration on lands listed in section 522(e) or 30 CFR 761.11 would have had to submit an application that includes a demonstration that (1) the exploration activities will not substantially disturb the protected lands, (2) the owner of the coal has demonstrated VER, (3) the exploration is needed for mineral valuation purposes or is authorized by judicial order, or (4) the applicant has obtained a waiver or exception authorized under proposed 30 CFR 761.11(a)(2) through (5) [now 30 CFR 761.11(a) through (e)].

Similarly, the proposed rule would have added a new paragraph (d)(2)(iv) to 30 CFR 772.12 to provide that the regulatory authority may not approve an application for exploration unless it first finds that the exploration activities described in the application will not substantially disturb any lands listed in 30 CFR 761.11. If exploration would substantially disturb those lands, the proposed rule would have authorized approval of the application only when the regulatory authority finds that the applicant has (1) demonstrated VER, (2) obtained one of the waivers or exceptions authorized under proposed 30 CFR 761.11(a)(2) through (5) [now 30 CFR 761.11(a) through (e)], or (3) demonstrated that the exploration is needed for mineral valuation purposes or authorized by judicial order.

Commenters were sharply divided on the merits and legality of the proposed rules. After careful consideration, we have decided not to proceed with the rules as proposed. Section 512 of SMCRA governs coal exploration, and that section does not mention section 522(e) as one of the provisions of the Act with which exploration must comply. Section 522(e) specifically limits the scope of its prohibitions and restrictions to surface coal mining operations. And the definition of surface coal mining operations in section 701(28) of the Act expressly excludes ''coal explorations subject to section 512 of this Act.'' Therefore, we believe that the Act provides insufficient basis for rules that would impose a requirement for a VER demonstration as a prerequisite for coal exploration on the lands listed in 30 CFR 761.11 and section 522(e).

The preamble to the proposed rule also sought comment on whether we should revise 30 CFR Part 772 and/or Part 761 to include a provision similar to 30 CFR 762.14, which we are redesignating as 30 CFR 762.15, either in addition to or in place of the proposed revisions to 30 CFR 772.12. Redesignated 30 CFR 762.15 provides that the regulatory authority has an obligation to use the exploration permit application review and approval process to ensure that exploration activities will not interfere with any of the values for which the area has been designated unsuitable for surface coal mining operations. However, this section applies only to lands designated as unsuitable for surface coal mining operations under the petition process in 30 CFR Part 762 and section 522(a) of the Act.

We have decided to adopt a modified version of this option rather than the rule language that we proposed. Under the final rule, coal exploration on lands listed in 30 CFR 761.11 and section 522(e) must be designed to minimize, but not necessarily prevent, interference with the values for which those lands were designated as unsuitable for surface coal mining operations. In other words, to gain the approval of the regulatory authority, an application for coal exploration on protected lands must demonstrate that, to the extent technologically and economically feasible, the operation has been designed to minimize interference with the values for which the land was designated as unsuitable for surface coal mining operations. However, the application need not demonstrate that the operation will prevent all interference with those values. Unlike the proposed rule language and, to some extent, the alternative discussed in the preamble to that rule, the provisions that we are adopting as part of the final rule do not include any conditions that would prohibit coal exploration. Therefore, we believe that the new provisions are consistent with the overall regulatory scheme for coal exploration under section 512 of SMCRA because they govern how coal exploration may be conducted, not whether it may be conducted.

The final rule modifies 30 CFR 772.12(b)(14) to require that each application for coal exploration include, for any lands listed in 30 CFR 761.11, a demonstration that, to the extent technologically and economically feasible, the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. In addition, the final rule requires that the application include documentation of consultation with the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 30 CFR 761.11. We added this provision in response to comments that expressed concern about the potential impacts of coal exploration on the lands listed in 30 CFR 761.11 and that urged the inclusion of the agency with jurisdiction over the protected feature in the decision-making process.

The final rule also modifies 30 CFR 772.12(d)(2) by adding a new paragraph (iv). That paragraph requires that, as a prerequisite for issuance of a coal exploration permit for any lands listed in 30 CFR 761.11, the regulatory authority must find that the applicant has demonstrated that, to the extent technologically and economically feasible, the exploration and reclamation described in the application will minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. Before making this finding, the regulatory authority must provide reasonable opportunity to the owner of the feature causing the land to come under the protection of 30 CFR 761.11, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 30 CFR 761.11, to comment on whether the finding is appropriate.

We added the latter provision in response to comments that expressed concern about the potential impacts of coal exploration on the lands listed in 30 CFR 761.11. The new provision also responds to those commenters who urged us to revise the decision-making process to include the agency with jurisdiction over the protected feature. However, the final rule does not afford veto authority to the agency with jurisdiction over the protected feature. To do so would be inconsistent with the principles of State primacy under section 503 of SMCRA. Instead, the new provision requires that the regulatory authority consult with the agency with jurisdiction over the protected feature in determining which values are important and how exploration activities may be planned and conducted to minimize interference with those values. The administrative record of the decision on the exploration applications should indicate the disposition of all relevant comments received from the agency with jurisdiction over the protected feature.

These rules do not ban exploration on any lands. Instead, they require that the

adverse impacts of exploration activities on lands protected under section 522(e) of the Act be minimized to the extent technologically and economically feasible. In this respect, they are more protective of the environment than the rule language that we proposed, which would not have placed any unique restrictions on exploration if the regulatory authority determined that a person had VER or qualified for one of the other exceptions proposed in 30 CFR 772.12(b)(14).

Finally, as a housekeeping measure, the final rule revises 30 CFR 772.12(d)(2)(ii) and (iii) to correct the manner in which they cite the Endangered Species Act and the National Historic Preservation Act.

XXV. Technical Amendments to Parts 773, 778, 780, and 784

As shown in the following table, the organizational changes to Part 761 require revision of cross-references to Part 761 in other portions of our regulations:

Regulation	Old cross-reference	New cross-reference
§ 773.13(a)(1)(v)	§ 761.12(d)	§ 761.14
§ 773.15(c)(3)(ii)	§§ 761.11 and 761.12	§ 761.11
§ 778.16(c)	§ 761.12	§ 761.14 or 761.15
§ 780.31(a)(2)	§ 761.12(f)	§ 761.17(d)
§ 780.33	30 CFR 761.12(d)	§ 761.14
§ 784.17(a)(2)	§ 761.12(f)	§ 761.17(d)
§ 784.18	30 CFR 761.12(d)	§ 761.14

To achieve consistency with the language of section 522(e) of the Act, we also made the following technical corrections to the language of those regulations:

- We replaced the term ''surface coal mining activities'' in 30 CFR 778.16(c) with ''surface coal mining operations.'' Part 778 applies to both surface and underground mines. Therefore, since section 522(e) applies to surface coal mining operations in general, the information requirements of 30 CFR 778.16(c) for permit applications that propose to disturb lands within the buffer zones for occupied dwellings and public roads must apply to all proposed surface coal mining operations within those buffer zones, not just to surface coal mining activities.
- We revised the titles of 30 CFR 780.31 and 784.17 by replacing the term ''public parks'' with ''publicly owned parks.'' We separately define these terms in 30 CFR 761.5, and ''publicly owned parks'' is the term that appears in section 522(e)(3) of the Act, which, in relevant part, provides the basis for these regulations.
- We replaced the term ''underground mining activities'' in 30 CFR 784.18(a) with ''surface coal mining operations.'' Paragraph (b) of the definition of ''underground mining activities'' in 30 CFR 701.5 includes underground operations that are not included in the definition of surface coal mining operations in 30 CFR 700.5 and section 701(28) of the Act. Since section 522(e) applies only to surface coal mining operations, the underground operations described in paragraph (b) of the definition of underground mining activities are not subject to the provisions of 30 CFR Part 761 and section 522(e).

In addition, since both 30 CFR 780.31(a)(2) and 784.17(a)(2) use the term ''valid existing rights,'' we revised those rules to include a cross-reference to the new VER determination rules at 30 CFR 761.16.

Finally, we made minor editorial revisions to 30 CFR 773.15(c)(3)(ii), 778.16(c), 780.31(a)(2), and 784.17(a)(2) to improve their accuracy, clarity, and consistency with plain language principles and to better accommodate the new or revised cross-references.

XXVI. What Effect Will This Rule Have in Federal Program States and on Indian Lands?

Through cross-referencing in the respective regulatory programs, this final rule applies to all lands in States with Federal regulatory programs. States with Federal regulatory programs include Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. These programs are codified at 30 CFR Parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

The revisions to 30 CFR Part 761 apply to Indian lands by virtue of the incorporation of this part by reference in 30 CFR 750.14. Revised 30 CFR Part 772 applies to coal exploration on Indian lands to the extent provided in 30 CFR 750.15.

In the preamble to the proposed rule, we invited the public to comment on whether there are unique conditions in any Federal program States or on Indian lands that should be reflected in the national rules or as specific amendments to the Federal programs or Indian lands rules. Since no commenters identified any unique conditions or amendment needs, the final rules do not include any changes to the Indian lands rules or individual Federal programs.

One commenter stated that we should not adopt a final rule without seeking input from affected Indian nations and obtaining approval from both recognized Indian governmental entities and traditional elders who hold to native religions and traditions. As described in Part I of this preamble, we provided the public and all other interested parties ample notice and opportunity to comment on the proposed rule, as required by the Administrative Procedure Act, 5 U.S.C. 553. In developing the final rule, we gave serious consideration to all substantive comments received. Neither SMCRA nor any other Federal law or regulation requires that we obtain the approval of Indian governmental entities and traditional elders (or any other potentially affected parties) before adopting a final rule.

XXVII. How Will This Rule Affect State Programs?

We will evaluate State regulatory programs approved under 30 CFR Part 732 and section 503 of the Act to determine whether any changes in these programs are necessary to maintain consistency with Federal requirements. If we determine that a State program provision needs to be amended as a result of these revisions to the Federal rules, we will notify the State in accordance with 30 CFR 732.17(d).

Section 505(a) of the Act and 30 CFR 730.11(a) provide that SMCRA and Federal regulations adopted under SMCRA do not supersede any State law or regulation unless that law or regulation is inconsistent with the Act or the Federal regulations adopted under the Act. Section 505(b) of the Act

and 30 CFR 730.11(b) provide that we may not construe existing State laws and regulations, or State laws and regulations adopted in the future, as inconsistent with SMCRA or the Federal regulations if these State laws and regulations either provide for more stringent land use and environmental controls and regulations or have no counterpart in the Act or the Federal regulations.

Under 30 CFR 732.15(a), State programs must provide for the State to carry out the provisions of, and meet the purposes of, the Act and its implementing regulations. In addition, that rule requires that State laws and regulations be in accordance with the provisions of the Act and consistent with the Federal regulations. As defined in 30 CFR 730.5, ''consistent with'' and ''in accordance with'' mean that the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act. The definition also provides that these terms mean that the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of the Act. Under 30 CFR 732.17(e)(1), we may require a State program amendment if, as a result of changes in SMCRA or the Federal regulations, the approved State program no longer meets the requirements of SMCRA or the Federal regulations.

In the preamble to the proposed rule, we solicited comments on whether State program VER definitions must be amended to include standards identical to those of the revised Federal definition to be no less effective than the revised Federal definition. We received few comments on this point, and those that we did receive took opposing positions. In general, commenters from both industry and the environmental community argued that we should require that States adopt definitions identical to ours if we adopted the particular VER definition that the commenter advocated. Otherwise, they favored allowing States to retain their existing definitions. We did not find these comments logical or persuasive.

One commenter argued that States should not have to change their VER definitions and procedures merely because we adopt a new definition and procedures, especially since States have not experienced problems using their current definitions and procedures. We do not agree. Under 30 CFR 730.5 and 732.17(e)(1), the standard for determining whether a program change is necessary in response to a new or revised Federal rule is whether the State program provisions are no less effective than our regulations in meeting the requirements of the Act. Our adoption of a new definition of VER and related procedural rules determines the extent to which persons are eligible to receive permits for surface coal mining operations on lands protected under section 522(e) of the Act. Therefore, we will evaluate State programs to determine whether existing State program provisions would protect the lands listed in section 522(e) to the same extent as our rules and whether they would provide similar opportunity for public participation in the decision-making process. Contrary to the commenter's arguments, past performance and the question of whether the public has identified problems with existing State program provisions are not relevant to this determination since this final rule alters the standards for VER (and hence the degree of protection for section 522(e) lands), as well as the opportunity for public participation.

We specifically sought comment on whether we should require those States with an approved takings standard for VER to remove this standard or whether the rationale that we relied upon to approve the takings standard in the Illinois definition of VER remains valid. *See* 30 CFR 917.15(j) and 54 FR 123, January 4, 1989. In other words, could the takings standard be considered no less effective than the good faith/all permits standard in achieving the purposes and requirements of the Act even though it purportedly balances the purposes of the Act and section 522(e) in a different manner with potentially different results in terms of the level of protection afforded to the areas listed in section 522(e) of the Act? Commenters were divided on this issue as well, depending upon which VER definition they favored.

As previously noted, under 30 CFR 730.5 and 732.17(e)(1), the standard for determining whether a State program amendment is necessary in response to new or revised Federal regulations is whether the State program provisions are no less effective than our regulations in meeting the requirements of the Act. The final environmental impact statement (EIS) for this rulemaking describes the takings standard as likely to be somewhat less protective of the lands listed in section 522(e) than the good faith/all permits standard. Specifically, the model used in the EIS analysis predicts that application of a takings standard nationwide would result in the mining of an additional 185 acres of section 522(e)(1) lands, 1,686 acres of Federal lands in eastern national forests, and 984 acres in State parks between 1995 and 2015. *See* Table V–1 of the EIS. Therefore, we anticipate that States would have difficulty justifying retention of a takings standard for VER unless they can convincingly demonstrate that the State program would ensure that application of the takings standard would be no less protective of section 522(e) lands than the good faith/all permits standard in the rule that we are adopting today.

One commenter noted that we previously approved the takings standard in the Illinois program partly on the basis of the argument that section 522(e) has multiple purposes of equal importance. In the preamble to that decision, we stated that the purposes of section 522(e) include protection of the lands listed therein, preservation of valid property rights, and avoidance of compensable takings. According to the preamble, the takings standard is consistent with the Act and no less effective than the good faith/all permits standard even though the takings standard accords greater weight to protection of the rights of mineral owners and avoidance of compensable takings than it does to protection of the lands listed in section 522(e). *See* 54 FR 120, January 4, 1989. The commenter argued that we should apply the same principle in evaluating State VER definitions today. We disagree.

We no longer adhere to the position stated in the 1989 preamble. As discussed in Part VII.C. of this preamble, we believe that the purpose of section 522(e) is to prohibit new surface coal mining operations on the lands listed in that section, with certain exceptions. And, as we state in that discussion, in view of the purpose of section 522(e), we do not agree that VER must or should be defined in a way that would avoid all compensable takings. Therefore, we do not expect that an argument that the takings standard is more protective of the rights of the mineral owners and is more likely to avoid compensable takings than the good faith/all permits standard will provide sufficient justification for retention of the takings standard as no less effective than the good faith/all permits standard in protecting the lands listed in section 522(e).

One commenter argued that since we had previously approved the Illinois takings standard as no less effective than the good faith/all permits standard, we could not now find Illinois' use of the takings standard to be less effective than the good faith/all permits standard in our proposed rule. We disagree. We based our prior approval of the Illinois standard on, among other things, an interpretation of the legislative history

of SMCRA and pertinent court decisions that we no longer believe to be appropriate. As discussed in Part VII.C. of this preamble, we no longer believe that the legislative history of SMCRA requires that we define VER in a way that completely avoids compensable takings. Therefore, the fact that we also based our prior approval of the Illinois definition on the argument that a takings standard is appropriate and necessary to avoid compensable takings under the Illinois Constitution is not relevant to an evaluation of whether the Illinois takings standard is no less effective than the good faith/all permits standard.

XXVIII. How Does This Rule Impact Information Collection Requirements?

The final rule does not alter the information collection burden associated with Parts 740, 745, 772, 773, 778, 780, and 784. However, the final rule includes editorial revisions to §§ 740.10, 745.10, and 772.10 to maintain consistency with Departmental guidance concerning the format and content of these sections.

In addition, we have revised section 761.10 to reflect the information collection burden changes resulting from the rule changes that we are adopting today.

XXIX. Procedural Matters

A. Executive Order 12866: Regulatory Planning and Review

This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This determination is based on a cost-benefit analysis prepared for the final rule. The cost-benefit analysis indicated that the cost increase resulting from the rule will be negligible. A copy of the analysis is available for inspection at the Office of Surface Mining, Administrative Record—Room 101, 1951 Constitution Avenue, N.W., Washington, DC 20240. You may obtain a single copy by writing us or calling 202–208–2847. You may also request a copy via the Internet at osmrules@osmre.gov.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule will not significantly change costs to industry or to the Federal, State, or local governments. Furthermore, the rule will have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients because the rule does not affect such items.

(4) This rule raises novel legal and policy issues as discussed in the preamble.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the findings that the rule will not significantly change costs to industry or to Federal, State, or local governments. Furthermore, the rule will have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act, because it will not:

- Have an annual effect on the economy of $100 million or more.
- Cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions because the rule does not impose any substantial new requirements on the coal mining industry, consumers, or State and local governments. It essentially codifies current policy.
- Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

D. Unfunded Mandates Reform Act of 1995

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act, 1 U.S.C. 1531, *et seq.*, is not required.

E. Executive Order 12630: Takings

In accordance with Executive Order 12630 (March 18, 1988) and the ''Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings,'' dated June 30, 1988, the Department has prepared a takings implication assessment, which has been made a part of the administrative record for this rulemaking and is set forth below:

Section 522(e) of SMCRA provides that, subject to VER (and with certain other specified exceptions), no surface coal mining operations shall be permitted on certain lands designated by Congress. As stated in the preceding parts of this preamble, the final rule defining VER establishes a good faith/all permits standard for VER under section 522(e).

Under the good faith/all permits standard, a person would have VER if, prior to the date the land came under the protection of section 522(e), the person or a predecessor in interest had all necessary property rights and had obtained, or made a good faith effort to obtain, all State and Federal permits and other authorizations required to conduct surface coal mining operations.

The final rule may have some significant, but unquantifiable, takings implications. We do not expect that a court would find that this final rule constitutes a facial taking, because, as discussed in Part VI of this preamble, that issue was litigated in 1979–80, in *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) 1083 (1980).

1. No Facial Takings

It is unlikely that the good faith/all permits standard would be determined to constitute a facial taking. This standard is a modification of the ''all permits'' standard adopted on March 13, 1979, which required that a person demonstrate valid issuance by August 3, 1977 of all necessary State and Federal permits.

The rule was challenged in *PSMRL I, Round I,* 14 Env't Rep. Cas. (BNA) at 1090–92 (1980), as effecting a compensable taking of property. While the court declined to address the constitutionality of the VER definition, it found that a person who applies for all permits, but fails to receive one or more through government delay, engenders the same investments and expectations as a person who has obtained all permits. Therefore, the court found that a good faith attempt to

obtain all permits before August 3, 1977, should suffice for purposes of VER. The court remanded to the Secretary that portion of the definition that required the property owner actually to have obtained all permits necessary to mine.

2. Likelihood of Compensable Takings

In evaluating takings claims for compensation concerning government regulatory actions, the courts have typically considered three factors on a fact-specific, case-by-case basis: the character of the governmental action, the economic impact of the action, and the extent to which the government action interferes with reasonable investment-backed expectations. *See Penn Cent. Transp. Co.* v. *New York City,* 438 U.S. 104, 124 (1978). Because of the scope of the final rule and the lack of information on specific property interests that might be affected, this assessment cannot predict or evaluate the effects of the final rule on property rights. However, most States have been applying the good faith/all permits standard or a similar standard since the inception of state regulatory primacy under SMCRA, so experience to date with this standard provides some indication of the likelihood of future compensable takings. In light of this history, the assessment will discuss generally the anticipated impacts of the final rule, and compare them to the impacts of the other alternatives considered.

a. *History.* History does not suggest that the promulgation of a good faith/all permits standard would result in a significant number of takings compensation awards. Twenty State programs currently include either the good faith/all permits standard (15 States) or the all permits standard (5 States); we also have used the good faith/all permits standard for a number of years. Two State programs use a takings standard, one uses only the needed for and adjacent standard, and one State has no VER definition. We are not aware of any instance in which the States' use of these standards has resulted in a judicial determination of a compensable taking.

Likewise, use of these standards has not resulted in any financial compensation in those instances where our application of the standard has resulted in litigation.

The question of whether application of the good faith/all permits standard for VER effects a compensable taking was examined by the court in *Sunday Creek Coal Co.* v. *Hodel (''Sunday Creek''),* No. 88–0416, slip op. (S.D. Ohio June 2, 1988). In *Sunday Creek,* applying Ohio's counterpart to the good faith/all permits standard, we found that the plaintiff did not have VER. The court ruled that our application of Ohio's VER standard would deprive Sunday Creek of its property rights in violation of the Fifth Amendment. The court therefore reversed our negative VER determination. In another case that considered the question of VER, *Belville Mining Co.* v. *United States (''Belville II''),* No. C–1–89–874 (S.D. Ohio), the court simply assumed that if an applicant could demonstrate a right to strip mine, then denial of VER would constitute a ''taking'' of that applicant's interest. These two decisions indicate that, at least in Ohio, a Federal court would be likely to conclude that application of the good faith/all permits standard for VER would effect a compensable taking. However, the United States Court of Federal Claims has exclusive jurisdiction to hear takings claims against the Federal government.

While the likelihood of some degree of financial exposure exists, based on the above data, we believe that adoption of a good faith/all permits standard will not result in any change in the Government's financial exposure.

b. *Character of the Governmental Action.* The purpose served and the statutory provisions implemented by this final rulemaking are discussed in the preamble to the final rule. The final rule substantially advances a legitimate public purpose. The legitimate public purpose is the implementation of the protections for specified areas set forth in section 522(e) of SMCRA. In that section, Congress determined that subject to certain exceptions, including valid existing rights, surface coal mining is prohibited on specified lands because such mining is incompatible with the values for which those lands were designated as unsuitable for surface coal mining operations.

The final rule substantially advances that purpose in several respects.

First, the final rule informs interested persons of what our interpretation and application of section 522(e) will be. Further, the rule sets out the procedures to be followed in implementation of section 522(e). Thus, the rule provides greater certainty, clarity, and predictability in implementation of section 522(e).

Second, the rule advances Congress' purpose of protecting the areas specified in section 522(e), by providing that the primary VER exception for mining in those protected areas applies only to the extent that a person can demonstrate that a good faith effort had been made to obtain all required permits for a surface coal mining operation before the area came under the protection of section 522(e). (As discussed in the preamble to the final rule, the rulemaking also addresses other VER standards that may apply, and other exceptions to section 522(e).) The final definition of VER thus advances the regulatory scheme Congress developed to prevent the harms which surface coal mining operations would cause in those areas.

We do not know of any other property use or actions that would significantly contribute to the problems caused by surface coal mining operations in such areas.

c. *Economic Impact.*

Affected Property Interests

The property interests that could be affected by this rule are primarily coal rights in section 522(e) areas. We cannot determine in advance which coal rights would be affected by the eventual application of this final rule, or what value those rights would have. However, under both the good faith/all permits standard and the needed for and adjacent standard in this final rule, the person requesting the VER determination must first demonstrate the requisite underlying property right to mine the coal by the proposed method. Thus, those coal owners that cannot demonstrate the requisite property right would not be able to demonstrate VER.

In many instances, a coal holder may not be able to demonstrate the requisite property right to surface mine coal. This is the case when the coal rights were severed at such an early date that, under state property law, no right to surface mine was conveyed. In those cases, denial of VER to surface mine would not be a compensable taking, because no property rights would have been taken. See the discussion of this topic in Final Environmental Impact Statement OSM–EIS–29, entitled ''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'' (July, 1999), and the accompanying Final Economic Analysis (EA) entitled ''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'' (July, 1999). As discussed in the EIS and EA, we have no means of precisely

estimating how many such instances will occur.

In all other instances, if we find that a person does not have VER and a takings claim is filed with the United States Court of Federal Claims, that court would evaluate the claim. Because of the geographical scope and complexity of this rulemaking, we do not have sufficient information to accurately predict or evaluate the incidence of such claims, or their likely merits. There is no data base that definitively or reliably lists all properties protected under section 522(e), or the nature or extent of individual coal rights included in such areas. Such a list would not remain current for any appreciable time because individual properties would be added or removed on a continual basis as protected features come into existence, evolve, and sometimes disappear. Even if it could be determined which coal rights are subject to section 522(e), it cannot reliably be predicted which coal an owner might seek to mine or for which lands a VER determination would be necessary.

Likely Degree of Economic Impact, Character and Present Use of Property, and Mitigating Benefits

Similarly, because we cannot predict what VER determinations may be necessary, we cannot predict the likely degree of economic impact on the underlying property interests from application of this final rule. However, in general, application of the final rule might result in more economic impact on underlying property interests than would occur under the other alternatives considered. This greater impact could occur because, compared to those other alternatives, more holders of coal rights may be unable to mine the coal under the final rule because they could not demonstrate VER under the good faith/all permits standard.

However, as discussed in the EIS and in this preamble, holders of coal rights do access the coal on lands protected by section 522(e) by methods other than the VER exception. These methods include the compatibility findings, waivers and joint approvals authorized under paragraphs (e)(2) through (e)(4) of section 522 as well as outright purchase of a protected feature such as an occupied dwelling to remove it from protected status.

We do not have information on the character and present use of individual affected properties. Likewise, we do not have the specific information necessary to evaluate the extent to which, in particular cases, the benefits to the property holder from applying the prohibitions of section 522(e) offset or otherwise mitigate the adverse economic impact of applying those prohibitions. In general, application of the prohibitions is expected to ensure that incompatible use is not made of such lands, where Congress has determined that surface coal mining operations are an incompatible use. The availability of other alternatives to the final rule is discussed below.

d. *Interference with reasonable investment-backed expectations.* Whether a coal holder has reasonable investment-backed expectations, and the degree to which application of the final rule might interfere with those expectations, cannot be determined until the coal holder has requested a determination or finding that a particular exception to the prohibitions and restrictions of section 522(e) applies. However, application of the final rule might result in more interference with reasonable investment-backed expectations than would occur under the other alternatives considered. Compared to the other alternatives, more holders of coal rights may be unable to mine the coal under the final rule because they could not demonstrate VER under the good faith/all permits standard. However, any such interference could be limited by factors such as the following:

In many cases, holders of coal rights in section 522(e) areas will not request VER, either because the holder determines that the coal is not economically minable, or because the holder determines that it is less costly to obtain some other exception, such as a compatibility finding or a waiver, from the prohibitions of section 522(e).

In other cases, under State property law, where the mineral rights have been severed from the surface estate, we expect that holders of coal rights would not have the necessary property right to surface mine the coal, as discussed in more detail in the EIS and EA. These holders could have no reasonable expectation of surface mining the coal.

If the holder of coal rights purchased those rights after the land came under the protections of section 522(e), the purchaser would be on notice of the applicability of the prohibitions in section 522(e). If the purchaser unsuccessfully requested a determination or finding that a particular exception under section 522(e) applied, and filed a takings claim concerning denial of the request, it is likely that the United States Court of Federal Claims would deem the purchaser to be on notice concerning the prohibitions and the exceptions. Thus, we would expect the court to find that the purchaser could have no reasonable expectation of evading the application of those requirements. In some cases, it is also likely that the court would find no reasonable expectation of mining under an exception. And if there is no reasonable expectation of mining, we would not expect the court to find that reasonable investment-backed expectations exist.

If a coal holder has made no significant expenditures, the holder probably would be unable to demonstrate sufficient investment-backed expectations to support a takings claim. Similarly, if VER for surface mining were denied, but underground mining were possible and economical, we expect that a takings claim would be difficult to sustain. Also, if a coal holder does not demonstrate VER, the holder may nonetheless be eligible for another exception to the prohibitions and restrictions of section 522(e), such as a compatibility finding or a waiver. The prohibitions and restrictions would not apply if the coal holder demonstrated that the other exception applies. We expect that a takings claim for denial of VER would be difficult to sustain if the holder failed to utilize another available exception—particularly in light of the fact that these other exceptions are used relatively often.

Summary of Takings Implications for Section 522(e) Lands

To provide a basis for comparing the relative environmental and economic impacts of the final rule and the alternatives, we developed impact estimates by using a model that relied on specific methodologies and assumptions. For purposes of this assessment, the evaluation of takings implications utilizes in part the analyses set out in the EIS and EA for the final rule. The EIS and EA discussions of the alternatives summarize the number of acres estimated to be disturbed under each VER alternative over a 20-year period.

Because of the difficulty in predicting the extent of actual mining in protected areas under this rule, we could not predict the actual impacts of the alternatives. Therefore, the EIS and EA estimates of coal acreage that could be mined under the good faith/all permits alternative and the other alternatives are relevant to this assessment only to the limited extent that they show the anticipated *relative* economic impacts of the final rule, compared to the other alternatives. Tables V–1 through V–5 of the EIS show relative amounts of coal acreage estimated to be mined over a 20-year period under the different

alternatives, as calculated using the model.

Generally speaking, these analyses assume that:

(1) Relatively few persons would be able to demonstrate VER under a good faith/all permits standard.

(2) For some categories of lands, more persons might be able to demonstrate VER under a good faith/all permits or takings standard, and that in some cases, even more persons might be able to demonstrate VER under an ownership and authority standard.

(3) The impacts of the bifurcated alternative would be somewhere between the impacts of the good faith/all permits standard and those of the ownership and authority standard.

In general, as stated, the good faith/all permits standard is more likely to limit surface coal mining operations. As a result, more takings claims would be expected to be filed under a good faith/all permits standard. Whether courts would find that a negative VER determination under the good faith/all permits standard constituted a compensable taking should turn on the specific property rights involved.

Based upon available information, including the EIS and EA for the final rule, and a survey of historical data concerning permitting, we anticipate that the final rule will have the following takings impacts.

Section 522(e)(1) lands: These areas include National Park lands, National Wildlife Refuge lands, National Trails, National Wilderness Areas, Wild and Scenic Rivers and study rivers, and National Recreation Areas. We anticipate relatively few takings impacts in (e)(1) areas because there has been a relative dearth of VER determinations and any resulting takings claims concerning (e)(1) areas since the enactment of SMCRA.

Further, as previously discussed, the Secretary's 1988 policy concerning exercise of VER in (e)(1) areas remains in effect. That policy states that, if a person acts to exercise VER on (e)(1) lands, then, subject to appropriation, the Secretary will use available authorities to seek to acquire the rights through exchange, negotiated purchase, or condemnation.

All of this suggests that there may continue to be few VER requests, little economic impact, few takings cases, and even fewer takings awards in (e)(1) areas.

Surface mining: As discussed in the EA, we anticipate that in many cases a compensable taking for denial of VER to surface mine would not be found, because the requisite property right to surface mine coal could not be demonstrated. And in many cases, if VER for surface mining were denied, underground mining would still be a reasonable remaining use of the coal, so a takings award would not be likely for denial of VER to surface mine in section 522 (e)(1) areas.

Underground mining: As explained in a separate rulemaking published in today's **Federal Register**, the prohibitions of section 522(e) do not apply to subsidence from underground mining operations. Therefore, we expect that any takings award for denial of VER for surface activities in connection with underground mining would be limited to coal that could not be mined from portals outside the (e)(1) area.

Section 522(e)(2) lands: These areas consist of Federal lands within national forests. For the reasons summarized below, we anticipate relatively few takings from VER determinations on (e)(2) lands.

Surface mining: We anticipate that no takings claims would arise from application of the good faith/all permits standard in surface mining VER determinations in western national forests and national grasslands. Coal owners in the western (e)(2) areas have never pursued surface mining VER determinations, but rather have obtained compatibility findings under section 522(e)(2). We anticipate that some acreage might be precluded from surface mining, and some takings claims might arise, concerning surface mining VER determinations in eastern national forests.

For surface coal mining, we do not expect that a court would find that a compensable taking exists if underground mining is an economically and technically feasible alternative. In the absence of VER for surface mining, most owners could qualify for a compatibility exception for underground mining, so underground mining would be a reasonable remaining use. As discussed in the EIS and EA, we anticipate that in a substantial number of cases (a higher proportion in the eastern coal fields), a court would find no property right to surface mine under State property laws. This is because the coal in many cases was severed from the surface rights relatively early, when surface mining was not common at the time and place of severance. As a result, under State property law, typically the coal owner would not have the necessary right to surface mine. We do not have information on actual dates of severance of coal rights. There might also be mitigation of takings in those limited instances where the United States decides to purchase coal rights.

Underground mining: The (e)(2) compatibility exception would continue to apply. Therefore, we expect few takings claims from denial of VER for underground mining in national forests, because we assume that virtually all underground mining could qualify for a compatibility finding. This is based in part on the fact that the Multiple-Use Sustained Yield Act and the National Forest Management Act establish multiple use as the guiding principle for management of national forest lands, and in part on the fact that, in the past, requests for compatibility findings have never been denied. Surface operations and impacts associated with underground mining generally disturb only a relatively minimal amount of the land surface. Roads and surface facilities can generally be sited in such a way as to avoid significant impacts on other land uses such as timber production, livestock grazing, and recreation.

Section 522(e)(3) lands: These areas include lands where surface coal mining operations would adversely affect a publicly owned park or site on the National Register of Historic Places. We do not anticipate that any significant takings would occur on (e)(3) lands as a result of surface or underground mining VER determinations. Pursuant to (e)(3), jurisdictional agencies, together with the regulatory authority, may approve mining in the vicinity of protected areas, and thus waive the prohibition of (e)(3). A sampling of permit records indicated that some such mining has occurred, but no VER requests were located for such areas. Therefore, we anticipate that, in many cases, operations may avoid such sites or resolve any jurisdictional agency concerns about mining impacts, so that the jurisdictional agency and the regulatory authority would jointly approve mining pursuant to (e)(3). In such cases, a VER determination would be unnecessary.

Section 522(e)(4) lands: These areas include lands within one hundred feet of the right of way of a public road. We anticipate relatively few takings claims concerning VER determinations for (e)(4) areas. Coal mines now tend to avoid areas with numerous roads and streets because of increased acquisition and public safety-related costs of mining in such areas. In the vast majority of cases, an exception to the prohibition of (e)(4) is obtained under the waiver provision of (e)(4), rather than through a VER determination. Therefore, we do not expect the choice of a VER standard to have a major effect on takings claims for coal located within the buffer zones for public roads. As noted above, our

survey of permitting data located only a few instances of VER determinations for (e)(4) areas.

Section 522(e)(5) lands: These areas include lands within 300 feet of an occupied dwelling, public building, school, church, community or institutional building, or public park, or within 100 feet of a cemetery. We anticipate relatively little economic impact for takings purposes on (e)(5) areas other than (e)(5) public park lands.

The survey of permit files indicated that in most cases (more than 85%), mining near dwellings occurs because (e)(5) waivers are negotiated with dwelling owners. Therefore, we expect that VER would not be necessary and would continue not to be pursued in most such areas. Proposals to mine in areas occupied by public buildings, schools, churches, and cemeteries are typically limited. It is usually less expensive for the operator to avoid such areas, rather than to pay the costs of seeking VER, avoiding material damage where prohibited, and paying reclamation costs.

In addition, the permit survey did not disclose any instances of VER requests for mining in the areas around non-NPS public parks protected under (e)(5). However, our model does anticipate that in the next 20 years substantial coal acreage in (e)(5) public parks might be precluded from mining as a result of underground mining VER determinations under the final rule, and a relatively smaller but still significant acreage might be precluded from surface mining as a result of surface mining VER determinations under the final rule. Some portion of that acreage could result in takings awards.

3. Alternatives to the Final Rule

As summarized above in this assessment, and as discussed in detail in the EIS and the EA, we developed and considered three alternatives to the good faith/all permits standard for VER. They are the good faith/all permits or takings (GFAP/T) standard, the ownership and authority standard, and the bifurcated alternative. The good faith/all permits standard has the greatest potential for takings implications, and we have found no way to minimize the takings implications of the final rule except by selecting one of the other alternatives. However, we do not believe that such a selection is justified. We believe that the good faith/all permits standard adopted as part of the final rule is the best alternative because it best protects the areas listed in section 522(e) from surface coal mining operations, as Congress intended.

GFAP/T Standard

Under this standard, a person could demonstrate VER by (1) demonstrating compliance with the good faith/all permits standard, or (2) demonstrating that denial of VER as of the date that the area became subject to section 522(e) would reasonably be expected to result in a compensable taking.

We would expect no takings implications from the GFAP/T standard because in all cases, VER should be granted if denial would result in a compensable taking. However, as noted in the preamble to the final rule, when we proposed the GFAP/T alternative in 1991, it elicited some of the strongest opposition that we have ever received on a proposed rule. We received approximately 750 comments, and virtually every comment emphatically opposed the GFAP/T standard. Opponents charged that this standard would be impossibly burdensome for States to implement. Some commenters charged that it was too complex, unpredictable, and uncertain. Many commenters urged adoption of a ''bright-line'' standard instead. Some charged that it was not protective enough of section 522(e) areas, and others charged that it was inappropriately restrictive of mining in section 522(e) areas. Some commenters felt that State regulatory authorities had no authority under State law to apply the standard. Every category of commenter rejected the GFAP/T standard as unworkable, unacceptable, or demonstrably inferior to some other alternative.

Ownership and Authority Standard

Under this standard, a person would have VER upon demonstrating ownership of the coal rights plus the property right under State law to remove the coal by the method intended. The ownership and authority standard would require demonstrating, as of the date that the land came under the protection of section 522(e), the property right to mine the coal by underground methods if VER for underground mining were sought, and by surface mining methods if VER for surface mining were sought.

We would not expect the ownership and authority standard to have significant takings implications. If a person could not demonstrate the right to mine the coal by the method intended, there would be no denial of or interference with property rights for which compensation would be due under takings law, since a person must have the property right to a particular use to be compensated for denial of that use.

Although the ownership and authority standard would have no significant takings implications, we believe that it suffers from a serious shortcoming in that it would effectively eviscerate the protections afforded under section 522(e) to lands underlain by non-Federal coal. This evisceration would result from the fact that the ownership and authority alternative would result in a finding of VER whenever a person met the permit application requirements for property rights. As a result, except for lands overlying unleased Federal coal, the prohibitions of section 522(e) would be meaningless and without practical effect, because they would add almost nothing to the protection already offered by the SMCRA permit requirements. Such a result would clearly be inconsistent with congressional intent.

Bifurcated Alternative

Under this alternative, when the mineral and surface estates have been severed, the date of severance would determine whether the ownership and authority or the good faith/all permits standard for VER would be used. When the mineral estate was severed from the surface estate before the land came under the protection of section 522(e), the ownership and authority standard would be used to determine VER. When the mineral estate was severed from the surface estate after the date the land came under the protection of section 522(e), the good faith/all permits standard would be used. Thus, we believe the takings implications of this alternative would be somewhere between those of the ownership and authority and the good faith/all permits standards. We did not propose this alternative, because we concluded that it was questionable whether there is a basis in SMCRA for applying two different VER standards, depending on the date of severance.

4. Estimate of Potential Financial Exposure From the Final Rule

The Attorney General's guidelines and the Department's supplemental guidelines for takings implications assessments provide that the assessment should set out an estimate of the financial exposure if the final rule were held to effect a compensable taking. Given the geographic scope of this final rule, however, and the lack of information on the effects on individual property rights, a meaningful estimate of financial exposure is impossible. Instead, as discussed above, this assessment discusses generally the

anticipated takings impacts of the final rule, relative to the other alternatives considered. Federal financial exposure is greatest from claims concerning VER denials in the eastern United States in section 522(e)(2) areas or from the costs associated with acquisition of property rights in section 522(e)(1) areas pursuant to the Secretary's 1988 policy statement, as discussed above.

5. Conclusion

The final rule for VER is expected to have a greater potential for takings implications than the other alternatives considered. More significant takings implications are anticipated primarily in some (e)(2) areas (Federal lands in eastern national forests) and (e)(5) areas (State and local parks). In light of the Secretary's 1988 policy on exercise of VER for (e)(1) areas, takings implications are less likely in (e)(1) areas. Takings implications are also substantially less likely in (e)(3) through (e)(5) areas other than public parks. Case-by-case application of the regulation might result in takings implications, but such an analysis is beyond the scope of this assessment and cannot be made until the rule is actually applied. Thus, insufficient information is available to enable an accurate assessment of the extent to which significant takings consequences might result from adoption and application of this rule.

Under the standards set forth in the ''Attorney General's Guidelines For the Evaluation of Risk and Avoidance of Unanticipated Takings,'' dated June 30, 1988, and the Supplementary Takings Guidelines of the Department of the Interior, we therefore conclude that this rulemaking has significant takings implications.

F. Executive Order 13132: Federalism

In accordance with Executive Order 13132, this rule does not have Federalism implications. The rule does 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.

SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' States are not required to regulate surface coal mining and reclamation operations under SMCRA, but they may do so if they wish and if they meet certain requirements. The Act also provides for Federal funding of 50% of the cost of administering State regulatory programs approved under SMCRA. Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA. Further, section 505 of SMCRA provides for the preemption of State laws and regulations that are inconsistent with the provisions of SMCRA.

G. Executive Order 12988: Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule (1) does not unduly burden the judicial system and (2) meets the requirements of sections 3(a) and 3(b)(2) of the order.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act, agencies may not conduct or sponsor a collection of information unless the collection displays a currently valid Office of Management and Budget (OMB) control number. Also, no person must respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. Therefore, in accordance with 44 U.S.C. 3501 *et seq,* we submitted the information collection and recordkeeping requirements of 30 CFR Parts 761 and 772 to OMB for review and approval. OMB subsequently approved the collection activities and assigned them OMB control numbers 1029–0111 and 1029–0112, respectively.

I. National Environmental Policy Act of 1969 and Record of Decision

This rule, issued in conjunction with the rule concerning the applicability of the prohibitions of section 522(e) of SMCRA to subsidence from underground mining operations (RIN 1029–AB82), constitutes a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA). Therefore, we have prepared a final environmental impact statement (EIS) pursuant to section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). The Environmental Protection Agency has published a separate notice of the availability of the EIS in today's edition of the **Federal Register**. A copy of the EIS, which is entitled ''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: Final Environmental Impact Statement OSM–EIS–29 (July, 1999),'' is available for inspection at the Office of Surface Mining, Administrative Record—Room 101, 1951 Constitution Avenue, N.W., Washington, DC 20240. You may obtain a single copy by writing us or calling 202–208–2847. You also may request a copy via the Internet at osmrules@osmre.gov.

The preamble to this final rule serves as the ''Record of Decision'' under NEPA. Because of the length of the preamble, we have prepared the following concise summary of the EIS and the decisions made in the final rule relative to the alternatives considered in the EIS.

The EIS addressed the general setting of the proposal, its purpose and need, the alternatives considered, existing environmental protection measures, the affected environment, the environmental consequences, and overall consultation and coordination activities. In addition, the EIS discussed the regulatory protections of SMCRA, the history of VER, and related rulemaking issues such as coal exploration on protected lands, the transferability of VER, procedural requirements for VER determinations, and responsibility for VER determinations for non-Federal inholdings within the areas listed in section 522(e)(1) of the Act.

We used a generic mine impact analysis on a hypothetical site-specific basis to describe impacts to certain resources when surface and underground mining operations are conducted within, and adjacent to, section 522(e) areas (see Chapter IV of the EIS). In addition, we estimated the coal resources within the areas defined by section 522(e) and subjected them to various tests and assumptions to provide an estimate of the number of acres that could be affected over a 20-year period (1995 to 2015). Using the generic mine impact analysis and the potentially affected acreage of section 522(e) areas, we were able to provide a measure of the relative degree of potential environmental impacts under each alternative.

Because of the comments the we received on the proposed rule, the final rule differs somewhat from the proposed rule. In making these changes, we used the EIS to understand the potential environmental impacts. We

determined that there are no measurable environmental impacts associated with these changes, and that, in terms of environmental impacts, the changes do not constitute a significant departure from the alternatives evaluated in the EIS.

Alternatives Considered

We identified five alternatives for implementing the VER exception in section 522(e) of SMCRA. These alternatives are no action, good faith/all permits (the preferred alternative), good faith/all permits or takings, ownership and authority, and bifurcated. The last alternative is a combination of the good faith/all permits and the ownership and authority alternatives.

No Action (NA) Alternative: Under the no action alternative, we would not adopt a rule defining VER and establishing implementing procedures; the status quo would continue. We would make VER determinations using the policy established in the suspension notice published November 20, 1986 (51 FR 41954) in all States except Ohio. In Ohio, we would use a takings standard. We would continue to make VER determinations for Federal lands in section 522(e)(1) and (2) areas. We also would continue to make VER determinations for non-Federal lands within section 522(e)(1) areas when surface coal mining operations on those lands would affect the Federal interest. States would continue to use their current standards and procedures for determining VER.

Good Faith/All Permits Alternative: Under the good faith/all permits standard, a person has VER if, prior to the date that the land came under the protection of section 522(e), the person or a predecessor in interest had obtained, or made a good faith effort to obtain, all permits and other authorizations required to conduct surface coal mining operations.

Good Faith/All Permits or Takings Alternative: Under this alternative, a person must either comply with the good faith/all permits standard or demonstrate that denial of VER would result in a compensable taking. VER would be found to exist whenever the agency making the VER determination finds that, based on existing takings jurisprudence, denial of VER would be expected to result in a compensable taking of property under the Fifth and Fourteenth Amendments to the Constitution.

Ownership and Authority Alternative: Under this alternative, an individual could establish VER by demonstrating possession of both a right to the coal and the right to mine it by the method intended. Adoption of the ownership and authority alternative would likely result in the greatest number of determinations that VER did exist.

Bifurcated Alternative: Under this alternative, VER standards would be based on the date of severance of the mineral and surface estates in relation to the date that the land came under the protection of section 522(e). When the mineral estate was severed from the surface estate before the land came under the protections of section 522(e), VER would be determined based on the ownership and authority standard. When the mineral estate had not been severed from the surface estate before the land came under the protection of section 522(e), VER would be based on the good faith/all permits standard.

Decision

The final rule establishes the good faith/all permits alternative as the standard for VER. This decision is based upon the belief that the good faith/all permits standard best achieves protection of the lands listed in section 522(e) in a manner consistent with congressional intent at the time of SMCRA's enactment. At the same time, it protects the interests of those persons who had taken concrete steps to obtain regulatory approval for surface coal mining operations on lands listed in section 522(e) before those lands came under the protection of section 522(e). And, since 20 of the 24 approved State regulatory programs already rely upon either the good faith/all permits standard or the all permits standard, adoption of a good faith/all permits standard would cause the least disruption to existing State regulatory programs.

The good faith/all permits standard is consistent with the legislative history of section 522(e), which indicates that Congress' purpose in enacting section 522(e) was to prevent new surface coal mining operations on the lands listed in that section, either to protect human health or safety, or because the environmental values and other features associated with those lands are generally incompatible with surface coal mining operations.

The analysis of environmental impacts indicated that, compared with the other alternatives considered, the good faith/all permits standard is the most protective of the lands listed in section 522(e). Adoption of the takings standard in place of the good faith/all permits standard would result in surface coal mining operations on an estimated additional 2,855 acres of protected lands between 1995 and 2015. Adoption of either the bifurcated standard or the ownership and authority standard would result in surface coal mining operations on an estimated additional 3,062 acres of protected lands during that time frame. Therefore, adoption of the good faith/all permits standard for VER will best fulfil the intent of Congress to prohibit, with certain exceptions, new surface coal mining operations on the lands protected by section 522(e).

The EIS also identified certain issues common to the VER alternatives. We discussed these issues and their potential impacts in Chapters II and V of the EIS. As discussed below, we made the following decisions with respect to these issues.

VER Definition Applicable to Section 522(e)(1) and (e)(2) Lands: Under 30 CFR Title VII, Subchapter C, State regulatory programs under SMCRA must be no less effective than the Federal regulations in meeting the requirements of the Act. Therefore, we expect that there would be no differences in the environmental impacts of the two alternatives that we considered (use of State versus Federal definition). The final rule specifies that the Federal definition of VER, not the approved State program definition, will apply to all VER determinations for the lands listed in section 522(e)(1) and (e)(2) of SMCRA, regardless of whether OSM or the State regulatory authority is responsible for making the determination. Application of the Federal definition will ensure that requests for VER determinations involving lands of national interest and importance are evaluated on the basis of the same criteria.

Continually Created VER: The definition of VER in the final rule provides for determination of VER based on property rights and circumstances in existence when the land comes under the protection of section 522(e) of SMCRA. This concept has sometimes been referred to as ''continually created VER.'' We first adopted it as a separate standard in the 1983 definition of VER. In the final rule, we are removing the separate standard and incorporating the concept into each VER standard and the exception for existing operations. The EIS found the differences in environmental impact between the existing and proposed (now final) rules to be negligible.

Transferability of VER: The final rule provides that, in general, VER are transferable because, unless otherwise provided by State law, the property rights, permits, and operations that form the basis for VER determinations are transferable. There is one significant exception. If an operation with VER

under the needed for and adjacent standard divests itself of the land to which the VER determination pertains, the new owner does not have the right to conduct surface coal mining operations on those lands under the prior VER determination. States may prohibit VER transfers to the extent that they have the authority to do so under State law.

Needed for and Adjacent Standard: The final rule adopts the needed for and adjacent standard as proposed in 1997, with several changes. To establish VER under the needed for and adjacent standard, a person must (1) make the required property rights demonstration, and (2) document that the land is both needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of section 522(e) of SMCRA. Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of section 522(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits was made. As stated in Chapter V of the EIS, we found that application of this standard would have no more than minor environmental impacts overall.

Procedural Requirements for VER Determinations: The existing rules had few requirements governing the submission and processing of requests for VER determinations. The final rule includes more complete requirements to promote public participation and establish consistent review and decision-making procedures. As discussed in Chapter V of the EIS, we found that adoption of more complete procedural requirements would result in minor to significant environmental benefits by improving decision accuracy and ensuring consideration of all relevant information.

Responsibility for VER Determinations for Non-Federal Inholdings in Section 522(e)(1) Areas: As discussed in Chapter V of the EIS, we determined that the environmental impacts of the alternatives that we considered for this issue would be determined more by the applicable VER standard than by which agency is responsible for making VER determinations for non-Federal lands within section 522(e)(1) areas. Under the final rule, the regulatory authority has the responsibility for making VER determinations for all non-Federal lands within the areas listed in section 522(e)(1), but, as noted above, the agency must use the Federal definition of VER when doing so.

VER for Coal Exploration Operations: Of the five alternatives under consideration regarding requirements for coal exploration on the lands protected by section 522(e), we decided that the no action alternative best conforms with the provisions of SMCRA. The prohibitions of section 522(e) apply only to surface coal mining operations, and SMCRA specifically excludes coal exploration from the definition of surface coal mining operations. Therefore, we decided not to add any VER demonstration requirements or other potentially prohibitory barriers to coal exploration on the lands listed in section 522(e). However, as discussed in Chapter V of the EIS, the no action alternative is the least protective of the environment. To mitigate the environmental impacts of this alternative, we have revised our rules to add a requirement that each application for coal exploration on lands listed in section 522(e) include a demonstration that the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. The final rule also provides that, before approving an application for coal exploration on lands listed in section 522(e), the regulatory authority must find that the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations.

Environmental Effects of the Alternatives

The areas most likely to be impacted by surface coal mining operations as a result of the VER exception are the lands listed in section 522(e)(1), State and local parks, and eastern national forests. Rather than claiming VER, operators generally use the waivers and compatibility findings authorized under SMCRA to gain access to coal resources within western national forests, adjacent to historic sites, or within the buffer zones for roads and occupied dwellings. While access to coal within the buffer zones for public parks, churches, schools, public buildings, and cemeteries is generally dependent upon establishing VER, mining operations can generally avoid these protected areas without difficulty.

Good Faith/All Permits Alternative: According to our model, the good faith/all permits alternative would have the least environmental impact. It also would provide surface owners and resource management agencies with the greatest degree of control over surface coal mining operations and any resultant adverse impacts in protected areas. Our model predicts that the only section 522(e) areas that would be disturbed by surface coal mining operations between 1995 and 2015 pursuant to VER determinations under this alternative would be 883 acres of Federal lands in eastern national forests, 996 acres within the buffer zones for public roads, and 4,823 acres within the buffer zones for occupied dwellings. Therefore, the good faith/all permits alternative is the environmentally preferable alternative for the VER rulemaking.

No Action Alternative: The impacts of this alternative would likely resemble those of the good faith/all permits alternative. However, this alternative would allow use of the takings standard in Ohio and in those States that have adopted the takings standard as part of their approved regulatory programs. Therefore, some areas protected by section 522(e) would be mined under this alternative that would not be mined under the good faith/all permits alternative. The model used in the EIS predicts that, relative to the good faith/all permits alternative, the no action alternative would result in surface coal mining operations on an additional 711 acres of Federal lands in eastern national forests between 1995 and 2015.

All Other VER Alternatives: The ownership and authority, bifurcated, and good faith/all permits or takings alternatives afford the greatest potential for mining-related disturbances in protected areas. Our model predicts that use of one of these alternatives in place of the good faith/all permits alternative would result in surface coal mining operations on an additional 185 to 304 acres of section 522(e)(1) lands (national parks, national wildlife refuges, and national recreation areas), 1,686 to 1,761 acres of Federal lands in eastern national forests, and 984 to 997 acres of State park lands because of VER determinations under these alternatives between 1995 and 2015. See Figure V–1 of the EIS.

The potentially affected section 522(e)(1) acreage appears to be confined to one National Park unit in the Central Appalachian region, several wildlife refuge system units within North Dakota, and, to a lesser degree, two

national recreation areas in the Central Appalachian region. The estimated cost to implement the Department's policy to acquire the interests of persons with VER who plan to conduct surface coal mining operations in section 522(e)(1) areas is $4.185 million during the 20-year time frame covered by our model.

VER Alternatives in Combination with Alternatives for Companion Rulemaking: As discussed above, the good faith/all permits standard is the most environmentally preferable of the alternatives considered for the VER definition. However, the EIS also considered the impact of the VER alternatives in combination with the alternatives for the rulemaking concerning the applicability of the prohibitions of section 522(e) to subsidence from underground mining. Based upon the number of acres of section 522(e) lands that could be subject to either surface coal mining operations or subsidence from underground mining, the combination of the good faith/all permits alternative for the VER rule and the ''prohibitions apply'' (PA) alternative for the prohibitions rulemaking would be the most environmentally protective of all potential combinations of alternatives for the two rulemakings. However, for reasons discussed in the preamble to the rulemaking concerning the applicability of the prohibitions of section 522(e) to subsidence from underground mining, we have selected the ''prohibitions do not apply'' alternative rather than any of the PA alternatives for that rulemaking.

Mitigation, Monitoring and Enforcement

We have adopted all practicable means to avoid or minimize environmental harm from the alternatives selected. Congress enacted SMCRA to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations; assure that the rights of surface landowners and other persons with a legal interest in the land are fully protected from such operations; assure that surface coal mining operations are not conducted where reclamation required by SMCRA is not feasible; and assure that surface coal mining operations are conducted so as to protect the environment.

SMCRA's permitting requirements and performance standards generally require avoidance, minimization, or mitigation of impacts to important environmental resources, and our regulations do likewise. Each SMCRA regulatory program includes five major elements: permitting requirements and procedures, performance bonds to guarantee reclamation in the event that the permittee defaults on any reclamation obligations, performance standards to which the operator must adhere, inspection and enforcement to maintain compliance with performance standards and the terms and conditions of the permit, and designation of lands as unsuitable for surface coal mining operations. Each State regulatory program must be no less effective than our regulations in achieving the requirements of the Act. And we conduct oversight of each State's implementation of its approved regulatory program.

Timing of Agency Action

The regulations of the Council on Environmental Quality at 40 CFR 1506.10(b)(2) allow an agency engaged in rulemaking under the Administrative Procedure Act to publish a decision on the final rule simultaneous with the publication of the notice of availability of the final EIS. Under section 526(a) of SMCRA, 30 U.S.C. 1276(a), anyone wishing to challenge the agency's decision may do so by filing suit in the United States District Court for the District of Columbia within 60 days of the date that the final rule is published in the **Federal Register**.

Author: The principal author of this rule is Dennis G. Rice, Division of Technical Support, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, DC 20240; Telephone (202) 208–2829. E-mail address: drice@osmre.gov.

List of Subjects

30 CFR Part 740

Public lands, Mineral resources, Reporting and recordkeeping requirements, Surety bonds, Surface mining, Underground mining.

30 CFR Part 745

Intergovernmental relations, Public lands, Mineral resources, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 761

Historic preservation, National forests, National parks, National trails system, National wild and scenic rivers system, Surface mining, Underground mining, Wilderness areas, Wildlife refuges.

30 CFR Part 762

Historic preservation, Surface mining, Underground mining.

30 CFR Part 772

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 773

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 778

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 780

Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining.

Dated: September 3, 1999.

Sylvia V. Baca,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons set forth in the preamble, the Department is amending 30 CFR Parts 740, 745, 761, 762, 772, 773, 778, 780, and 784 as set forth below:

PART 740—GENERAL REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON FEDERAL LANDS

1. The authority citation for Part 740 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 30 U.S.C. 181 *et seq.*

2. Section 740.4 is amended by deleting the word ''and'' at the end of paragraph (a)(2), replacing the period at the end of paragraph (a)(3) with a semicolon, and revising paragraphs (a)(4) and (a)(5) to read as follows:

§ 740.4 Responsibilities.

(a) * * *

* * * * *

(4) Decisions on requests to determine whether a person possesses valid existing rights to conduct surface coal mining operations on Federal lands within the areas specified in § 761.11(a) and (b) of this chapter; and

(5) Issuance of findings concerning whether there are significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations on Federal lands within a national forest, as specified in § 761.11(b) of this chapter.

3. Section 740.10 is revised to read as follows:

§ 740.10 Information collection.

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029–0027. This information is needed to implement section 523 of the Act, which governs surface coal mining operations on Federal lands. Persons intending to conduct such operations must respond to obtain a benefit.

(b) OSM estimates that the public reporting burden for this part will average 26 hours per respondent, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, NW, Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, N.W, Washington, DC 20503. Please refer to OMB Control Number 1029–0027 in any correspondence.

4. In § 740.11, paragraph (a) is revised and paragraph (g) is added to read as follows:

§ 740.11 Applicability.

(a) Except as provided in paragraph (g) of this section, both this subchapter and the pertinent State or Federal regulatory program in subchapter T of this chapter apply to:

* * * * *

(g) The definition of valid existing rights in § 761.5 of this chapter applies to any decision on a request for a determination of valid existing rights to conduct surface coal mining operations on the lands specified in § 761.11(a) and (b) of this chapter.

PART 745—STATE-FEDERAL COOPERATIVE AGREEMENTS

5. The authority citation for Part 745 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 30 U.S.C. 181 *et seq.*

6. Section 745.10 is revised to read as follows:

§ 745.10 Information collection.

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029–0092. This information is needed to implement section 523(c) of the Act, which allows States to regulate surface coal mining operations on Federal lands under certain conditions. States that desire to enter into cooperative agreements to do so must respond to obtain a benefit.

(b) OSM estimates that the public reporting burden for this part will average 1,364 hours per respondent, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, N.W., Washington, DC 20503. Please refer to OMB Control Number 1029–0092 in any correspondence.

7. In § 745.13, paragraphs (o) and (p) are revised to read as follows:

§ 745.13 Authority reserved by the Secretary.

* * * * *

(o) Determine whether a person has valid existing rights to conduct surface coal mining operations on Federal lands within the areas specified in § 761.11(a) and (b) of this chapter; or

(p) Issue findings on whether there are significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations on Federal lands within a national forest, as specified in § 761.11(b) of this chapter.

PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

8. The authority citation for Part 761 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

9. Section 761.5 is amended by removing the definition of ''surface coal mining operations which exist on the date of enactment,'' adding definitions of ''*we, us,* and *our*'' and ''*you* and *your*'' in alphabetical order, and revising the definition of ''valid existing rights'' to read as follows:

§ 761.5 Definitions.

* * * * *

Valid existing rights means a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where 30 U.S.C. 1272(e) and § 761.11 would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of § 761.11 and 30 U.S.C. 1272(e). A person seeking to exercise valid existing rights must comply with all other pertinent requirements of the Act and the applicable regulatory program.

(a) *Property rights demonstration.* Except as provided in paragraph (c) of this definition, a person claiming valid existing rights must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended. This right must exist at the time that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Applicable State statutory or case law will govern interpretation of documents relied upon to establish property rights, unless Federal law provides otherwise. If no applicable State law exists, custom and generally accepted usage at the time and place that the documents came into existence will govern their interpretation.

(b) Except as provided in paragraph (c) of this definition, a person claiming valid existing rights also must demonstrate compliance with one of the following standards:

(1) *Good faith/all permits standard.* All permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). At a minimum, an application must have been submitted for any permit required under subchapter G of this chapter or its State program counterpart.

(2) *Needed for and adjacent standard.* The land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith attempt to obtain all permits and authorizations had been made, before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact

the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of § 761.11 or 30 U.S.C. 1272(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made. In evaluating whether a person meets this standard, the agency making the determination may consider factors such as:

(i) The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) depend upon use of that land for surface coal mining operations.

(ii) The extent to which plans used to obtain financing for the operation before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) rely upon use of that land for surface coal mining operations.

(iii) The extent to which investments in the operation before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) rely upon use of that land for surface coal mining operations.

(iv) Whether the land lies within the area identified on the life-of-mine map submitted under § 779.24(c) or § 783.24(c) of this chapter before the land came under the protection of § 761.11.

(c) *Roads.* A person who claims valid existing rights to use or construct a road across the surface of lands protected by § 761.11 or 30 U.S.C. 1272(e) must demonstrate that one or more of the following circumstances exist if the road is included within the definition of ''surface coal mining operations'' in § 700.5 of this chapter:

(1) The road existed when the land upon which it is located came under the protection of § 761.11 or 30 U.S.C. 1272(e), and the person has a legal right to use the road for surface coal mining operations.

(2) A properly recorded right of way or easement for a road in that location existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e), and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations.

(3) A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(4) Valid existing rights exist under paragraphs (a) and (b) of this definition.

We, us, and *our* refer to the Office of Surface Mining Reclamation and Enforcement.

You and *your* refer to a person who claims or seeks to obtain an exception or waiver authorized by § 761.11 or 30 U.S.C. 1272(e).

10. Section 761.10 is added to read as follows:

§ 761.10 Information collection.

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029–0111. The regulatory authority or other responsible agency will use this information to determine whether a person has valid existing rights or qualifies for one of the other waivers or exemptions from the general prohibition on conducting surface coal mining operations in the areas listed in 30 U.S.C. 1272(e). Persons seeking to conduct surface coal mining operations on these lands must respond to obtain a benefit in accordance with 30 U.S.C. 1272(e).

(b) We estimate that the public reporting and recordkeeping burden for this part will average 15 hours per response under § 761.13, 0.5 hour per response under § 761.14, 2 hours per response under § 761.15, 14 hours per response under § 761.16, 2 hours per response under § 761.17(c), and 2 hours per response under § 761.17(d), including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The burden for § 761.16 includes 6 hours for the person seeking the determination and 8 hours for the agency processing the request. Send comments regarding this burden estimate or any other aspect of these information collection and recordkeeping requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, N.W., Washington, DC 20503. Please refer to OMB Control Number 1029–0111 in any correspondence.

11. Sections 761.11 and 761.12 are revised and new §§ 761.13 through 761.17 are added to read as follows:

§ 761.11 Areas where surface coal mining operations are prohibited or limited.

You may not conduct surface coal mining operations on the following lands unless you either have valid existing rights, as determined under § 761.16, or qualify for the exception for existing operations under § 761.12:

(a) Any lands within the boundaries of:

(1) The National Park System;

(2) The National Wildlife Refuge System;

(3) The National System of Trails;

(4) The National Wilderness Preservation System;

(5) The Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act, 16 U.S.C. 1276(a), or study rivers or study river corridors established in any guidelines issued under that Act; or

(6) National Recreation Areas designated by Act of Congress.

(b) Any Federal lands within a national forest. This prohibition does not apply if the Secretary finds that there are no significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations, and:

(1) Any surface operations and impacts will be incident to an underground coal mine; or

(2) With respect to lands that do not have significant forest cover within national forests west of the 100th meridian, the Secretary of Agriculture has determined that surface mining is in compliance with the Act, the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. 528–531; the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. 181 *et seq.*; and the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.* This provision does not apply to the Custer National Forest.

(c) Any lands where the operation would adversely affect any publicly owned park or any place in the National Register of Historic Places. This prohibition does not apply if, as provided in § 761.17(d), the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or place jointly approve the operation.

(d) Within 100 feet, measured horizontally, of the outside right-of-way line of any public road. This prohibition does not apply:

(1) Where a mine access or haul road joins a public road, or

(2) When, as provided in § 761.14, the regulatory authority (or the appropriate public road authority designated by the regulatory authority) allows the public road to be relocated or closed, or the area within the protected zone to be affected by the surface coal mining operation, after:

(i) Providing public notice and opportunity for a public hearing; and

(ii) Finding in writing that the interests of the affected public and landowners will be protected.

(e) Within 300 feet, measured horizontally, of any occupied dwelling. This prohibition does not apply when:

(1) The owner of the dwelling has provided a written waiver consenting to surface coal mining operations within the protected zone, as provided in § 761.15; or

(2) The part of the operation to be located closer than 300 feet to the dwelling is an access or haul road that connects with an existing public road on the side of the public road opposite the dwelling.

(f) Within 300 feet, measured horizontally, of any public building, school, church, community or institutional building, or public park.

(g) Within 100 feet, measured horizontally, of a cemetery. This prohibition does not apply if the cemetery is relocated in accordance with all applicable laws and regulations.

§ 761.12 Exception for existing operations.

The prohibitions and limitations of § 761.11 do not apply to:

(a) Surface coal mining operations for which a valid permit, issued under Subchapter G of this chapter or an approved State regulatory program, exists when the land comes under the protection of § 761.11. This exception applies only to lands within the permit area as it exists when the land comes under the protection of § 761.11.

(b) With respect to operations subject to Subchapter B of this chapter, lands upon which validly authorized surface coal mining operations exist when the land comes under the protection of 30 U.S.C. 1272(e) or § 761.11.

§ 761.13 Procedures for compatibility findings for surface coal mining operations on Federal lands in national forests.

(a) If you intend to rely upon the exception provided in § 761.11(b) to conduct surface coal mining operations on Federal lands within a national forest, you must request that we obtain the Secretarial findings required by § 761.11(b).

(b) You may submit a request to us before preparing and submitting an application for a permit or boundary revision. If you do, you must explain how the proposed operation would not damage the values listed in the definition of ''significant recreational, timber, economic, or other values incompatible with surface coal mining operations'' in § 761.5. You must include a map and sufficient information about the nature of the proposed operation for the Secretary to make adequately documented findings. We may request that you provide any additional information that we determine is needed to make the required findings.

(c) When a proposed surface coal mining operation or proposed boundary revision for an existing surface coal mining operation includes Federal lands within a national forest, the regulatory authority may not issue the permit or approve the boundary revision before the Secretary makes the findings required by § 761.11(b).

§ 761.14 Procedures for relocating or closing a public road or waiving the prohibition on surface coal mining operations within the buffer zone of a public road.

(a) This section does not apply to:

(1) Lands for which a person has valid existing rights, as determined under § 761.16.

(2) Lands within the scope of the exception for existing operations in § 761.12.

(3) Access or haul roads that join a public road, as described in § 761.11(d)(1).

(b) You must obtain any necessary approvals from the authority with jurisdiction over the road if you propose to:

(1) Relocate a public road;

(2) Close a public road; or

(3) Conduct surface coal mining operations within 100 feet, measured horizontally, of the outside right-of-way line of a public road.

(c) Before approving an action proposed under paragraph (b) of this section, the regulatory authority, or a public road authority that it designates, must determine that the interests of the public and affected landowners will be protected. Before making this determination, the authority must:

(1) Provide a public comment period and opportunity to request a public hearing in the locality of the proposed operation;

(2) If a public hearing is requested, publish appropriate advance notice at least two weeks before the hearing in a newspaper of general circulation in the affected locality; and

(3) Based upon information received from the public, make a written finding as to whether the interests of the public and affected landowners will be protected. If a hearing was held, the authority must make this finding within 30 days after the hearing. If no hearing was held, the authority must make this finding within 30 days after the end of the public comment period.

§ 761.15 Procedures for waiving the prohibition on surface coal mining operations within the buffer zone of an occupied dwelling.

(a) This section does not apply to:

(1) Lands for which a person has valid existing rights, as determined under § 761.16.

(2) Lands within the scope of the exception for existing operations in § 761.12.

(3) Access or haul roads that connect with an existing public road on the side of the public road opposite the dwelling, as provided in § 761.11(e)(2).

(b) If you propose to conduct surface coal mining operations within 300 feet, measured horizontally, of any occupied dwelling, the permit application must include a written waiver by lease, deed, or other conveyance from the owner of the dwelling. The waiver must clarify that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver will act as consent to surface coal mining operations within a closer distance of the dwelling as specified.

(c) If you obtained a valid waiver before August 3, 1977, from the owner of an occupied dwelling to conduct operations within 300 feet of the dwelling, you need not submit a new waiver.

(d) If you obtain a valid waiver from the owner of an occupied dwelling, that waiver will remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase. A subsequent purchaser will be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to State laws or if surface coal mining operations have entered the 300-foot zone before the date of purchase.

§ 761.16 Submission and processing of requests for valid existing rights determinations.

(a) *Basic framework for valid existing rights determinations.* The following table identifies the agency responsible for making a valid existing rights determination and the definition that it must use, based upon which paragraph of § 761.11 applies and whether the request includes Federal lands.

Paragraph of § 761.11 that provides protection	Protected feature	Type of land to which request pertains	Agency responsible for determination	Applicable definition of valid existing rights
(a)	National parks, wildlife refuges, etc..	Federal	OSM	Federal [1]
(a)	National parks, wildlife refuges, etc..	Non-Federal	Regulatory authority	Federal [1]
(b)	Federal lands in national forests [3].	Federal	OSM	Federal [1]
(c)	Public parks and historic places.	Does not matter	Regulatory authority	Regulatory program [2]
(d)	Public roads	Does not matter	Regulatory authority	Regulatory program [2]
(e)	Occupied dwellings	Does not matter	Regulatory authority	Regulatory program [2]
(f)	Schools, churches, parks, etc..	Does not matter	Regulatory authority	Regulatory program [2]
(g)	Cemeteries	Does not matter	Regulatory authority	Regulatory program [2]

[1] Definition in 30 CFR 761.5.
[2] Definition in applicable State or Federal regulatory program under 30 CFR Chapter VII, Subchapter T.
[3] Neither 30 U.S.C. 1272(e) nor 30 CFR 761.11 provides special protection for non-Federal lands within national forests. Therefore, this table does not include a category for those lands.

(b) *What you must submit as part of a request for a valid existing rights determination.* You must submit a request for a valid existing rights determination to the appropriate agency under paragraph (a) of this section if you intend to conduct surface coal mining operations on the basis of valid existing rights under § 761.11 or wish to confirm the right to do so. You may submit this request before preparing and submitting an application for a permit or boundary revision for the land, unless the applicable regulatory program provides otherwise.

(1) *Requirements for property rights demonstration.* You must provide a property rights demonstration under paragraph (a) of the definition of valid existing rights in § 761.5 if your request relies upon the good faith/all permits standard or the needed for and adjacent standard in paragraph (b) of the definition of valid existing rights in § 761.5. This demonstration must include the following items:

(i) A legal description of the land to which your request pertains.

(ii) Complete documentation of the character and extent of your current interests in the surface and mineral estates of the land to which your request pertains.

(iii) A complete chain of title for the surface and mineral estates of the land to which your request pertains.

(iv) A description of the nature and effect of each title instrument that forms the basis for your request, including any provision pertaining to the type or method of mining or mining-related surface disturbances and facilities.

(v) A description of the type and extent of surface coal mining operations that you claim the right to conduct, including the method of mining, any mining-related surface activities and facilities, and an explanation of how those operations would be consistent with State property law.

(vi) Complete documentation of the nature and ownership, as of the date that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e), of all property rights for the surface and mineral estates of the land to which your request pertains.

(vii) Names and addresses of the current owners of the surface and mineral estates of the land to which your request pertains.

(viii) If the coal interests have been severed from other property interests, documentation that you have notified and provided reasonable opportunity for the owners of other property interests in the land to which your request pertains to comment on the validity of your property rights claims.

(ix) Any comments that you receive in response to the notification provided under paragraph (b)(1)(viii) of this section.

(2) *Requirements for good faith/all permits standard.* If your request relies upon the good faith/all permits standard in paragraph (b)(1) of the definition of valid existing rights in § 761.5, you must submit the information required under paragraph (b)(1) of this section. You also must submit the following information about permits, licenses, and authorizations for surface coal mining operations on the land to which your request pertains:

(i) Approval and issuance dates and identification numbers for any permits, licenses, and authorizations that you or a predecessor in interest obtained before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(ii) Application dates and identification numbers for any permits, licenses, and authorizations for which you or a predecessor in interest submitted an application before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(iii) An explanation of any other good faith effort that you or a predecessor in interest made to obtain the necessary permits, licenses, and authorizations as of the date that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(3) *Requirements for needed for and adjacent standard.* If your request relies upon the needed for and adjacent standard in paragraph (b)(2) of the definition of valid existing rights in § 761.5, you must submit the information required under paragraph (b)(1) of this section. In addition, you must explain how and why the land is needed for and immediately adjacent to the operation upon which your request is based, including a demonstration that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(4) *Requirements for standards for mine roads.* If your request relies upon one of the standards for roads in paragraphs (c)(1) through (c)(3) of the definition of valid existing rights in § 761.5, you must submit satisfactory documentation that:

(i) The road existed when the land upon which it is located came under the protection of § 761.11 or 30 U.S.C. 1272(e), and you have a legal right to use the road for surface coal mining operations;

(ii) A properly recorded right of way or easement for a road in that location existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e), and, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct

a road across that right of way or easement to conduct surface coal mining operations; or

(iii) A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(c) *Initial review of request.* (1) The agency must conduct an initial review to determine whether your request includes all applicable components of the submission requirements of paragraph (b) of this section. This review pertains only to the completeness of the request, not the legal or technical adequacy of the materials submitted.

(2) If your request does not include all applicable components of the submission requirements of paragraph (b) of this section, the agency must notify you and establish a reasonable time for submission of the missing information.

(3) When your request includes all applicable components of the submission requirements of paragraph (b) of this section, the agency must implement the notice and comment requirements of paragraph (d) of this section.

(4) If you do not provide information that the agency requests under paragraph (c)(2) of this section within the time specified or as subsequently extended, the agency must issue a determination that you have not demonstrated valid existing rights, as provided in paragraph (e)(4) of this section.

(d) *Notice and comment requirements and procedures.* (1) When your request satisfies the completeness requirements of paragraph (c) of this section, the agency must publish a notice in a newspaper of general circulation in the county in which the land is located. This notice must invite comment on the merits of the request. Alternatively, the agency may require that you publish this notice and provide the agency with a copy of the published notice. We will publish a similar notice in the **Federal Register** if your request involves Federal lands within an area listed in § 761.11(a) or (b). Each notice must include:

(i) The location of the land to which the request pertains.

(ii) A description of the type of surface coal mining operations planned.

(iii) A reference to and brief description of the applicable standard(s) under the definition of valid existing rights in § 761.5.

(A) If your request relies upon the good faith/all permits standard or the needed for and adjacent standard in paragraph (b) of the definition of valid existing rights in § 761.5, the notice also must include a description of the property rights that you claim and the basis for your claim.

(B) If your request relies upon the standard in paragraph (c)(1) of the definition of valid existing rights in § 761.5, the notice also must include a description of the basis for your claim that the road existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). In addition, the notice must include a description of the basis for your claim that you have a legal right to use that road for surface coal mining operations.

(C) If your request relies upon the standard in paragraph (c)(2) of the definition of valid existing rights in § 761.5, the notice also must include a description of the basis for your claim that a properly recorded right of way or easement for a road in that location existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). In addition, the notice must include a description of the basis for your claim that, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations.

(iv) If your request relies upon one or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of valid existing rights in § 761.5, a statement that the agency will not make a decision on the merits of your request if, by the close of the comment period under this notice or the notice required by paragraph (d)(3) of this section, a person with a legal interest in the land initiates appropriate legal action in the proper venue to resolve any differences concerning the validity or interpretation of the deed, lease, easement, or other documents that form the basis of your claim.

(v) A description of the procedures that the agency will follow in processing your request.

(vi) The closing date of the comment period, which must be a minimum of 30 days after the publication date of the notice.

(vii) A statement that interested persons may obtain a 30-day extension of the comment period upon request.

(viii) The name and address of the agency office where a copy of the request is available for public inspection and to which comments and requests for extension of the comment period should be sent.

(2) The agency must promptly provide a copy of the notice required under paragraph (d)(1) of this section to:

(i) All reasonably locatable owners of surface and mineral estates in the land included in your request.

(ii) The owner of the feature causing the land to come under the protection of § 761.11, and, when applicable, the agency with primary jurisdiction over the feature with respect to the values causing the land to come under the protection of § 761.11. For example, both the landowner and the State Historic Preservation Officer must be notified if surface coal mining operations would adversely impact any site listed on the National Register of Historic Places. As another example, both the surface owner and the National Park Service must be notified if the request includes non-Federal lands within the authorized boundaries of a unit of the National Park System.

(3) The letter transmitting the notice required under paragraph (d)(2) of this section must provide a 30-day comment period, starting from the date of service of the letter, and specify that another 30 days is available upon request. At its discretion, the agency responsible for the determination of valid existing rights may grant additional time for good cause upon request. The agency need not necessarily consider comments received after the closing date of the comment period.

(e) *How a decision will be made.* (1) The agency responsible for making the determination of valid existing rights must review the materials submitted under paragraph (b) of this section, comments received under paragraph (d) of this section, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. If not, the agency must notify you in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the agency deems necessary to remedy the inadequacy.

(2) Once the record is complete and adequate, the responsible agency must determine whether you have demonstrated valid existing rights. The decision document must explain how you have or have not satisfied all applicable elements of the definition of valid existing rights in § 761.5. It must contain findings of fact and conclusions, and it must specify the reasons for the conclusions.

(3) *Impact of property rights disagreements.* This paragraph applies only when your request relies upon one

or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of valid existing rights in § 761.5.

(i) The agency must issue a determination that you have not demonstrated valid existing rights if your property rights claims are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. The agency will make this determination without prejudice, meaning that you may refile the request once the property rights dispute is finally adjudicated. This paragraph applies only to situations in which legal action has been initiated as of the closing date of the comment period under paragraph (d)(1) or (d)(3) of this section.

(ii) If the record indicates disagreement as to the accuracy of your property rights claims, but this disagreement is not the subject of pending litigation in a court or administrative agency of competent jurisdiction, the agency must evaluate the merits of the information in the record and determine whether you have demonstrated that the requisite property rights exist under paragraph (a), (c)(1), or (c)(2) of the definition of valid existing rights in § 761.5, as appropriate. The agency must then proceed with the decision process under paragraph (e)(2) of this section.

(4) The agency must issue a determination that you have not demonstrated valid existing rights if you do not submit information that the agency requests under paragraph (c)(2) or (e)(1) of this section within the time specified or as subsequently extended. The agency will make this determination without prejudice, meaning that you may refile a revised request at any time.

(5) After making a determination, the agency must:

(i) Provide a copy of the determination, together with an explanation of appeal rights and procedures, to you, to the owner or owners of the land to which the determination applies, to the owner of the feature causing the land to come under the protection of § 761.11, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 761.11.

(ii) Publish notice of the determination in a newspaper of general circulation in the county in which the land is located. Alternatively, the agency may require that you publish this notice and provide a copy of the published notice to the agency. We will publish the determination, together with an explanation of appeal rights and procedures, in the **Federal Register** if your request includes Federal lands within an area listed in § 761.11(a) or (b).

(f) *Administrative and judicial review.* A determination that you have or do not have valid existing rights is subject to administrative and judicial review under §§ 775.11 and 775.13 of this chapter.

(g) *Availability of records.* The agency responsible for processing a request subject to notice and comment under paragraph (d) of this section must make a copy of that request available to the public in the same manner as the agency, when acting as the regulatory authority, must make permit applications available to the public under § 773.13(d) of this chapter. In addition, the agency must make records associated with that request, and any subsequent determination under paragraph (e) of this section, available to the public in accordance with the requirements and procedures of § 840.14 or § 842.16 of this chapter.

§ 761.17 Regulatory authority obligations at time of permit application review.

(a) Upon receipt of an administratively complete application for a permit for a surface coal mining operation, or an administratively complete application for revision of the boundaries of a surface coal mining operation permit, the regulatory authority must review the application to determine whether the proposed surface coal mining operation would be located on any lands protected under § 761.11.

(b) The regulatory authority must reject any portion of the application that would locate surface coal mining operations on land protected under § 761.11 unless:

(1) The site qualifies for the exception for existing operations under § 761.12;

(2) A person has valid existing rights for the land, as determined under § 761.16;

(3) The applicant obtains a waiver or exception from the prohibitions of § 761.11 in accordance with §§ 761.13 through 761.15; or

(4) For lands protected by § 761.11(c), both the regulatory authority and the agency with jurisdiction over the park or place jointly approve the proposed operation in accordance with paragraph (d) of this section.

(c) *Location verification.* If the regulatory authority has difficulty determining whether an application includes land within an area specified in § 761.11(a) or within the specified distance from a structure or feature listed in § 761.11(f) or (g), the regulatory authority must request that the Federal, State, or local governmental agency with jurisdiction over the protected land, structure, or feature verify the location.

(1) The request for location verification must:

(i) Include relevant portions of the permit application.

(ii) Provide the agency with 30 days after receipt to respond, with a notice that another 30 days is available upon request.

(iii) Specify that the regulatory authority will not necessarily consider a response received after the comment period provided under paragraph (c)(1)(ii) of this section.

(2) If the agency does not respond in a timely manner, the regulatory authority may make the necessary determination based on available information.

(d) *Procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places.*

(1) If the regulatory authority determines that the proposed surface coal mining operation will adversely affect any publicly owned park or any place included in the National Register of Historic Places, the regulatory authority must request that the Federal, State, or local agency with jurisdiction over the park or place either approve or object to the proposed operation. The request must:

(i) Include a copy of applicable parts of the permit application.

(ii) Provide the agency with 30 days after receipt to respond, with a notice that another 30 days is available upon request.

(iii) State that failure to interpose an objection within the time specified under paragraph (d)(1)(ii) of this section will constitute approval of the proposed operation.

(2) The regulatory authority may not issue a permit for a proposed operation subject to paragraph (d)(1) of this section unless all affected agencies jointly approve.

(3) Paragraphs (d)(1) and (d)(2) of this section do not apply to:

(i) Lands for which a person has valid existing rights, as determined under § 761.16.

(ii) Lands within the scope of the exception for existing operations in § 761.12.

PART 762—CRITERIA FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

12. The authority citation for part 762 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

13. Section 762.14 is redesignated as § 762.15 and a new § 762.14 is added to read as follows:

§ 762.14 Applicability to lands designated as unsuitable by Congress.

Pursuant to appropriate petitions, lands listed in § 761.11 of this chapter are subject to designation as unsuitable for all or certain types of surface coal mining operations under this part and parts 764 and 769 of this chapter.

PART 772—REQUIREMENTS FOR COAL EXPLORATION

14. The authority citation for part 772 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

15. Section 772.10 is revised to read as follows:

§ 772.10 Information collection.

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection and recordkeeping requirements of this part. The OMB clearance number is 1029–0112. OSM and State regulatory authorities use the information collected under this part to maintain knowledge of coal exploration activities, evaluate the need for an exploration permit, and ensure that exploration activities comply with the environmental protection, public participation, and reclamation requirements of parts 772 and 815 of this chapter and 30 U.S.C. 1262. Persons seeking to conduct coal exploration must respond to obtain a benefit.

(b) OSM estimates that the combined public reporting and recordkeeping burden for all respondents under this part will average 11 hours per notice or application submitted, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Specifically, OSM estimates that preparation of a notice of intent to explore under § 772.11 will require an average of 10 hours per notice, preparation and processing of an application for coal exploration under § 772.12 will require an average of 103 hours per application, compliance with § 772.14 will require an average of 18 hours per application, and recordkeeping and information collection under § 772.15 will require an average of approximately 1 hour per response. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, N.W., Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, N.W., Washington, DC 20503. Please refer to OMB Control Number 1029–0112 in any correspondence.

16. Section 772.12 is amended by revising the section heading, adding paragraph (b)(14), revising paragraphs (d)(2)(ii) and (d)(2)(iii), and adding paragraph (d)(2)(iv) to read as follows:

§ 772.12 Permit requirements for exploration that will remove more than 250 tons of coal or that will occur on lands designated as unsuitable for surface coal mining operations.

* * * * *

(b) * * *

(14) For any lands listed in § 761.11 of this chapter, a demonstration that, to the extent technologically and economically feasible, the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. The application must include documentation of consultation with the owner of the feature causing the land to come under the protection of § 761.11 of this chapter, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 761.11 of this chapter.

* * * * *

(d) * * *

(2) * * *

(ii) Not jeopardize the continued existence of an endangered or threatened species listed pursuant to section 4 of the Endangered Species Act of 1973, 16 U.S.C. 1533, or result in the destruction or adverse modification of critical habitat of those species;

(iii) Not adversely affect any cultural or historical resources listed on the National Register of Historic Places pursuant to the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, unless the proposed exploration has been approved by both the regulatory authority and the agency with jurisdiction over the resources to be affected; and

(iv) With respect to exploration activities on any lands protected under § 761.11 of this chapter, minimize interference, to the extent technologically and economically feasible, with the values for which those lands were designated as unsuitable for surface coal mining operations. Before making this finding, the regulatory authority must provide reasonable opportunity to the owner of the feature causing the land to come under the protection of § 761.11 of this chapter, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 761.11 of this chapter, to comment on whether the finding is appropriate.

* * * * *

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

17. The authority citation for Part 773 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, 16 U.S.C. 470 *et seq.*, 16 U.S.C. 661 *et seq.*, 16 U.S.C. 703 *et seq.*, 16 U.S.C. 668a *et seq.*, 16 U.S.C. 469 *et seq.*, and 16 U.S.C. 1531 *et seq.*

§ 773.13 [Amended]

18. In paragraph (a)(1)(v) of § 773.13, ''§ 761.12(d)'' is revised to read ''§ 761.14''.

19. In § 773.15, paragraph (c)(3)(ii) is revised to read as follows:

§ 773.15 Review of permit applications.

* * * * *

(c) * * *

(3) * * *

(ii) Not within an area designated as unsuitable for surface coal mining operations under parts 762 and 764 or 769 of this chapter or within an area subject to the prohibitions of § 761.11 of this chapter.

PART 778—PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

20. The authority citation for Part 778 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

21. In § 778.16, paragraph (c) is revised to read as follows:

§ 778.16 Status of unsuitability claims.

* * * * *

(c) An application that proposes to conduct surface coal mining operations within 100 feet of a public road or within 300 feet of an occupied dwelling must meet the requirements of § 761.14 or § 761.15 of this chapter, respectively.

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

22. The authority citation for part 780 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

23. In § 780.31, the section heading and paragraph (a)(2) are revised to read as follows:

§ 780.31 Protection of publicly owned parks and historic places.

(a) * * *

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

* * * * *

§ 780.33 [Amended]

24. In § 780.33, ''30 CFR 761.12(d)'' is revised to read ''§ 761.14 of this chapter''.

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

25. The authority citation for part 784 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

26. In § 784.17, the section heading and paragraph (a)(2) are revised to read as follows:

§ 784.17 Protection of publicly owned parks and historic places.

(a) * * *

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

§ 784.18 [Amended]

27. In § 784.18:

a. In the introductory paragraph, ''30 CFR 761.12(d)'' is revised to read ''§ 761.14 of this chapter''; and

b. In paragraph (a), ''underground mining activities'' is revised to read ''surface coal mining operations.''

[FR Doc. 99–30892 Filed 12–16–99; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 761

RIN 1029–AB82

Interpretative Rule Related to Subsidence Due to Underground Coal Mining

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule and record of decision.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement interprets sections 522(e) and 701(28) of the Surface Mining Control and Reclamation Act of 1977 and implementing rules to provide that subsidence due to underground mining is not a surface coal mining operation. Subsidence therefore is not prohibited in areas protected under the Act . Neither subsurface activities that may result in subsidence, nor actual subsidence, are prohibited on lands protected by section 522(e). Subsidence is subject to regulation under other applicable provisions of the Surface Mining Control and Reclamation Act of 1977, primarily sections 516 and 720.

EFFECTIVE DATE: January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Nancy R. Broderick, Office of Surface Mining Reclamation and Enforcement, Room 210, South Interior Building, 1951 Constitution Avenue, NW, Washington, DC 20240. Telephone: (202) 208–2700. E-mail address: nbroderi@osmre.gov. Additional information concerning OSM, this rule, and related documents may be found on OSM's home page at http://www.osmre.gov.

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Background

A. Why Is OSM Doing This Rulemaking?

The Surface Mining Control and Reclamation Act of 1977 (Public Law 95–87, 30 U.S.C. 1201 *et seq.*) (SMCRA or the Act) prohibits surface coal mining operations on all lands designated in section 522(e), subject to valid existing rights and except for those operations which existed on August 3, 1977. Lands designated in section 522(e)(1)–(5) include:

—Any lands within the boundaries of units of the National Park System;

—Federal lands within National Forests; publicly owned parks;

—Properties listed on the National Register of Historic Places;

—Buffer zones around public roads, homes, public buildings, schools,

churches, community and institutional buildings; and
—Cemeteries.

Section 701(28) Defines ''Surface Coal Mining Operations.''

This interpretive rulemaking is in part the result of litigation concerning the applicability of:

—The section 522(e)(4) prohibition to underground mining within 100 feet of any public road; and
—The (e)(5) prohibition to underground mining within 300 feet from any occupied dwelling, unless waived by the owner, or within 300 feet of public buildings or public parks, or within 100 feet of a cemetery.

In that litigation, environmental and citizen plaintiffs contended that our regulations implementing SMCRA section 522(e), at 30 CFR 761.11(d) through (g), did not explicitly prohibit subsidence from underground mining in 522(e)(4) and (5) areas. Citizen Plaintiffs' Mem. Round III of *In Re: Permanent Surface Mining Regulation Litigation,* No. 79–1144, (D.D.C. 1985) [hereafter, *In Re: Permanent (II)]* at 56. There is still disagreement over whether and to what extent subsidence and underground mining which causes or is expected to cause subsidence, are prohibited. Environmental and citizen groups believe all subsidence is prohibited. Industry groups believe subsidence is not covered by the prohibitions. In its decision on the issue, the court affirmed our regulations, stating that they track the statutory language, while noting that the Secretary had committed to further rulemaking on the applicability of sections 522(e)(4) and (5) to underground mining. *In Re: Permanent (II),* Mem. Op. at 70 (July 15, 1985).

In 1988, we issued a proposed rule to address the issue. See 53 FR 52374, Dec. 27, 1988. In 1989, we withdrew the proposed rule for further study due to the comments we received and our analysis indicating that this was fundamentally a legal issue. 54 FR 30557, July 21, 1989. We then decided to seek a formal opinion on this matter from the Department of the Interior's Office of the Solicitor. The Solicitor completed his review of this issue in July 1991, and concluded that the best interpretation of SMCRA is that subsidence is not a surface coal mining operation subject to the prohibitions of § 522(e). Memorandum Opinion of the Solicitor, Department of the Interior, M–36971, Applicability of Section 522(e) of the Surface Mining Control and Reclamation Act to Subsidence (100 I.D. 85 (1993)) [hereafter, the ''M–Op',].

The M–Op is based on an extensive analysis of the statute, the legislative history, relevant case authority and our regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining. The M–Op:

—Concluded that Congress did not intend for the prohibitions of section 522(e) to apply to subsidence from underground mining and
—Noted that OSM may regulate subsidence solely under section 516 of SMCRA and not under section 522(e).

The M–Op recognizes that regulation under section 516 may not have the same effect as regulation under section 522(e). At the same time, the analysis of the statute and legislative history supports the conclusion that regulation under section 516 will achieve full protection of the environmental values which Congress sought to protect from subsidence under the Act while encouraging longwall mining.

On July 18, 1991, we published a Notice of Inquiry (NOI) which stated that no further rulemaking action was necessary in regard to the applicability of section 522(e) prohibitions to underground mining. The NOI stated that we based this conclusion upon our review of the Act and the legislative history, the comments received on the December 27, 1988, proposal, and the M–Op. We concluded that the regulations, at 30 CFR 761.11(d), (e), (f) and (g), adequately addressed underground mining and appropriately applied the statutorily-established buffer zones in a horizontal dimension only. 56 FR 33170.

On September 6, 1991, the National Wildlife Federation (NWF) filed suit against the Secretary challenging the July 18 NOI and the July 10 M–Op, on the applicability of 522(e) of SMCRA to subsidence. *National Wildlife Fed'n (NWF)* v. *Babbitt,* 835 F. Supp. 654 (D.D.C. September 21, 1993). The NWF contended that both the M–Op and the NOI violated the requirements of the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and SMCRA. NWF requested, among other things, that the court order OSM to undertake rulemaking to determine the applicability of section 522(e) to subsidence, and vacate the M–Op and the NOI. In addition, the Interstate Mining Compact Commission (IMCC) and a number of industry groups, including the National Coal Association (NCA) and American Mining Congress (AMC), filed a motion to intervene as defendants in this action. The court granted that motion .

The district court vacated the NOI on September 21, 1993, on procedural grounds, and remanded the case to the Secretary for rulemaking on the applicability of section 522(e) to subsidence, in accordance with the notice and comment procedures of the APA, 5 U.S.C. section 551 *et seq. National Wildlife Fed'n (NWF)* v. *Babbitt,* 835 F. Supp. 654 (D.D.C. September 21, 1993).

B. What Process Did OSM Use To Develop the Final Rule?

This final rule is based upon a proposed rule published for public review and comment on January 31, 1997 (62 FR 4864). We also posted the proposed rule and associated documents on the OSM home page on the Internet. In response to requests from the public, we held public hearings on the proposed rule in Athens, Ohio; Billings, Montana; Washington, Pennsylvania; and Whitesburg, Kentucky. The comment period was originally scheduled to close June 2, 1997, but, in response to several requests, we extended the deadline until August 1, 1997. 62 FR 29314, May 30, 1997.

In addition to the testimony offered at the four hearings, we received approximately 491 written comments on the proposed rule (430 from private citizens, 40 from companies and associations affiliated with the mining industry, 9 from environmental organizations, and 12 from Federal, State, and local governmental entities and associations). We considered all comments and hearing transcripts in developing the final rule. With the exception of comments that did not address the substance or merits of the proposed rule, the preamble summarizes the major types of comments received and their disposition.

In addition to the changes made in response to comments, we have written this document in plain language, using better organization, more concise sentences, and pronouns.

C. How Is This Rule Related to the Valid Existing Rights Rulemaking?

Under section 522(e), surface coal mining operations are prohibited in specified areas unless a person can demonstrate a valid existing right to mine the coal resources, or can meet one of the other statutory exceptions to the prohibitions. SMCRA does not define the term ''valid existing rights'' (VER) . In a separate rulemaking, published in this issue of the **Federal Register**, we define valid existing rights, establish standards for VER, tell how to submit a

VER claim, and explain how we will process claims.

That separate rulemaking establishes a ''good faith all permits'' primary standard for VER, which provides that a person has VER if, before the land came under the protection of section 522(e), the person had obtained, or made a good faith effort to obtain, all necessary permits. In general, access to coal resources within western National Forests, and within protected historic sites, road buffers, and occupied dwellings buffers is largely gained by processes other than VER (compatibility findings, waivers, and avoidance). In addition, even though access to coal under churches, schools, public buildings, and cemeteries is generally dependent upon establishing VER, these protected areas are encountered at a frequency that generally allows mining operations to readily avoid them.

The EIS accompanying this rulemaking concludes that, overall, the areas most likely to be impacted through successful VER determinations appear to be:

—Section 522(e)(1) lands;
—State and local parks; and
—Some areas contained in eastern National Forests.

The ''good faith all permits'' standard is likely to have the least environmental impact and allow surface owners and resource management agencies the greatest control to decide whether to authorize adverse effects to protected areas. Under this standard, it appears that few, if any, areas protected by section 522(e) would be mined under VER determinations. See *Final Environmental Impact Statement: 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,* OSM–EIS–29 (July, 1999). [hereafter, ''Final EIS, 1999'']. We don't expect the ''good faith all permits'' VER standard to significantly limit underground mining access to coal in areas protected under section 522(e) This is in part because, under this rulemaking, subsidence is not prohibited under section 522(e).

We analyzed the relative impacts of the various combinations of alternatives for the two rules in an Environmental Impact Statement (EIS) and an Economic Analysis (EA) that addressed the two rulemakings. The National Environmental Policy Act requires an EIS when a rulemaking will have a significant effect on the quality of the human environment. An EA is required when a rule is considered significant regulatory action under the criteria of Executive Order 12866. In 1994, we published a notice in the **Federal Register** (59 FR 21996) of our intent to prepare an EIS and EA on these two issues. The scoping process for the support documents identified several impact issues regarding the proposed rulemakings.

Simultaneously with the two proposed rulemakings published in January 1997, we published for review and comment a draft EIS (U.S. Department of the Interior. Office of Surface Mining Reclamation and Enforcement. *Draft Environmental Impact Statement 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,* OSM–EIS–29, September 1995).

We also made available for review and comment a draft EA (U.S. Department of the Interior. U.S. Geological Survey and Office of Surface Mining Reclamation and Enforcement. *Draft Economic Analysis 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,* March 1996).

The final EIS and EA provide detailed responses to comments on the draft support documents. See, Final EIS, 1999; Final Economic Analysis, *Rulemaking Alternatives for a Standard for Valid Existing Rights and for the Rulemaking Alternatives for Application of 522(e) Prohibitions to Underground Mining,* prepared by U.S. Geological Survey and U.S. Office of Surface Mining, (July, 1999). (Hereafter ''Final EA , 1999'').

D. What Statutory Language Is OSM Interpreting?

1. Prohibition on Surface Coal Mining Operations—Section 522(e)

SMCRA prohibits surface coal mining operations on all lands designated in section 522(e), subject to valid existing rights and except for those operations which existed on August 3, 1977. Congress determined that the nature and purpose of section 522(e) areas and land uses were incompatible with surface coal mining operations. See S. Rep. No. 128, 95th Cong. 1st Sess. 55 (1977). Under section 522(e), if a person who proposes to conduct a surface coal mining operation on protected lands does not qualify for one of the statutory exceptions, then the person cannot conduct the intended operation on such lands, and the permit area cannot include those lands. See 30 CFR § 773.15(c)(3)(ii). Section 522(e), subject to specified exceptions, states that no surface coal mining operations shall be permitted on lands designated in subsections (e)(1) through (5). Section 522(e) does not specifically mention subsidence.

Section 522(e) provides, in relevant part, as follows:

After the enactment of this Act and subject to valid existing rights *no surface coal mining operations* except those which exist on the date of enactment of the Act shall be permitted—

(1) On any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress;

(2) On any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and —

(A) Surface operations and impacts are incident to an underground coal mine; or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further,* That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

(3) Which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) Within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or

haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) Within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

30 U.S.C. 1272(e) (emphasis added).

2. Definition of Surface Coal Mining Operations—Section 701(28)

The prohibitions of section 522(e) of SMCRA apply to ''surface coal mining operations.'' Thus, determining the scope of the prohibitions requires an understanding of the definition of the term ''surface coal mining operations'' in section 701(28). As defined in section 701(28), ''surface coal mining operations'' specifically includes certain aspects of underground coal mining. However, the definition does not specifically mention subsidence.

Section 701(28) provides in full as follows: ''surface coal mining operations'' means—

(A) Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 ⅔ per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 512 of this Act; and

(B) The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

30 U.S.C. 1291(28).

E. What Other SMCRA Provisions Are Relevant?

1. Surface Effects of Underground Coal Mining Operations—Section 516

Section 516 establishes the regulatory requirements for the surface effects of underground coal mining, including provisions for the control of subsidence from underground coal mining. SMCRA section 516 provides in relevant part:

(a) The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, embodying the following requirements and in accordance with the procedures established under section 501 of this Act: *Provided however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining * * * .

* * * * *

(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to—

(1) Adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: *Provided,* That nothing in this subsection shall be construed to prohibit the standard method of room-and-pillar mining;

* * * * *

(8) Eliminate fire hazards and otherwise eliminate conditions which constitute a hazard to health and safety of the public;

* * * * *

(11) To the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable * * *.

* * * * *

(c) In order to protect the stability of the land, the regulatory authority shall suspend underground coal mining under urbanized areas, cities, towns, and communities and adjacent to industrial or commercial buildings, major impoundments, or permanent streams if he finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.

(d) The provisions of this subchapter relating to State and Federal programs, permits, bonds, inspections and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining * * * .

30 U.S.C. 1266.

2. Subsidence—Section 720

Section 720 of SMCRA was added by the Energy Policy Act of 1992, Pub. L. 102–486, 106 Stat. 2776 (1992). (Hereafter ''EPAct''). The statute was enacted on October 24, 1992. Section 720 provides, in relevant part:

(a) Underground coal mining operations conducted after Oct. 24, 1992 shall comply with each of the following requirements:

(1) Promptly repair, or compensate for, material damage resulting from subsidence caused to any occupied residential dwelling and structures related thereto, or non-commercial building due to underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and structures related thereto, or non-commercial building. Compensation shall be provided to the owner of the damaged occupied residential dwelling and structures related thereto or non-commercial building and shall be in the full amount of the diminution in value resulting from the subsidence* * *.

(2) Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal

mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.

Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations.

30 U.S.C. 1319a.

F. What Existing Regulations Are Relevant?

1. Provisions Implementing SMCRA Sections 522(e) and 701(28)

Section 522(e) is implemented in large part at 30 CFR Part 761, which sets forth the procedures and standards to be followed in determining whether a proposed surface coal mining and reclamation operation is excepted from the prohibitions and limitations of section 522(e). Part 761 reiterates the areas on which section 522(e) prohibits surface coal mining operations. Part 761 also reiterates the exceptions to the statutory prohibitions, and the procedures to be followed in determining whether an operation qualifies for an exception to the prohibitions. Part 761 is the subject of the rulemaking which accompanies this final rule in the **Federal Register**.

As noted previously, if a proposed operation includes Federal lands within the boundaries of any areas specified under section 522(e)(1) or (2), a determination of valid existing rights for surface coal mining and reclamation operations must be made. Part 740 describes the responsibilities of the Secretary, various Federal agencies and the States for regulating surface coal mining and reclamation operations on Federal lands under SMCRA, the Mineral leasing Act and other applicable Federal laws, regulations and executive orders. Section 740.4(a) provides that the Secretary is responsible for determining valid existing rights for surface coal mining and reclamation operations on Federal lands within 522(e)(1) or (2) areas. Valid existing rights determinations on such areas are of such national importance that the Secretary retains this responsibility to carry out the congressional mandate to protect these areas and to ensure that there will be no prohibited surface coal mining operations on Federal lands in national parks and national forests. See 48 FR 6917, Feb. 16, 1983.

The regulatory definition of surface coal mining operations adopted in the permanent program regulations tracks the statutory definition very closely, except that the regulations specifically include extraction of coal from coal refuse piles. See 44 FR 14914, Mar. 13, 1979. In keeping with SMCRA section 701(28)(A), the definition of surface coal mining operations under section 700.5 provides:

(a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coals, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; and in situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. *Provided,* these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16⅔ percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to section 512 of the Act; and, *Provided further,* that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

2. Provisions Implementing SMCRA Sections 516 and 720

Sections 516 and 720 are implemented in large part at 30 CFR Parts 784 and 817, which set forth, respectively, permitting requirements and performance standards for underground mining activities.

Part 784 includes § 784.20, which sets out requirements for a subsidence control plan, including a pre-subsidence survey. The pre-subsidence survey must include a map that shows the type and location within the proposed permit area or adjacent area, of structures and renewable resource lands that subsidence may materially damage, or for which the reasonably foreseeable use may diminished by subsidence. The maps must also show the type and location within the proposed permit area or adjacent area, of drinking, domestic, and residential water supplies that could be contaminated, diminished, or interrupted by subsidence. In addition, a narrative is required that must indicate whether subsidence, if it occurred, could cause material damage to, or diminish the value or reasonably foreseeable use of the structures and renewable resource lands. The narrative is also required to indicate whether subsidence, if it occurred, could contaminate, diminish, or interrupt the drinking, domestic, or residential water supplies.

Section 784.20(a)(3) sets out requirements for a presubsidence structural condition survey. On April 27, 1999, the U.S. Court of Appeals for the District of Columbia vacated:

—Our rebuttable presumption that, when subsidence damage occurs within the ''angle of draw'' damage was caused by the related underground mine (30 CFR 817.121(c)(4)). *National Mining Ass'n* v. *Babbitt,* 172 F.3d 906 (D.C. Cir 1999) (hereafter, ''*NMA*'').

—Our regulation at § 784.20(a)(3) requiring a pre-subsidence structural condition survey, insofar as that regulation is interconnected with the angle of draw regulation. (The court held that we have the authority to require such a survey, but vacated the regulation because it defines the area in which the survey is required by reference to the angle of draw. *Id.*)

Under § 784.20 the pre-subsidence survey must identify the quantity and quality of all drinking, domestic, and residential water supplies within the proposed permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence. The applicant must provide copies of the survey and any technical assessments or engineering evaluations to the property owner and regulatory authority.

Section 784.20(b) requires a subsidence control plan if the initial survey, required under § 784.20(a), shows that subsidence could cause material damage to identified structures or renewable resource lands. The

subsidence control plan must include a map and physical description of the proposed underground operation and type of mining, a description of the monitoring, and details of the subsidence control monitoring measures. Longwall operations must either (1) describe the methods to be used to minimize damage to structures identified in the Energy Policy Act or (2) demonstrate that the costs of minimizing damage exceed the anticipated costs of repair. In addition, the operator must submit a description of the measures to replace adversely affected protected water supplies or to mitigate subsidence-related material damage to land and protected structures.

Other regulations in Part 784 ensure that each permit application contains the information necessary to determine that the operation will protect water supplies and reclaim the land after mining is completed. For example, these regulations require the application to include information on ground water and surface water quality and quantity sufficient to demonstrate seasonal variation and water usage. In addition, an analysis of both suspended and dissolved constituents helps determine the presence of heavy metals in the water supply. In particular, requirements ensure that, prior to mining, the permittee demonstrate whether the proposed operation may result in contamination, diminution, or interruption of a well or spring within a proposed permit area or adjacent area which is used for domestic, drinking or residential purposes. Moreover, throughout the application process, the regulatory authority may require additional information necessary to assure that the proposed operation will protect the hydrologic balance and to understand the potential impacts of the operation.

The provisions concerning subsidence control in Part 817 include performance standards which require the prevention of material damage and maintaining the value and reasonably foreseeable use of surface lands, or using mine technology for planned subsidence in a predictable and controlled manner; compliance with the subsidence control plan; repair of material damage; and a detailed plan of underground workings. See 30 CFR 817.121.

Specifically, § 817.121(a)(1) requires that the operator must either adopt measures consistent with known technology which prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner.

Under § 817.121(a)(2), the operator of a mine using a planned subsidence technology must minimize damage to non-commercial buildings and occupied residential dwellings and related structures. The operator is obliged to take minimization measures that are technologically and economically feasible.

Section 817.121(c)(1) requires repair of material damage from subsidence to surface lands, to the extent technologically and economically feasible. The operator must restore the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence. Section 817.121(c)(2) requires that an operator promptly repair or compensate for material damage from subsidence to non-commercial buildings or occupied residential dwellings or related structures. These requirements apply to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.

As noted above, on April 27, 1999, the U.S. Court of Appeals for the District of Columbia vacated the rebuttable presumption in § 817.121(c)(4). (*NMA,* supra.) That rule provided that if damage to non-commercial buildings or occupied residential dwellings and related structures occurs as a result of earth movement within the area determined by projecting a specified angle of draw from underground mine workings to the surface, a rebuttable presumption exists that an operator caused the damage.

Additional regulations detailed in Part 817 ensure that underground mining is conducted so as to protect the health and safety of the public, minimize damage to the environment, and protect the rights of landowners. These regulations require that all underground mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with SMCRA. Included are additional protections from subsidence-related damage from underground mining activities. For example, § 817.41(j) requires the prompt replacement of any drinking, domestic or residential water supply, in existence before the date of the permit application, that is contaminated, diminished or interrupted by underground mining activities conducted after October 24, 1992.

II. Discussion of Final Rule

A. Do the Prohibitions of Section 522(e) Apply to Subsidence From Underground Mining?

We interpret section 522(e) as not applying to subsidence from underground mining activities, or to the underground activities that may lead to subsidence.

B. What Is the Rationale for the Final Rule?

For the reasons set forth below, we interpret section 522(e) in light of the statutory definition of ''surface coal mining operations'' in section 701(28), as not applying to subsidence from underground mining. We've based the final rule on extensive analysis of the statute, the legislative history, relevant case authority, our regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining, and consideration of all relevant comments. We conclude that the best reading of section 701(28) is that ''surface coal mining operations'' does not include subsidence, and that therefore the prohibitions of section 522(e) do not apply to subsidence from underground mining. We believe that this is consistent with legislative intent, and that subsidence is properly regulated under sections 516 and 720 and related regulatory provisions of SMCRA and not under section 522(e). While we recognize that regulation under sections 516 and 720 may not have precisely the same effect as regulation under section 522(e), based on our analysis we conclude that regulation under sections 516 and 720 will achieve full protection of the environmental values which Congress sought to protect from subsidence under the Act while encouraging longwall mining. We believe that this interpretation will promote the general statutory scheme of SMCRA and fully protect the environment and the public interest. We also believe this interpretation best balances all relevant policy considerations.

1. Statutory Language

Section 522(e) prohibits ''surface coal mining operations.'' However, the definition of ''surface coal mining operations'' in SMCRA section 701(28) is not a model of clarity. We believe a careful reading of the Act indicates Congress' intent that the SMCRA definition of ''surface coal mining operation'' does not include subsidence. Therefore, we conclude that the best reading of the law is that section 522(e) does not apply to subsidence. We base this conclusion on:

(1) A rigorous reading of section 701(28);

(2) Analysis of the language of sections 516, 522(e) and 701(28) of SMCRA; and

(3) A consideration of other relevant statutory provisions, including the congressional findings and purposes in sections 101(b) and 102(k).

We believe that paragraph (A) of section 701(28), and the analogous provision in the existing rules at 30 CFR 700.5, apply to ''activities conducted on the surface of lands.'' Thus, subsidence is not included in paragraph (A) of the definition because it is not an activity conducted on the surface of the land. This interpretation is consistent with the fact that there is no mention in paragraph (A) of subsidence, underground activities, or surface impacts of underground activities, which might clearly establish that section 701(28) did include subsidence. By contrast, paragraph (A) does specifically mention numerous activities that occur on the surface of lands.

Therefore, we interpret the definition of ''surface coal mining operations'' at SMCRA section 701(28)(A) and in the analogous portion of the existing rules at 30 CFR 700.5, not to include subsidence, and to include only:

(1) Activities on the surface of lands in connection with a surface coal mine; and

(2) Activities subject to section 516, conducted on the surface of lands in connection with surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce.

The second part of this definition, at SMCRA section 701(28)(B), supports our interpretation that paragraph (A) refers to ''*activities* conducted on the surface of lands in connection with [1] a surface coal mine or * * * [2] ''surface operations and surface impacts incident to an underground coal mine.'' Paragraph (B) refers to ''the areas upon which *such activities* occur or where *such activities* disturb the natural land surface'' and to holes or depressions ''resulting from or incident to *such activities* * * *'' (emphases added). The only ''activities'' to which paragraph (B) could refer are those described in paragraph (A), namely those conducted on the surface of lands. Thus, these surface activities define the applicability of paragraph (B) to underground mining.

We construe SMCRA section 701(28)(B) (and the rules at 30 CFR 700.5) to include only:

(1) The areas upon which such surface activities occur;

(2) The areas where such surface activities disturb the natural land surface; adjacent lands the use of which is incidental to such surface activities;

(3) Lands affected by construction of new roads or improvement or use of existing roads to gain access to the site of such surface activities and for haulage; and

(4) Areas on which are sited structures, facilities, or other property or materials on the surface resulting from or incident to such surface activities.

Paragraph (B) includes a lengthy list of specific surface features resulting from or incident to surface activities, which are included in this last category. Those surface features include excavations, workings, holes or depressions, repair areas, *etc.* All of these areas and features included under paragraph B are referred to hereafter in this preamble as ''surface features affected by'' surface activities.

Surface activities in connection with surface operations incident to an underground coal mine, and surface activities in connection with surface impacts incident to an underground coal mine are included in the definition. Likewise, as provided in paragraph (B), surface features affected by such surface activities are included.

However, subsidence is not included within the term ''surface coal mining operations'' because it is not an activity conducted on the surface of lands, and it is not a surface feature affected by surface activities. In short, while subsidence is clearly a surface impact incident to underground mining, it is not included in the SMCRA definition of surface coal mining operations.

This reading of subsection 701(28) does not exempt subsidence from regulation under the Act, since Congress specifically provided for performance standards for subsidence under section 516, and subsequently section 720, of SMCRA. Most risks related to material damage caused by subsidence are addressed under the requirements of sections 516 and 720, such as the requirements for adopting measures consistent with known technology in order to prevent subsidence causing material damage, to the extent technologically and economically feasible, and maintaining the value and reasonably foreseeable use of surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner. However, if an unforeseen subsidence danger arises, section 516(c) contains procedures to prohibit underground operations as necessary, providing a second level of protection for public health and safety. For example, section 516 requires:

(1) Sealing of all shafts, entryways, and exploratory holes between the surface and underground mine working when no longer needed;

(2) Elimination of fire hazards and any other conditions that constitute a hazard to health and safety of the public; and

(3) Suspension of underground coal mining under urbanized areas, cities, towns, and communities if mining poses an imminent danger.

Thus, we believe Congress addressed in section 516 those subsidence control measures necessary to protect public health and safety and the public interest in subsidence protection. Therefore, prohibition of subsidence in all section 522(e) areas is unnecessary.

Our interpretation is consistent with SMCRA's explicit intent to ''encourage the full utilization of coal resources through the development and application of underground extraction technologies,'' SMCRA section 102(k), 30 U.S.C. section 1202(k). Similarly, SMCRA states that:

> * * * the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry.

SMCRA section 101(b), 30 U.S.C section 1201(b).

These passages make clear that Congress intended to encourage and support an economically healthy and efficient underground coal mining industry. We believe that our interpretation best assures that these congressional intentions are met.

2. Legislative History

The legislative history on section 701(28) supports our interpretation, set out above, that the definition of ''surface coal mining operations'' includes only *surface activities* and, as set out in section 701(28)(B), surface features affected by surface activities. Our interpretation is consistent with the description of the effect of section 701(28) in the Senate Report on the adopted version:

> Surface [coal] mining operations'' * * * includes all areas upon which occur *surface mining activities* and *surface activities incident to underground mining.* It also includes all roads, facilities, structures, property, and materials on the surface resulting from or incident to *such activities*

S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphasis added).

The Senate Report on the 1977 Senate bill discusses the significance of the definition in that Senate bill:

> 'Surface mining operations' is so defined to include not only traditionally regarded coal surface mining activities but also *surface operations incident to coal underground mining, and exploration activities.* The effect of this definition is that coal surface mining and *surface impacts* of underground coal mining are subject to regulation under the Act. * * *

S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphases added).'

The references in the above paragraph to surface ''operations'' incident to underground mining and to surface ''impacts'' of underground mining, and the assertions that exploration activities are included in the definition (although coal exploration is specifically *excluded* from the Act's definition) are inconsistent with the terms of the statute. Therefore, we conclude that the language of this passage is imprecise, and that it is not clear whether any weight should be attached to this discussion of the Senate bill (as opposed to the later Conference Committee Report's discussion of the Act).

Our interpretation that paragraph (A) of the definition of ''surface coal mining operations'' embodies only *surface activities* is consistent with the legislative history of section 522(e). This conclusion is supported by the discussion in the 1977 Senate report on section 522(e) which notes that ''surface coal mining'' is prohibited within the specified distances of public roads, occupied buildings, and active underground mines, ''for reasons of public health and safety.'' S. Rep. No. 128 at 55. Thus, one of Congress' purposes in sections 522(e)(4)–(5) was to protect public health and safety. However, prohibition of subsidence in section 522(e) areas would be unnecessary, since an underground mine must meet the requirements of sections 516 (and subsequently 720), and those requirements should prevent almost all risks to public health and safety. If an unforeseen subsidence danger were to arise, section 516(c) sets forth procedures to prohibit underground mining as Congress found necessary, providing a second level of protection for public health and safety. Therefore, we believe Congress sufficiently addressed in sections 516 (and 720) the measures necessary to address public health and safety from subsidence.

Congressional discussion of the prohibitions on mining in section 522(e) is devoid of any mention of subsidence or underground activities of coal mining. H. Rep. No. 218, 95th Cong. 1st Sess. 95 (1977); S. Rep. No. 128, 95th Cong. 1st Sess. 55 (1977). Instead, the legislative history of section 522(e) does mention terms that do not include any aspects of subsidence or underground operations, such as:'strip mines,'' ''surface coal mines,'' and ''surface coal mining.'' See *National Wildlife Fed'n* v. *Hodel,* 839 F.2d 694 at 753–754 (D.C. Cir. 1988), interpreting ''surface coal mine'' and ''surface coal mine operation'' as not including underground mines for purposes of SMCRA section 717(b)).

The legislative history of SMCRA indicates that Congress was only concerned with subsidence insofar as it causes environmental or safety problems, disrupts land uses, or diminishes land values. Congress has repeatedly recognized that there is little concern about subsidence that causes no significant damage to a surface use or facility or danger to human life or safety. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71–72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73–74 (1976); H.R. Rep. No. 45, 94th Cong. 1st Sess. 115–116 (1975); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 108–109 (1974); H.R. Rep. No. 776, 102d Cong., 2d Sess. 102–474 (1992).

Analysis of the structure of Title V and the Act as a whole confirms that Congress set out related but separate regulatory schemes for surface and underground mining. Congress received ample testimony prior to the passage of the Act regarding the differences in both the nature and consequences of the two types of coal mining. The legislative history emphasizes that the differences in the nature and consequences of the two types of mining require significant differences in regulatory approach. For example, SMCRA section 516(a) requires that:

> The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations * * *: *Provided, however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground mining.

30 U.S.C. section 1266(a); See also SMCRA sections 516(b)(10) and (d), 30 U.S.C. §§ 1266(b)(10) and (d). See, *e.g.,* H.R. Rep. No. 218, 95th Cong., 1st Sess. 59 (1977); S. Rep. No. 128, 95th Cong., 2d Sess. 50 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 19 (1976); S. Rep. No. 402, 93d Cong., 2d Sess. 83 (1973); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 57, 108 (1974); H.R. Rep. No. 1462, 92d Cong., 2d Sess. 32 (1972); 123 Cong. Rec. 8083, 8154 (1977); 123 Cong. Rec. 7996 (1977); 123 Cong. Rec. 3726 (1977).

For instance, Congress was aware that environmental risks associated with underground mining are, for the most part, significantly different from those associated with surface mining. Environmental impacts associated with (pre-SMCRA) unregulated or unreclaimed underground mines include subsidence and hydrological problems that are hidden deep underground and not observable at the surface for an unpredictably long time. Such surface consequences could be severe and long-lasting. The problems in some cases remain fundamentally inaccessible or unchangeable because of adverse technological, geological, and hydrological conditions. By contrast, most of the impacts of unregulated pre-SMCRA surface mining result from surface activities that are more immediate and more readily observable, and the resulting conditions are relatively accessible for reclamation. See H.R. Rep. No. 1445, 94th Cong., 2d Sess. 20–22 (1976).

It is reasonable to conclude that Congress addressed specifically, in section 516(c), the limited types of surface features that might be so significantly affected by subsidence from underground mining that subsidence should be precluded where appropriate. This interpretation that preclusion of subsidence is provided for solely under 516(c) is buttressed by the discussion in the 1977 House report that subsidence has no appreciable impact on agricultural land and similar types of land. H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977). We believe Congress did not intend to impose the prohibitions of section 522(e) on subsidence, because those prohibitions would be unnecessary, since Congress had insured that the surface features that might need such protection are covered by section 516(c).

Further, the legislative history of SMCRA suggests that Congress may have wished to encourage longwall mining in particular:

> Underground mining is to be conducted in such a way as to assure appropriate permanent support to prevent surface subsidence of land and the value and use of surface lands, except in those instances where the mining technology approved by the regulatory authority at the outset results in planned subsidence. Thus, operators may use underground mining techniques, such as long-wall mining, which completely extract the coal and which result in predictable and controllable subsidence.

S. Rep. No. 128, 95th Cong., 1st Sess. 84 (1977). See also S. Rep. No. 28, 94th Cong., 1st Sess. 215 (1975).

Congressman Udall, the bill's principal sponsor, also commented on this issue:

> The House Bill contemplates rules to ''prevent subsidence to the extent technologically and economically feasible.'' The word ''prevent'' led to fears expressed by Secretary of the Interior Morton, that the effect would be to outlaw longwall mining, with its obvious subsidence * * *. In fact, the bill's sponsors consider longwall mining ecologically preferable and it and other methods of controlled subsidence are explicitly endorsed.

120 Cong. Rec. 22731 (1974).

Thus, our interpretation is consistent with Congress' intent to encourage planned, predictable, and controlled underground mining and full coal resource recovery. Because subsidence is likely from room-and-pillar mining and is virtually inevitable with longwall mining, prohibiting subsidence below homes, roads, and other features specified in section 522(e) could make it substantially less feasible to mine. This would frustrate Congressional intent to encourage longwall mining, which provides planned, predictable, and controlled subsidence. Prohibiting subsidence would also substantially reduce the level of coal recovery in areas where the features specified in section 522(e) are common on the surface.

After examining the SMCRA legislative history, we believe that including subsidence in the definition of ''surface coal mining operations'' at section 701(28), and applying the section 522(e) prohibitions to subsidence would not accommodate Congress' intent to encourage underground mining and longwall mining in particular. Applying the prohibitions in section 522(e) to subsidence could substantially impede longwall and other full-extraction mining methods. As discussed above, SMCRA demonstrates that Congress intended to encourage underground mining and especially full-extraction methods such as longwall mining. Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No. 218, *supra.* These techniques involve planned subsidence.

The legislative history of section 516 contains ample references to Congress' focus on controlling rather than prohibiting subsidence. The following is pertinent House report language:

> Surface subsidence has a different effect on different land uses. Generally, no appreciable impact is realized on agricultural land and similar types of land and productivity is not affected. On the other hand when subsidence occurs under developed land such as that in an urbanized area, substantial damage results to surface improvements be they private homes, commercial buildings or public roads and schools. One characteristic of subsidence which disrupts surface land uses is its unpredictable occurrence in terms of both time and location. Subsidence occurs, seemingly on a random basis, at least up to 60 years after mining and even in those areas it is still occurring. It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to *control* subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977) (emphasis added). See also H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71–72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73–74 (1976); H.R. Rep. No. 45, 94th Cong. 1st Sess. 115–116 (1975); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 108–109 (1974).

In those extreme cases in which Congress felt that precluding subsidence could be necessary, it provided broad authority under section 516(c):

> In order to prevent the creation of additional subsidence hazards from underground mining in developing areas, subsection (c) provides permissive authority to the regulatory agency to prohibit underground coal mining in urbanized areas, cities, towns and communities, and under or adjacent to industrial buildings, major impoundments or permanent streams.

S. Rep. No. 128 at 84–85.

In 1992, Congress enacted EPAct which amended SMCRA and added additional subsidence protection in a new SMCRA section 720, described above. 30 U.S.C. 1309(a), Energy Policy Act of 1992, section 2504, Pub. L. No. 102–486, 106 Stat. 3104. Although it is not germane to Congress' intent in enacting SMCRA, because it does postdate SMCRA's enactment, the EPAct provides evidence of continuing congressional support for recovering coal resources through underground mining techniques. Congress notes specifically that, ''Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations.'' SMCRA section 720, 30 U.S.C. section 1309a.

We believe, based on its interpretation of the language of section 516 and of the legislative history, that Congress intended section 516(c), in combination with other provisions of SMCRA, to offer sufficient prevention and mitigation of damage to features vulnerable to significant impairment from subsidence. The existence of such a comprehensive subsidence regulatory scheme addressing subsidence makes it unlikely that Congress also intended to prohibit subsidence under section 522(e).

3. Policy Considerations

a. This Rule Resolves Questions About Our Interpretation of Statutory Provisions

This rulemaking establishes that subsidence is not a surface coal mining operation under SMCRA section 701(28), and therefore is not prohibited under SMCRA section 522(e). In the past, we have taken varying positions on section 522(e)'s applicability to subsidence. In some instances, our position could be interpreted to mean section 522(e) does apply to subsidence from underground mining. However, we believe that in the majority of cases, we have interpreted section 522(e) as not applying to subsidence.

In the 1979 rulemaking which first established permanent program rules under SMCRA, we addressed this issue in two provisions. We rejected a commenter's suggestion that the definition at 30 CFR 761.5 of ''surface operations and impacts incident to an underground coal mine'' should be limited to subsidence. We stated that the definition was intended to provide comprehensive language that related to the definition of surface coal mining operations in section 701(28). We then went on to say that because the definition in section 701(28) (B) relates to disturbances of the natural land surface, and because SMCRA sections 516(b)(9) and (11) also relate to surface disturbances other than subsidence, the final definition should cover all surface disturbances. 44 FR 14990, Mar. 13, 1979. It appears that we were indicating that all surface disturbances, including subsidence, are covered under the definition in section 701(28) of ''surface coal mining operations'' and consequently are prohibited by section 522(e).

The preamble to the 1979 permanent program regulations also includes a discussion of 30 CFR 761.11(d), which concerns the SMCRA section 522(e)(4) prohibition on mining within 100 feet of the outside right-of-way of a public road. We accepted a comment that the 100 feet should be measured horizontally ''so that underground mining below a public road is not prohibited''. We stated that mining under a road should not be prohibited ''where it would be safe to do so''. 44 FR 14994, Mar. 13, 1979. One interpretation of this statement is that mining under a public road should be prohibited where it would be unsafe to do so. However, the preamble does not discuss whether the statutory authority

for this prohibition would come from section 516 or from section 522(e).

Similarly, in a 1981 letter to the U.S. Forest Service concerning *Otter Creek Coal Company* v. *United States,* we stated that ''subsidence from mining activities under wilderness areas is acceptable as long as it does not significantly affect surface features. These effects can be predicted and mitigated if necessary''. Letter of Patrick Boggs, Office of Surface Mining, to Ralph Albright, Jr., regarding *Otter Creek Coal Company* v. *United States,* at 2 (January 19, 1981). This document appears to conclude that *only* subsidence causing material damage is prohibited under section 522(e). However, in our later decision on the valid existing rights request of the Otter Creek Coal Company, we concluded that *all* subsidence from underground mining is a prohibited surface impact under section 522(e). 49 FR 31233, Aug. 3, 1984.

The Secretary took a different position in the supplemental M–Op filed with the District Court for the District of Columbia in 1985, in litigation challenging the validity of the 1983 rulemaking on VER. Federal Defendant's Supplemental Memorandum on the Relationship Between Section 522(e) and the Surface Impacts of Underground Coal Mining at 8, *In re Permanent Surface Mining Regulation Litigation II,* No. 79–1144 (D.D.C. 1985). In that case, the National Wildlife Federation (NWF), in its reply brief, raised for the first time the question of whether, in areas protected under sections 522(e)(4) and (5), all subsidence is prohibited. The supplemental memorandum stated that the Secretary had previously interpreted section 522(e)(5) as prohibiting subsidence causing material damage to protected features, and that 30 CFR 761.11 requires operators to prevent subsidence causing material damage within the areas protected under 522(e).

On several other matters, our actions are consistent with the position that subsidence is not a surface coal mining operation. In our most recent rulemaking defining ''permit area,'' we indicated that we do not consider subsidence to be a ''surface coal mining and reclamation operation''. Our rules do not require including the ''area overlying underground workings'' (where subsidence may occur) within the definition of ''permit area.'' In the preamble, we explained that the permit area should only include the ''areas *upon* which surface coal mining and reclamation operations'' are conducted, not areas where potential subsidence may occur. 48 FR 14820 (Apr. 5, 1983). Thus, no permit is required for these areas where there are no surface activities.

In the absence of a Federal regulation specifically addressing this issue, we have accepted the policy of the majority of States with active underground coal mining operations, which do not currently apply the prohibitions of section 522(e) to subsidence impacts of underground coal mining. Rather, the States apply existing subsidence control requirements, which require the operator to identify and mitigate potential subsidence damage to structures and renewable resource lands. The States regulate subsidence effects on surface features in State counterparts to the Federal regulations implementing sections 516 and 720 of SMCRA.

We have also accepted the policy of other States to apply the prohibitions only to subsidence causing material damage. Only four States with underground coal reserves, Colorado, Illinois, Indiana, and Montana, arguably prohibit (or may prohibit) subsidence in 522(e) areas, in some way. See Final EIS, 1999, Table II–1 at pages II–2–3. Montana has no defined policy regarding the regulation of subsidence, due in part to the fact that the State has no active underground mine. Colorado prohibits material damage to any structures through State regulations under, in part, section 516 of SMCRA. In Illinois, under state property law, the mineral owner must possess the right to subside through applicable waiver or VER. Indiana prohibits material damage from subsidence to certain structures and lands, but has not developed specific policies related to the approval of planned subsidence. Our interpretation that section 522(e) prohibitions do not apply to subsidence is consistent with what most states are currently doing.

b. This Rule Balances Economic and Environmental Considerations

We believe this final rule best balances the competing environmental and economic considerations involved in this rulemaking. The language of SMCRA demonstrates that Congress intended to encourage underground mining, especially full-extraction methods such as longwall mining. The statute and legislative history express Congress' intent to ''encourage the full utilization of coal resources through the development and application of underground extraction technologies,'' SMCRA section 102(k), 30 U.S.C. 1202(k). Similarly, SMCRA states that, ''* * * the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry.'' SMCRA section 101(b), 30 U.S.C section 1201(b). Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No 218, 95th Cong., 1st Sess. 126 (1977). However, applying the prohibitions of section 522(e) to subsidence could substantially impede longwall and other full-extraction mining methods. Clearly, if subsidence is likely to occur from room-and-pillar underground mining and is a virtually inevitable consequence of longwall mining, then prohibiting all subsidence below homes, roads, and other features specified in section 522(e) could make it substantially less feasible to mine and could substantially reduce coal recovery in areas where these features are common. We therefore believe that including subsidence in the definition of ''surface coal mining operations'' at section 701(28), and applying the section 522(e) prohibitions to subsidence, would fail to accommodate congressional recognition of the importance of underground mining and longwall mining in particular.

The viability of underground coal mining continues to be important to the nation's economy. The Nation's Demonstrated Reserve Base for underground mining (32.9 billion tons) is almost twice that for surface mineable reserves 16.7 billion tons. In almost one third of the coal producing states, underground reserves are 4 to 5 times greater than surface mineable reserves. See Department of Energy, Energy Information Administration (DOE/EIA), ''U.S. Coal Reserves: A Review and Update'', pp. 10–12, (Aug. 1996).

Overall, coal continues to be the principal energy source for electric power generation in the United States. The electric power industry is the dominant coal consumer with about 90 percent of U.S. coal consumption issued for electricity generation. (DOE/EIA, Annual Energy Outlook, pp. 3–5, 1998). Total U.S. energy consumption is projected to continue growing between 1996 and 2020, and electricity consumption is expected to parallel that growth by 1.4 percent per year through 2020. Forecasts predict both increased demand for electricity and decline in nuclear power. With lower coal prices, lower capital costs for coal-fired generating technologies, and higher electricity demand, coal-fired generation is projected to increase. However, the *share* of coal generation is expected to

decline by 2020, because of anticipated restructuring of the electricity industry favoring less capital-intensive gas technologies for new capacity additions. Although coal-fired generation is anticipated to lose market share by 2020, it continues to account for more than one-half of electricity generation.

The continued rise in coal power generation accounts for the record high coal production in 1997. The electric power industry, the dominant coal consumer, used a record 922 million short tons in 1997, an estimated 2.8 percent increase over 1996, and record high production. The productivity gains that occurred in both underground and surface mines during the 1980's continued into the 1990's.

The three main underground mining methods used to extract coal are room-and-pillar, room-and-pillar with secondary mining, and longwall mining. Room-and-pillar is the predominant underground mining method in the United States, although longwall mining has increased in use since 1960. And longwall mining continues to gain wide acceptance in the U.S. mining industry, having nearly doubled its share of total coal production since 1980.

Room and Pillar Mining Method

The room and pillar method consists of driving entries, rooms, and cross-cuts into the coal seam to extract coal. Pillars of coal are left to support the mine roof, or for haulage and ventilation. This is called ''development'' mining. Movements of the ground surface during development mining are nearly always imperceptible. During the development mining phase, 30 to 50 percent of the coal may be extracted from the panel. To prevent subsidence, the remainder of the coal may be left in a mine panel, to permanently support the overburden.

To increase coal extraction where conditions allow, development mining is followed by ''pillar recovery,'' which is called secondary or retreat mining. During secondary mining, some or all of the coal pillars left to support the mine roof are extracted to obtain maximum recovery of the coal. As the pillars are extracted, controlled subsidence occurs, because the overburden sags into the mined-out area. Secondary mining can increase coal recovery to 85 percent.

Longwall Mining Method

Longwall mining is a high-extraction mining method that maximizes coal recovery. Developing longwall mine main airways and sub-mains (underground ventilation channels needed for access and ventilation of the longwall panels) is essentially identical to developing room and pillar mining. However, longwall mining differs from room-and-pillar mining in that the panel is fully extracted by an automated shearer or plow. A longwall mining operation can extract as much as 90 percent of the coal in each panel. Retreat mining of a longwall panel can extract 100 percent of the coal.

The longwall mining method works as follows:

1. Groups of three or four parallel entries are driven perpendicular to the main entry on either side of the proposed panel. The width of the panel varies from 500 to 1,200 feet, and the length of a panel varies from 4,000 to 15,000 feet.

2. Longwall mining removes the coal in one operation from a long working face or wall that advances, or retreats, in a continuous line. The coal is cut by a shearer or coal plough which travels up and down along the face and makes cuts from 27 to 39 inches deep. The broken coal falls on to an armored flexible conveyor (AFC) which transfers the coal to the stage loader.

3. The coal is then conveyed to the surface through several belt conveyors. Mechanical steel supports known as shields or chocks are used to support the mine roof along the entire longwall face.

4. After each cutting cycle of the shearer/plough, the steel supports and AFC are hydraulically advanced. The mine roof immediately behind the AFC is allowed to cave. The space from which the coal has been removed is either allowed to collapse or is completely or partially filled with stone and debris. The roof rock that falls into the mined out area is referred to as the ''gob.''

5. As the overburden continues to collapse, effects of subsidence progress upwards toward the surface. However, some solid coal barriers and pillars are left in the mine for haulage, ventilation, and other purposes. Ninety percent of the surface subsidence caused by longwall mining occurs within 4 to 6 weeks of mining.

In the past two decades, the longwall mining method has become the safest, most productive and most economic underground mining method. We expect longwall mining to continue to be an important and expanding type of mining. In 1993, longwall mining accounted for 38 percent of the coal extracted by underground mining methods. The Economic Analysis estimates that longwall mining will account for 48 percent of production by 2015. Final EA, 1999.

Longwall mining requires only approximately one-third of the personnel required by room-and-pillar mining at the face. The high capital costs of longwall mining are generally offset by lower operating costs due primarily to higher productivity. The average operating costs for a coal mine operation include the operating cost per ton and the return on the capital cost allocated per ton. The operating costs for longwall mining range from $0.50 to $2.00 per ton, while operating costs for room-and-pillar range from $2.00 to $7.00 per ton. Room-and-pillar mining operating costs average $3.25 per ton more than longwall mining. The difference in costs is attributable to higher labor and material costs for room-and-pillar mining, and to economies of scale for longwall mining.

Effects on the Coal Mining Industry and on the Economy if 522(e) Prohibitions Were Applied to Subsidence

Under SMCRA, when coal is mined, the mine operator must meet all existing subsidence control requirements, as outlined above. If section 522(e) were deemed to apply to subsidence from underground mining, the operator could not mine in any part of the underground workings where mining would cause subsidence affecting a protected surface feature. The surface area affected by subsidence is usually considerably larger than the area actually mined underground. Because subsidence typically occurs in a funnel shape radiating upward and outward from the underground mine cave-in, any surface impacts may extend well beyond the area directly above the mine. Thus, to ensure that subsidence would not take place within a surface area specified in section 522(e), underground mine operations would be required to leave coal in place around each protected feature for a horizontal distance much larger than the protected area. In many cases, the amount of coal left in place to support dwellings would result in a pattern of irregular mined areas that would eliminate the contiguous coal reserves needed to make longwall operations economical. Consequently, few new longwall mines would be opened. In the Economic Analysis, we estimate that blocking longwall production would increase coal-mining and coal-delivery costs and would shift production patterns. The additional coal-mining and coal-delivery costs to the economy would be approximately $2.65 billion (discounted) over a 20-year period. Final EA, 1999.

However, if the section 522(e) prohibitions were applied to subsidence, subsidence could be allowed nonetheless on some lands protected by 522(e)(2), (3), and (4), and some (e)(5) areas. Before this could

happen, an operator would have to get a waiver or approval for subsidence on the protected lands. The area for which an operator would have to obtain a waiver would include the area directly under the protected feature, and the area within any specified buffer zone around the protected feature (either 300 feet or 100 feet). In the absence of that waiver, the operator would have to leave the coal in those areas, and in an additional buffer area based on the predicted angle of draw and the depth of the coal seam. Because of the potentially large amount of coal that would have to be left in the ground in the absence of a waiver, we estimated that if 10 percent or more of homeowners withheld waivers, a longwall mining operation would not be economically viable. *See* Final EIS, 1999; Final EA, 1999.

In Summary:

1. Longwall mining is an important and expanding type of mining. It accounted for 38 percent of the underground mining in 1993, and is forecast to increase its share to 48 percent by 2015.

2. Longwall mining is a low-cost underground mining method, and in some instances, may be the only economically feasible underground mining method when the coal seam is deep or the roof is extremely fragile.

3. The key to the competitive advantage of longwall mining is access to large blocks of uninterrupted coal.

4. If the prohibitions of 522(e) were to apply to subsidence, longwall mining would no longer be economically feasible if as few as 10 percent of the owners of occupied dwellings denied waivers for mining.

A more detailed discussion of the impacts is provided in the Final EA, 1999.

Alternatives Considered

We also evaluated potential environmental impacts of identified rulemaking alternatives concerning the applicability of section 522(e) prohibitions to subsidence. In the EIS prepared for the rulemaking, we concluded that subsidence-related impacts to section 522(e) lands have occurred in the past and are likely to continue to occur irrespective of whether or not the prohibitions apply. This conclusion was based on information showing that subsidence on National Forest lands, historic sites listed on the National Register of Historic Places, and roads is typically allowed through either compatibility findings or waivers granted by surface owners and land managers.

The EIS concludes that the interpretation in the final rulemaking would have the greatest level of environmental impact and afford the lowest level of protection to the areas listed in section 522(e)(1). However, for the reasons stated in the EIS, we predict relatively limited potential impacts over a 20-year period from the final rulemaking. On lands protected by section 522(e)(1), totaling nearly 200 million acres, approximately 5.2 million acres are underlain by coal, but only about 175,000 acres are underground mineable. Under the final rule, less than 2 percent (approximately 3,500 acres) of section 522(e)(1) lands is predicted to be underground mined over the next 20 years. Those areas most likely to be impacted are lands within the National Parks System and National Recreation Areas.

The EIS identified approximately 12,600 acres of State park lands that could be affected by subsidence-related impacts over the next 20 years if the prohibitions of section 522(e) do not apply to subsidence. However, the EIS predicted that impacts to State and local parks could be reduced by as much as 45 percent under the ''good faith all permits'' VER definition. This reduction could be caused if mineral owners are unable to demonstrate VER needed for surface support facilities such as roads, ventilation, and face-up areas for access to underground coal within the protected area.

The greatest level of impact is predicted for occupied dwellings in section 522(e)(5) areas. The EIS estimated that approximately 29,600 would be affected over a 20-year period under the interpretation that section 522(e) prohibitions do not apply to subsidence. These impacts generally would span an extended period of time, and could result in reduced property value, loss of income, and disruption to many aspects of daily life. Homeowners could suffer financial burdens from the repair of damaged land and structures. And while these impacts represent a significant amount of disruption to the dwelling owners, they are mitigated through the performance standards for underground coal mining. Those standards require that underground mining operations repair adversely affected dwellings, or compensate for diminution in value.

However, in evaluating these predicted environmental impacts, we noted that they are virtually identical to the impacts of taking no final rulemaking action, because the final rule is virtually the same as maintaining the status quo—the No Action Alternative. Final EIS, 1999.

c. This Rule Avoids a Regulatory Gap

As noted above, we have concluded that no regulatory gap occurs as a result of section 522(e) not applying to subsidence. This is so because sections 516 and 720 and related SMCRA provisions provide ample authority to regulate surface effects of underground mining under existing regulations. The detailed description of the existing relevant regulations in part I demonstrates that our regulations implementing sections 516 and 720 provide broad subsidence protection, and that a prohibition of subsidence within the buffer zones around dwellings, roads, and other surface features listed in section 522(e) would be superfluous, and that no regulatory gap results from our interpretation. And, if there are any environmental values or public interests that warrant additional protection beyond what is currently provided, we have full authority under sections 516 and 720 and other SMCRA provisions, to develop additional regulations to protect such values or interests, without the disruption in the longwall mining industry that would result from applying section 522(e) prohibitions to subsidence.

d. This Rule Balances the Interests of Surface Owners and Industry

Our interpretation recognizes that in most cases, the mineral owner purchased the property right to undermine and probably to subside, upon acquiring the mineral rights. This property right has already been made subject to regulatory requirements under SMCRA that protect the surface owner's interests to the extent Congress has established specific requirements. Thus, our interpretation best balances both the surface and owner's interests, because it ensures that the surface owner's property rights are protected, and allows the mineral owner to use its mineral rights consistent with existing SMCRA subsidence control requirements. And most importantly, we believe that the public interest in protecting 522(e) surface features from subsidence damage will be fully protected by SMCRA's subsidence control requirements.

e. This Rule Maintains Stability in SMCRA Implementation

We believe that the final rule will cause minimal disruption to existing State regulatory programs and expectations associated with them. Those programs reflect existing SMCRA regulatory provisions. We believe the existing provisions adequately protect 522(e) features and therefore do not

require change. Because this rule reflects current and longstanding practice and policy in state administration of regulatory programs, it avoids unnecessary change in state administration of regulatory programs.

Equally as important, the final rule enables the states to retain flexibility in regulating coal mining operations and protecting the environment. A goal of the SMCRA regulatory system is to create and maintain an effective balance between state and federal government. SMCRA sections 101(e), (g), and (k). To achieve this balance, Congress established state primacy under SMCRA. See SMCRA sections 101(f), 102(g). State primacy allows States to develop and implement regulatory programs that meet SMCRA requirements and also address the specific conditions and concerns of individual states. This allows states to address differences in terrain, geology, and other conditions when regulating subsidence.

Applying the section 522(e) prohibition to subsidence could require a major overhaul of State regulatory programs without a commensurate benefit to the citizens, the environment, the economy, or the State. We believe that existing subsidence controls under State and Federal programs properly implement SMCRA. Without a clearly demonstrated need, a requirement to impose new administrative burdens and costs would waste State and Federal resources.

f. This Rule Promotes Safety

Although capital-intensive, longwall mining has become the safest and most productive and economic underground mining method. The result of this mining technique is almost immediate subsidence that is highly predictable as to how much surface lands will subside. Hydraulic shields provide for temporary support for the miners and equipment at the longwall face, and as the mining progresses along the longwall face, the roof in the mined-out section collapses. The roof collapse progresses to the surface via fracturing and/or the flexing of strata, and manifests itself as surface subsidence.

Almost all surface displacement occurs within days of the underlying roof failure. The amount of surface displacement is fairly predictable and depends upon the thickness of the coal seam and the makeup and arrangement of the overlying strata. Since the amount and timing of the subsidence is both highly predictable and controlled it is referred to as ''planned subsidence.'' However, this planned subsidence can cause damage to surface structures, since no supporting coal pillars are left within the mine to support the surface. And, while the probability of subsidence from longwall mining is relatively predictable, the nature and extent of subsidence damage to surface features and water resources is less predictable. However, because the subsidence occurs within a relatively short period, usually during the permit period, it is usually easier to verify the cause and to ensure mitigation or compensation for any structural damage and replacement of water supply.

In terms of worker safety, the longwall system also offers a number of advantages over room-and-pillar mining:

1. It concentrates miners and equipment in fewer working sections, making the mine easier to manage;
2. It improves safety through better roof control and reduction in the use of moving equipment;
3. It eliminates roof bolting at the working face to support the mine roof, and it minimizes the need for dusting mine passages with inert material to prevent coal dust explosions;
4. It involves no blasting and attendant dangers;
5. It also recovers more coal from deeper coalbeds than does room-and-pillar mining;
6. The coal haulage system is simpler, ventilation is better controlled, and subsidence of the surface is more predictable; and
7. It offers the best opportunity for automation.

Thus, if longwall mining is not precluded, it will continue to provide greater safety and faster, more controlled, and more quickly mitigated subsidence damage. As discussed above and in the EIS and EA, prohibiting subsidence in 522(e) areas could make longwall mining infeasible in substantial parts of the coal fields, and thus could preclude the safest, most economical and productive and most readily mitigated method of underground mining. See Final EIS, 1999; Final EA, 1999.

g. This Rule Acknowledges Existing Property Rights

The final rule recognizes existing property rights and avoids certain potential compensable takings of property interests. In most cases of severed coal rights, the severance also conveys the property right to undermine the surface, and may include the right to subside; and any such rights would still limit or burden the surface property rights. See, *e.g.* R. Roth, J. Randolph, C. Zipper, Coal Mining Subsidence Regulation in Six Appalachian States, 10 *Va. Envtl. L.J.* 311 (1991); C. Fox, Jr., Private Mining Law in the 1980's, 92 *W.Va. L. Rev.* 795 (1990); T. Gresham, M. Jamison, Do Waivers of Support and Damage Authorize Full Extraction Mining, 92 *W.Va. L. Rev.* 911 (1990). We believe failure to allow exercise of these conveyed rights would be inequitable and could risk compensable takings. The final rule allows the holder of such mining and subsidence rights to continue to exercise them, subject to existing SMCRA regulation.

III. Response to Comments

Several commenters dispute the need for any rulemaking, arguing that our longstanding interpretation provides an efficient system consistent with the intent of SMCRA. However, several commenters disagree, expressing general support for the clarity and additional specificity that the rule provides. We believe that the clarity, specificity, and relative stability provided by a rulemaking support adoption of a final rule. Furthermore, as noted above the district court has ordered the Secretary to do a rulemaking on the applicability of section 522(e) to subsidence in accordance with the notice and comment procedures outlined in the Administrative Procedure Act. 5 U.S.C., section 551 *et seq. National Wildlife Fed'n* v. *Babbitt,* 835 F. Supp. 654 (D.D.C. September 21, 1993).

Many of the comments from private citizens expressed general opposition to the proposed rule and argued that mining should be prohibited entirely in the 522(e) areas. Similarly, some commenters argued that the question should not be framed in terms of whether protection against subsidence is required or not, but rather should address protection of the use of surface lands from all adverse effects of underground mining. Commenters noted that subsidence has both direct and indirect effects. Thus, uneven settlement from mining can cause dewatering of aquifers and other indirect effects on land stability, even though it may not directly impair use of the land surface through surface slumping and other surface land deformation. Additionally, when underground works intercept bedding planes and fracture zones, they can cause dewatering without subsidence. Commenters asserted that properly applying section 522 would require that underground mining be prohibited where any surface impacts (direct or indirect) could result from the underground mining activity.

SMCRA prohibits surface coal mining operations in section 522(e) areas, but

also specifies exceptions to those prohibitions. Therefore, the proposed rule did not include absolute prohibition as an option, and we are not adopting such a prohibition. Further, SMCRA does not prohibit underground mining *per se* in section 522(e) areas, or all surface impacts of underground mining, and for the reasons given above we are not adopting such a prohibition.

A. SMCRA Definition of Surface Coal Mining Operations

Some commenters support our interpretation that the definition of ''surface coal mining operations'' embodies only surface activities. Those commenters note that our interpretation is consistent with the description of the effect of section 701(28) in the Senate Report on the version of the definition that was adopted:

> ''Surface [coal] mining operations'' * * * includes all areas upon which occur surface mining activities and *surface activities incident to underground mining.* It also includes all roads, facilities, structures, property, and materials on the surface resulting from or incident to *such activities.*

S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphasis added).

These commenters agree with us that the legislative history of section 701 can reasonably be read to support the interpretation that the definition of ''surface coal mining operations'' embodies only surface activities. Commenters refer to the discussion in the 1977 House Report of the definition of ''surface coal mining operations':

> (A) Activities conducted on the surface of lands in connection with a surface coal mine or surface operations and surface impacts incident to an underground coal mine * * *

H.R. Rep. No. 218 at 43.

Commenters also agree that paragraph (B) of section 701(28) supports our interpretation. While paragraph (A) applies to ''*activities* conducted on the surface of lands in connection with a surface coal mine *or* * * * ''*surface operations and surface impacts* incident to an underground coal mine * * *,'' paragraph (B) applies to ''the areas upon which *such activities* occur or where *such activities* disturb the natural land surface'' and to holes or depressions ''resulting from or incident to *such activities* * * *'' (emphases added). The commenters agree that the only ''activities'' to which paragraph (B) could refer are those described in paragraph (A), namely those conducted on the surface of lands in connection with a surface coal mine or in connection with the surface operations and impacts incident to an underground coal mine. Thus, commenters agree that, if our reading of paragraph (A) were not adopted, paragraph (B) would not apply to any aspects of underground mining—an untenable result.

Commenters affirm that our reading of subsection 701(28) would not mean that subsidence would be exempt from regulation under the Act, since Congress specifically provided for regulation of subsidence under section 516 of SMCRA.

In contrast, other commenters argue that the plain meaning of the Act establishes that subsidence is included in the definition of ''surface coal mining operations'' and is therefore prohibited in section 522(e) areas. These commenters assert that the language of section 701(28)(A) encompasses two elements:

(1) ''Activities conducted on the surface of lands in connection with a surface coal mine;'' and

(2) ''Surface operations and surface impacts incident to an underground mine.''

These commenters argue that, in addition to activities and operations incident to underground mining, impacts incident to underground mining also clearly constitute ''surface coal mining operations''. Commenters assert that the D.C. Circuit stated that

> ''The most natural reading of the statute as a whole, and the definition in section 701(28) in particular, * * * suggests that 'surface coal mining operations' encompasses both surface coal mines and the surface impacts [sic. The decision said ''effects.''] of 'underground coal mines.' *National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 753 (D.C. Cir. 1988).''

We do not agree with commenter's interpretation of the significance of this passage in the court's 1988 decision. The issue before the court was whether the requirement of SMCRA section 717(b), for replacement of water supplies by the operator of ''a surface coal mine,'' also requires water supply replacement by underground mine operators. Thus, the interpretation of section 701(28) as it applies to 522(e) was not before the court, and the passage quoted by the commenters is dictum.

Commenters also assert that, applying ''the definition of 'surface mining' contained in the Act, *i.e.,* ''surface impacts incident to an underground mine,' '' the Sixth Circuit concluded that under section 522(e), ''no coal mining which disturbs the surface 'shall be permitted * * * on any federal lands within the boundaries of any national forest.'' *Ramex Mining Corp.* v. *Watt*, 753 F.2d 521, 522, and 523 (6th Cir. 1985) quoting sections 701(28) and 522(e).

We conclude that the quoted language from the *Ramex* decision is best read as dictum, since the issue before the court was not the interpretation of section 701(28), but rather whether national forest lands on which a mineral holder proposed to mine severed coal rights, were ''federal lands'' for purposes of SMCRA section 522(e)(2). We note in passing that the court used a different term (''surface mining'') than the term used in section 701(28) (''surface coal mining operations'') and that the two terms are not properly interchangeable. We also note that the court did not quote and may not have considered the full and correct language of the definition of ''surface coal mining operations'', at section 701(28).

We considered these comments and the quoted comments of the courts. We believe these interpretations would require an alternative parsing of the definition of ''surface coal mining operations'' in section 701(28) in which the phrase ''surface impacts incident to an underground coal mine'' would be read as independent of the words ''activities conducted on the surface of the lands.'' Therefore, for the reasons set out below, we do not agree with these interpretations.

There are at least three problems with this parsing of section 701(28)(A). First, it would render the phrase ''on the surface of lands'' superfluous, since all ''[activities conducted * * * in connection with a surface coal mine'' necessarily occur on the surface of lands. The phrase has meaning only if it also modifies ''[activities conducted * * * in connection with * * * an underground coal mine.''

Second, the remainder of paragraph (A) and all of paragraph (B) of this definition would not apply to underground coal mines, since those provisions refer back to the surface *activities* covered in the first portion of paragraph (A). We do not believe Congress could have intended such a result.

Third, this construction would require the reader to conclude that the phrase ''in connection with'' was not intended to apply to surface operations and surface impacts incident to an underground coal mine. This result would conflict with our position since the inception of the program that the term ''surface coal mining operations'' includes surface facilities operated in connection with an underground coal mine. The latter is a position which we regard as consistent with the Act and with legislative intent, and which we reaffirmed in a rulemaking concerning surface facilities in connection with an underground coal mine. 53 FR 47384

(Nov. 22, 1988). Consequently, we believe the alternative parsing is not a sound interpretation of the definition. Since these problems with the alternative parsing were not considered by the court in the quoted 1988 decision. We believe the courts did not have the opportunity to address these problems, and we expect that court would not have applied the quoted rationale if the court had considered these matters.

Commenters claim the 1991 Solicitor's opinion offered contradictory rationales for the conclusion that ''subsidence from underground mining is properly regulated solely under SMCRA section 516 and not under section 522(e).'' In their opinion, the Solicitor states that the statutory definition of ''surface coal mining operations'' is, on the one hand, clear on its face and excludes subsidence and, on the other hand, ambiguous enough to allow the Secretary [sic] discretion to exempt subsidence from its scope. (*citing* the M–Op at 2, 13 [100 I.D. 85 at 87, 93, and 99–100]). We do not agree that the M–Op contains contradictory statements. Rather the M–Op concludes that Congress has spoken to the issue, and gives the best reading of the statutory language. The M–Op then indicates that, even if this reading were not required by the terms of the statute and the legislative history, we would have ample authority to adopt the interpretation. The M–Op also notes that, to the extent there is confusion as to the meaning of the term ''surface coal mining operations'', an agency's interpretation of a statute it administers is entitled to great deference. *Id.*

Our proposed rule would interpret 701(28) to include ''activities conducted on the surface of lands * * * in connection with * * * surface operations and surface impacts incident to an underground mine.'' Commenters refer to the M–Op and argue that if the Secretary's[sic] juxtaposition were accepted, it would lead to the absurd conclusion that *causing* subsidence in section 522(e) areas is permissible (because it does not involve ''activities'' on the surface) but that *correcting* subsidence is prohibited (because reclamation activities would constitute ''activities conducted on the surface of lands in connection with * * * surface impacts incident to an underground coal mine'').

By contrast, several commenters agree with our position that the reclamation of off-permit subsidence does not require a permit. In a 1983 rulemaking, we established that the ''permit area'' for an underground coal mine does not include the area overlying underground mining where subsidence may occur. 48 FR 14820 (Apr. 5, 1983). Areas overlying underground mining are included in the definition of ''adjacent area''. SMCRA section 510(b)(4) requires a determination that ''the areas proposed to be mined are not included within an area designated unsuitable for *surface coal mining* pursuant to section 522 of the Act * * *''. This statutory provision is implementing the requirement for a permit finding in section 773.15(c)(3). Some commenters further point out that the mere potential for subsidence is not a surface coal mining operation with attendant reclamation obligation. (*citing* Government Brief before the U.S. District Court in *National Wildlife Fed'n* v. *Hodel* at 99–109). (839 F. 2d 694 (D.C. Cir. 1988). These commenters note that if subsidence impacts occur, the regulations impose a reclamation responsibility upon an operator even if such impacts are outside the permit area. The commenters also note that whether the impacts are inside or outside the permit area, the performance standards of 30 CFR Part 817 provide applicable reclamation requirements. However, for other offsite ''impacts'' regulated under SMCRA, the commenters observe that no permit is required to conduct reclamation. These commenters add that throughout the years of program implementation, the Department's position has been clear and consistent: the area overlying underground workings does not need to be included in the ''permit area'' for a mine and is not subject to section 522(e).

We agree. We believe our interpretation is consistent with the 1983 rulemaking in which we defined ''adjacent area'' as ''the area outside the permit area where a resource or resources * * * are or reasonably could be expected to be adversely impacted by proposed mining operations, including probable impacts from underground workings.'' 30 CFR 701.5. We stated in the April 5, 1983, rulemaking that the ''requirements of section 522(e) *do not* apply to adjacent areas.'', *i.e.,* potential off-site impacts. 48 FR 14816, Apr. 5, 1983. In that rulemaking, we defined ''adjacent area'' as ''the area outside the permit area where a resource or resources * * * are or reasonably could be expected to be adversely impacted by proposed mining operations, including probable impacts from underground workings.'' 30 CFR 701.5. Thus, since 1983, our interpretation has been that areas where subsidence may occur are not required to be included in the permit area, and that section 522(e) does not apply to the adjacent areas (where subsidence may occur).

One commenter alleges that the proposed rule assumes that underground mining could be authorized within a section 522(e) area merely through a redefinition of ''surface impacts'' as it relates to subsidence. This commenter also alleges that this assumption fails to account for the other surface impacts intended to be avoid[ed] in section 522(e) areas: dewatering of aquifers, alteration of the prevailing hydrologic balance of the area, placement of mine support structures, entryways, ventilation shafts, and access or haulage roads. The commenter mischaracterizes our position. We agree that some of the things listed by the commenter would be ''surface impacts.'' Other things listed, including placement, construction, maintenance, or use of structures or features on the surface, would be surface *activities* and the areas affected by them, and thus would be included in the definition of surface coal mining operations.

Commenters assert that the Secretary's reading is contrived and also fails to give effect to the portion of section 701(28)(A) that cross-references section 516. The commenters also assert that the ''Secretary concedes the ''subject to'' language is merely a cross-reference indicating which activities conducted on the surface in connection with an underground coal mine are surface coal mining operations, *namely, those that are subject to regulation under section 516 SMCRA*''. Commenters argue that *subsidence* is equally subject to regulation under section 516, and therefore, under the Secretary's own theory, must be included within the scope of section 701(28)(A). They further suggest that the Secretary's [sic] reading is contrary to the plain meaning of section 701(28)(A), and rests on a contorted and nonsensical reading of the statutory language. We are not persuaded by commenters' assertions. We believe that our interpretation outlined above is reasonable, and that only surface *activities* are properly included under section 701(28)(A). For the reasons set out in the rationale section, we have concluded subsidence is not included in paragraph (A) of the definition because it is not an activity conducted on the surface of the land. This interpretation is consistent with the fact that there is no mention in paragraph (A) of subsidence, underground activities, or surface impacts of underground activities, which might clearly establish that section 701(28) did include subsidence. By contrast, paragraph (A)

does specifically mention numerous activities that occur on the surface of lands.

Commenters allege that even if section 701(28)(A) were limited to surface ''activities,'' subsidence in section 522(e) areas would still be prohibited by section 701(28)(B) because the paragraph expressly states that ''holes or depressions * * * resulting from or incident to such activities'' constitute ''surface coal mining operations.'' They further point out that in the 1998 Draft Environmental Impact Statement the Secretary [sic] concedes that subsidence constitutes *holes or depressions:*

> Two types of topographic features caused by mine subsidence are *sinkholes* and troughs. A sinkhole is a circular *depression* in the ground surface that occurs when the overburden collapses into a typically shallow mine void. A trough is a *depression* in the ground surface, often rectangular in shape with rounded corners, that is formed by sagging of the overburden into a mined-out area.

We agree that subsidence may include holes or depressions. However, for the reasons explained above, our position is that only surface features affected by surface activities would be surface coal mining operations under section 701(28)(B).

Commenters argue that subsidence not only constitutes ''holes or depressions;'' it also is ''resulting from or incident to such activities'' within the meaning of the last phrase of section 701(28)(B). In their opinion, the initial excavation on the earth's surface through which miners and material are conveyed underground would constitute ''*activities*'' within the Secretary's reading of section 701(28)(A). We agree that the process of surface excavation would be a surface activity. However, commenters go on to incorrectly assert that any subsidence that occurs is necessarily ''resulting from or incident to'' these surface activities. Commenters believe that subsidence is functionally related to these surface activities and could not occur without them, i.e. subsidence is linked to these surface activities in a but-for chain of causation. Commenters refer to *NWF* v. *Hodel,* 839 F.2d at 742–45 (affirming DOI rule that applied the ''resulting from or incident to'' test to include even processing and support facilities that are entirely off-site). We do not agree with this assertion. Subsidence results from underground activities, not surface activities. If there were no underground activities, there would be no subsidence from underground mining.

Commenters charge that the applicability of section 522(e) to subsidence is confirmed by subsection 522(e)(2)(A) which prohibits ''surface coal mining operations'' within national forests, but allows a limited exception where ''surface operations *and impacts* are incidental to an underground coal mine''. Commenters argue that, if ''impacts'' were generally outside the scope of section 522(e), such an exemption would not have been necessary. We do not agree. We interpret the referenced language in 522(e)(2)(A) to refer to surface operations and impacts from underground mining which are included in the definition of surface coal mining operations at SMCRA section 701(28)(B) under our interpretation.

Commenters allege that the term ''activities'', which the Secretary considers to be the operative term for the entire definition of surface coal mining operations, is conspicuous by its absence from section 522(e)(2)(A). They suggest that if Congress had really intended the tangled parsing of section 701(28)(A) proposed by the Secretary, it would have drafted section 522(e)(2)(a) to apply where ''*activities on the surface of lands* are incident to an underground coal mine''. In their opinion, Congress did not do so, however, and they recommend that the Secretary respect Congress' decision to address ''impacts''.

We disagree with the commenters' characterization. Congress defined what ''surface coal mining operations'' means in section 701(28), and then used that term in section 522(e). The definition at 701(28) refers to ''surface activities'', and then refers repeatedly in 701(28) to ''such activities''; but activities are not the only thing included in the definition. Section 701(28) also specifies certain surface features affected by surface activities. Section 701(28) includes all of the listed categories of surface activities and surface features. Thus, neither section 701(28) nor section 522(e) refers only to surface *activities.* We are not required to speculate about other ways Congress might have drafted this provision, if we have provided a reasonable interpretation of what Congress actually did say. For the reasons set out in this preamble, we believe our interpretation is reasonable.

Commenters suggest that the Secretary [sic] acknowledged the import of section 522(e)(2) in his discussion of the 1979 rulemaking:

> Concerning the definitions at 30 CFR section 761.5, we rejected a comment that ''surface operations and impacts incident to an underground mine'' should be limited to subsidence. 44 FR 14990 (Mar. 13, 1979). *The negative implication would appear to be that such operations and impacts (including subsidence) are otherwise prohibited by section 522(e).* (citing the M–Op at 11 n. 17 [100 I.D. 85 at 92, fn. 17]).

The commenters further assert that the Secretary [sic] failed to offer any justification for ignoring this ''negative implication''. This comment refers to a passage in the Solicitor's M-Op In that passage, the Solicitor did not ignore the implication but rather recognized it as one of numerous arguably inconsistent actions by OSM over the history of implementing 522(e). Similarly, in the proposed rule, we did not ignore the negative implication, but rather considered it as well as all other relevant factors. This rulemaking is the first time we specifically address the issue with this level of detailed analysis. And in this final rule, for the reasons stated above in the rationale section, we are not adopting the interpretation urged by these commenters.

Commenters claim that the 1979 rulemaking explicitly defines the section 522(e)(2)(A) phrase ''surface operations and impacts incident to an underground coal mine'' to include activities that are not conducted on the surface of the lands:

> [A]ll activities involved in or related to underground coal mining which are *either* conducted on the surface of the land, produce changes in the land surface *or* disturb the surface, air or water resources of the area, including all activities listed in section 701(28) of the Act and the definition of surface coal mining operations appearing in section 700.5 of this chapter.

30 CFR. 761.5.

Commenters urge that because subsidence both ''produce[s] changes in the land surface'' and ''disturb[s] the surface, air, and water resources,'' it is included within the second and third disjunctive clauses of the definition. We agree that subsidence is a surface impact incident to an underground coal mine. However, for the reasons outlined above in section II. B., we do not agree that subsidence is a surface coal mining operation subject to the prohibitions of section 522(e). That is, we interpret section 701(28)(A) to apply only to surface activities of the types listed in that section (and not to surface operations and impacts *per se*); and we interpret section 701(28)(B) to apply only to the areas and features listed; and therefore section 701(28) does not include subsidence.

Other commenters agree with us , and argued that attempting to glean the term subsidence from the language of

subsection (B) is unavailing. The two words ''holes or depressions,'' for instance, do not constitute Congress' vernacular for subsidence. We disagree in part with this comment. Subsidence may result in a hole or depression, but subsidence would be included under section 701(28) only if it is a surface feature affected by surface activities, as provided in section 701(28)(B).

B. Congressional Intent

As discussed below, various commenters point to language in the Congressional reports that appears to be imprecise and inconsistent with other report language and with the terms of the statute. We believe that in any case, the language of the Act prevails.

A group of commenters allege that the legislative history of SMCRA establishes that Congress intended that subsidence due to underground mining be considered a surface coal mining operation, and that subsidence therefore is prohibited in areas protected under SMCRA section 522(e). These commenters argue that committee reports from both houses of Congress compel a conclusion that subsidence constitutes ''surface coal mining operations'' and is therefore subject to section 522(e). Commenters note that the Senate Report includes a statement that the hazards from the surface effects of underground coal mining include the dumping of coal waste piles, subsidence and mine fires. The commenters refer to three statements in the Senate Report on SMCRA, to support their claim:

(1) The Act was addressed to ''surface coal mining operations—including exploration activities and *the surface effects of underground mining.*

(2) Initial regulatory requirements extend to ''[a]ll surface coal mining operations, which include, by definition *surface impacts incident to underground coal mines''*;

(3) The Senate Report characterizes ''Surface coal mining operations'' as including not only traditionally regarded coal surface mining activities but also surface operations incident to underground coal mining, and exploration activities. The effect of this definition is that coal surface mining *and surface impacts of underground coal mining are subject to regulation under the Act.*''

S. Rep. No. 128, 95th Cong., 1st Sess. 49, 50, 71, 98 (1977).

We have considered the materials cited by the commenters. We are not persuaded by the commenters' arguments and interpretations. We agree that Congress considered subsidence to be a surface impact and a surface effect incident to underground mining. However, for the reasons given above, we do not agree that Congress intended to include subsidence in the definition of a surface coal mining operation. We recognize that the Act addresses subsidence as a surface effect of underground mining, but we believe the Act addressed those effects in sections 516, and subsequently 720, and not as surface coal mining operations under sections 701(28) and 522(e).

Regarding the first quoted passage from the 1977 Senate Report, we believe the report's statement that coal exploration is included in ''surface coal mining operations'', is inconsistent with the statutory definition in section 701(28). The definition in section 701(28) explicitly *excludes* coal exploration. It is not clear whether the passage's reference to ''surface effects'' is a vague reference to the surface effects of surface activities or is another inconsistency with the statutory language. In the alternative, this might be an anachronism, a reference to an earlier version, that should have been deleted from the final bill. It is also possible that this report statement reflects inconsistencies in Congress' interpretation of 701(28). In any case, if there is a conflict between report language and statutory language, the statutory language must prevail.

Regarding the second quoted passage from the Senate Report, which refers to initial program requirements, we are unsure what Congress intended by this statement. While this passage might be read to provide that subsidence is included in ''surface coal mining operations'', we have never interpreted the SMCRA initial program requirements to apply to subsidence. And that issue is not within the scope of this rulemaking.

Regarding the third quoted passage from the Senate Report, commenters believe this passage is especially significant in light of narrower language in previous Senate reports. For example, one earlier report said, ''The effect of this definition is that only coal surface mining is subject to regulation under the Act.'' S. Rep. No. 28, 94th Cong., 1st Sess. 224 (1975); S. Rep. No. 402, 93d Cong., 1st Sess. 74 (1973). Commenters believe the very different language in the 1977 Senate Report was no mere accident, but rather a deliberate choice of more expansive words. We are not sure what significance to attribute to the third quoted passage. That language may be interpreted to confirm our interpretation, because the passage says the definition of ''surface coal mining operation'' includes surface operations incident to underground mines, and concludes that the *effect* is to regulate surface impacts. We believe that by referring to surface operations incident to underground coal mining, the passage may be referring to surface activities incident to underground coal mining. Thus, this may be an imprecise reference to the statutory language. This latter hypothesis is supported by the fact that the passage asserts that the term ''surface coal mining operation'' applies to exploration. However, the enacted definition specifically *excludes* exploration, and we have always interpreted the definition to exclude exploration. For the reasons outlined above, we believe the reading urged by these commenters inconsistent with a careful parsing of the language of section 701(28) (A) and (B), because it would not apply section 701(28)(B) to underground mining.

In summary, the quoted passages from the Senate Report, read alone, do raise some questions about Congress' intent, and are not the most precise guidance. However, we believe our interpretation of the language of section 701.28 itself is reasonable. We have found no other interpretation which gives meaning to all parts of the definition.

Commenters also believe that Congress intended to encompass more than merely subsidence effects in including underground mining within the ambit of the term ''surface coal mining operations.'' They charge that acid mine drainage, waste disposal, fire hazards, disturbances to the hydrologic balance, surface operations and structures, impacts on fish and wildlife and related environmental values were impacts of underground mining to be regulated through the application of the performance standards. S. Rep. No. 95–128, 95th Cong., 1st Sess. 98 (1977). We do not take the position that the term ''surface operations and surface impacts'' of underground mining addresses only subsidence. This rulemaking, however, addresses only the question of whether the prohibitions of section 522(e) apply to subsidence.

Commenters allege that the statutory framework of SMCRA clearly applies the prohibitions of section 522(e) to subsidence, and commenters assert that the House Report supports their allegations. They point to the statement in the report that ''environmental problems associated with underground mining for coal which are directly manifested on the land surface are addressed in section 212 [*i.e.,* section 516] *and such other sections which may have application.* These problems include surface subsidence[.]'' H.R. Rep. No. 218, 95th Cong., 1st Sess. 125–126 (1977) (emphasis added).

We do not agree that this portion of the House Report on section 516 supports commenter's contention. Commenters apparently assume that the

emphasized language means that section 701(28) includes subsidence and that therefore, the prohibitions of section 522(e) must apply to subsidence. However, nowhere does the quoted language say this. Commenters cite no basis for such a conclusion; and we know of no basis for that conclusion. We believe the underlined House Report language would include any other SMCRA sections that apply to surface environmental problems associated with underground mining but for the reasons outlined above, we do not agree that sections 701(28) and 522(e) apply to subsidence.

Another commenter points to the Secretary's statement that subsidence effects constitute ''surface impacts'' incident to an underground mine. Commenters assert that if Congress had wished to cover only surface activities as the Secretary suggests, it would not have included the additional word ''impacts'; and that the Secretary's theory renders this additional word surplusage. We disagree. As discussed above, we interpret 701(28)(A) to apply to surface activities ''in connection with (1) surface operations and (2) surface impacts incident to an underground coal mine''. Thus, if surface impacts are incident to an underground mine, then surface activities in connection with them constitute surface coal mining operations.

Commenters further argue that the Secretary's reading makes no sense. Commenters assert that the reading given by the Secretary [sic] would have the second component of 701(28)(A) include ''activities conducted on the surface of lands in connection with * * * subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine.'' Citing M–Op pp. 2, 13 [100 I.D. 85 at 87, 93 (July 10, 1991)]. Commenters claim there would be no reason for Congress to refer to ''*activities* conducted on the surface of lands in connection with * * * surface *operations*'' * * *'' Once Congress had swept ''activities'' within the scope of the definition, nothing additional would be accomplished by adding the word ''operations.'' Commenters also suggest that there would be no reason for Congress to refer to ''*activities* conducted on the surface of lands in connection with * * * surface impacts''.

We disagree. All of the words of the definition are given meaning under our interpretation. Contrary to commenter's assertion, neither ''surface operations'' nor ''surface activities'' is surplusage or unnecessary under our interpretation. These terms help to delineate what is included and what is excluded. For example, there can be onsite activities that have no connection with the surface operations of the mine. The statutory language excludes such activities from the definition. Further, there may be activities that are not conducted on the surface but are in connection with surface operations. The statute also excludes these activities from the definition. We also believe there can be surface activities that are not in connection with surface operations or surface impacts of an underground mine, and there can be surface activities in connection with underground impacts rather than surface impacts. We believe Congress intended to exclude all of these types of activities, and that the words of the definition are needed to make this clear.

Commenters assert that the Secretary's statement that ''section 701(28) does not specifically mention subsidence'' (62 FR 4868) offers no basis for retreating from the plain meaning of SMCRA. As discussed above, we do not agree with commenter's assumption as to what is SMCRA's plain meaning on this issue. Further, this statement refers to only one of a number of factors we considered in reaching its interpretation. Commenters also argue that acceptance of this statement would require rejection of the Secretary's [sic] own interpretation. These commenters allege that under the Secretary's [sic] interpretation, ''face-up or mine portal areas'' associated with underground mines are banned in section 522(e) areas. *Citing* M–Op at 13, n.19 [100 I.D. 85 at 87 fn. 19]. Commenters note that, however, neither section 701(28) nor section 522(e) mentions either of these two items. We do not accept commenter's comparison. Our analysis makes clear that ''face-up or mine portal areas'' would come within the terms of 701(28), because they are areas where surface activities disturb the surface in connection with surface operations of an underground coal mine. Commenters also note the Secretary's assertion that section 516(c) applies to subsidence (*citing* 62 FR 4869), even though the word ''subsidence'' never appears there. We have consistently taken the position that subsidence could pose an ''imminent danger'', and thus is within the terms of section 516(c). We note that interpretation of 516(c) is outside the scope of this rulemaking.

Commenters feel the Secretary's assertion that subsidence is regulated only under section 516 is contrary to the House report's reference to ''such other sections which may have application'' to ''subsidence.'' They argue that since subsidence is explicitly mentioned only in section 516, the only way it can be regulated by ''other sections'' is if it constitutes ''surface coal mining operations'', and therefore, it is banned in section 522(e) areas. Commenters' conclusion is flawed. For example, other SMCRA sections that may be applicable to subsidence or subsidence related impacts may include: Sections 508 (reclamation plan requirements), 510 (permit approval), 515 (portions concerning prime farmlands) and 720 (subsidence).

According to commenters, because we are unable to explain away these clear expressions of legislative intent, we are reduced to suggesting in effect that, because the Senate Report once refers to ''surface *activities* incident to underground mining,'' any reviewing Court should overlook the word ''impacts'' in sections 701(28)(A) and 522(e)(2)(A), and should ignore the three references to ''impacts'' and ''effects'' elsewhere in the Senate Report. Commenters are wrong. As explained above, we are not overlooking, nor do we advocate overlooking, the use of the term ''impacts'' in section 701(28) or 522(e). Rather, our interpretation gives full and reasonable meaning to all terms in those sections. In contrast, commenter's interpretation would render the second half of the definition, at 701(28)(B), inapplicable to underground mining. That interpretation is untenable. Furthermore, we have not ignored the referenced passages in the legislative history. To the extent the passages of legislative history quoted by commenters cannot be explained or reconciled with the language of section 701(28), we believe the language of the Act must prevail.

Commenters also argue that our position is not supported by legislative history allegedly showing that underground and surface mining ''require significant differences in regulatory approach.'' *Citing* 62 FR 4865. In support of their argument, they point out that (1) differences in *regulatory* approach to the two kinds of mining in areas where they are permitted in no way conflicts with an evenhanded prohibition of both surface mining and the surface impacts of underground mining in the special areas enumerated in section 522(e), and (2) where Congress wanted to allow the Secretary [sic] to accommodate differences between the two kinds of mining, it said so. Commenters mischaracterize our position. We believe that not applying 522(e) to subsidence *is* one of the differences in regulatory approach countenanced by Congress in Title V of SMCRA.

Likewise without merit, commenters charge, is the Secretary's citation of legislative history allegedly showing that ''most of the impacts of unregulated pre-SMCRA surface mining resulted from surface activities that were more immediate and more readily observable, and the resulting conditions were relatively accessible for reclamation.'' Citing 62 FR 4866. Furthermore, they contend that the Secretary does not explain how this distinction supports exempting subsidence from section 522(e), and they submit that it does not. Commenters assert that, if anything, the greater difficulty of reclaiming subsidence-impacted surface features makes the preventive approach of section 522(e) more necessary, not less. Commenters have offered no basis for these assertions, and we believe neither the record nor our experience support commenters' characterizations. For the reasons given above, we find these comments unpersuasive.

Commenters allege the legislative history of section 720 further confirms that subsidence is covered by the term ''surface coal mining operations.'' In support of their position, they submit two points. First, that the final bill enacted by Congress rejected a proposed amendment included in the House committee bill:

> Notwithstanding the reference to surface impacts incident to an underground coal mine in paragraph (28)(A), for the purpose of section 522(e), the term ''surface coal mining operations'' shall not include subsidence caused by an underground coal mine.

(Section 2805(b) of the committee bill, proposing to add section 701(35)(D) to SMCRA), H.R. Rep. No. 102–474, pt. 8 at 133 (1992).

The authors of this amendment stated that it ''clearly exempts land surface subsidence from the prohibitions of section 522(e) of the Act.'' *Id.* pt. 8 at 133. Commenters believe that the House committee's attempt to ''exempt'' subsidence from section 522(e) necessarily reflects the committee's understanding that, absent such an exemption, subsidence was covered by section 522(e). This statement is not necessarily true. It is just as likely that the proposed amendment was rejected because Congress was aware of the language of the Act and its interpretation, including the M-Op, and agreed that section 701(28) is properly interpreted as not including subsidence; so that no further amendment of the Act was required in order to exclude subsidence.

Second, commenters submit that Congress's ultimate rejection of another House committee amendment to SMCRA may raise issues with respect to the interpretation of section 717(b), but does not raise an issue concerning the committee's understanding that provisions in section 701(28) cover surface impacts, not merely surface activities. The House committee proposed an amendment to SMCRA section 717, stating that:

> Section 2805(a)(1) would amend section 717(b) of the Surface Mining Control and Reclamation Act of 1977 to clarify the terminology used under that subsection. Recent litigation has called into question whether Congress, in using the term ''surface coal mine operation'' in section 717(b), intended to require underground coal mine operators to replace water supplies * * *.

The Committee, in formulating legislation that was enacted as the Surface Mining Control and Reclamation Act of 1977, did not intend to exclude the impacts of underground mining from the scope of section 717(b). However, in light of the litigation, section 2805(a)(1) amends section 717(b) of the Act with the terminology defined under section 701(28) of the Act *so that a clear reading of the law expressly includes the surface impacts incident to an underground coal mine* under the scope of section 717(b). H.R. Rep. No. 102–474, pt. 8 at 132 (1992) (emphasis added). However, this proposed amendment was not accepted by Congress. In any case, we believe that Congress' action on this proposed amendment to SMCRA section 717 is irrelevant to the issues in this rulemaking because this action postdated passage of SMCRA and did not concern section 522(e) or section 701(28).

We also received other comments that agree with our analysis of the legislative history. These commenters also argue that a compelling indication of Congressional intent can be found on pages 94–95 of House Report 95–218 (Apr. 22, 1977). The commenters assert that the focus of Congress relative to section 522 in general, and 522(e) specifically, was on surface mining impacts. Commenters argue that the report, under the title of ''Land Use Considerations'', addresses the lands unsuitable for mining provision of section 522. The report states:

> The committee wishes to emphasize that this section does not require the designation of areas as unsuitable for **surface mining** other than where it is demonstrated that reclamation of an area is not physically or economically feasible under the standards of the act * * *.
>
> Although the designation process will serve to limit mining where such activity is inconsistent with rational planning in the opinion of the committee, the decision to bar surface mining in certain circumstances is better made by Congress itself. Thus section 522(e) provides that, subject to valid existing rights, no surface coal mining operation, except those in existence on the date of enactment, shall be permitted * * *.
>
> As subsection 522(e) prohibits **surface coal mining** on lands within the boundaries of national forests, subject to valid existing rights, it is not the intent, nor is the effect of this provision to preclude **surface coal mining** on private inholdings within the national forests. The language ''subject to valid existing rights'' in section 522(e) is intended, however, to make clear that the prohibition of strip mining on the national forests is subject to previous court interpretations of valid existing rights * * *. (Emphasis added)

H.R. Rep. No. 95–218 at 94, 95.

The commenters argue that the second paragraph goes directly to the Congressional intent to address ''surface mining'' in creating 522(e) buffer zones. The commenters also argue that frequent use of the term ''surface mining'' while addressing the ''reclamation'' related goals in the Act; the discussion about ''strip mining'' (which has the same limited meaning as surface mining and surface coal mining) in the national forests; and the absence of any subsidence reference anywhere in this discussion, seem clearly to direct section 522 to surface mining and to exclude subsidence from the realm of consideration.

We agree in part with these comments. While the House Report language quoted by the commenters does refer to the effect of section 522(e) on surface mining, we do not believe that SMCRA section 522(e) addresses only surface mining. As discussed above, we believe the language of section 701(28) also encompasses surface activities in connection with underground mining, as well as other surface features affected by surface activities. Paragraph (B) includes a lengthy list of specific surface features included in this last category.

C. History of Interpretation as to Applicability of Section 522(e) Prohibitions to Subsidence

As previously discussed in other sections of this rule, we recognize that there appears to have been inconsistency in our past interpretations. However, we conclude that the majority of past OSM rulemaking and regulatory practices have not considered subsidence to be a surface coal mining operation, have not applied section 522(e) prohibitions to subsidence, and have not required regulatory authorities to do so. Comments on this aspect of this rulemaking fall into two camps. Numerous comments allege that we have consistently taken the position that

subsidence is not subject to the prohibitions of 522(e). Other comments assert that we have properly taken the position that subsidence is subject to the prohibitions of 522(e). Both sets of commenters have cited numerous instances to support their positions. Neither position is entirely correct. As discussed above, we acknowledge that our past actions have not been consistent on this issue.

Several commenters argue that in the administrative history of the implementation of SMCRA, we have never interpreted the statute to apply section 522(e) to subsidence. Furthermore, these commenters argue that there exists a longstanding interpretation of SMCRA that section 516 provides the exclusive provision to control subsidence effects. Commenters disagree with our statement in the proposed rule that in the past we have not taken a definitive position on the issue of the applicability of section 522(e) to subsidence. The commenters believe the administrative history shows from the outset the agency never interpreted the statute to apply section 522(e) to subsidence. These commenters referred to the examples we mentioned in the proposed rule to illustrate that the agency has not taken a consistent and definitive position. The commenters describe these examples as aberrational and pale in comparison to the overwhelming evidence demonstrating that section 522(e) has not been applied in the federal rules or state programs to subsidence. The commenters emphasize that the examples were used by us to describe what the agency calls ''negative implications'', but these commenters feel that the agency has misconstrued the implication properly drawn from these examples. For the reasons discussed above in Part II. B, we do not agree with commenter's assertions that OSM' interpretation has consistently been that 522(e) does not apply to subsidence. The proposed rule and this preamble acknowledge numerous past explicit or apparent inconsistencies.

In contrast, other commenters allege that our proposed interpretation is an abrupt substantive change of agency policy, particularly from the 1979 regulations and actions taken by the agency in 1984 and 1985. The commenters assert that in the 1979 rulemaking that established the permanent regulatory program regulations, the agency indicated plainly that the jurisdictional term ''surface operations and surface impacts incident to an underground coal mine'' included more than merely surface impacts attendant to the surface operations, but instead included subsidence and other impacts attendant to the underground coal removal itself. As discussed above, we continue to acknowledge that subsidence can be a surface impact incident to an underground coal mine. However, we do not regard this as inconsistent with the final rule's interpretation of section 701(28). And to the extent that our interpretation in this final rule may be a change from any past interpretations, we gave notice in the proposed rule of the proposed interpretation and rationale and acknowledged various past inconsistencies, so that commenters have had full notice and opportunity to comment.

Commenters further assert that the agency acknowledged in the 1979 rulemaking that the concept of VER applied to underground mining as well as surface mining; an applicability that would be unnecessary if, as the agency now posits, the prohibitions of section 522(e) did not apply to underground mining in the first instance. Citing 44 FR 14993, Mar. 13, 1979. We do not agree. As explained above, we continue to interpret section 522(e) as applying to those aspects of underground mining that are surface activities, and the areas and features affected by, incident to, or resulting from surface activities, as set out in more detail in SMCRA section 701(28)(B). Thus, we take the position that 522(e) continues to apply to those aspects of underground mining that constitute a surface coal mining operation. However, those aspects do not include subsidence. Further, as discussed elsewhere in this preamble, this interpretation is consistent with other rules implementing SMCRA, including for example, our rules concerning bonding and permitting, and our definition of ''adjacent area.''

Commenters believe that in the 1979 rules, when we addressed the measurement of the 300-foot buffer zone, we tacitly determined section 522(e) did not apply to underground mining. They allege that our subsequent actions contradict this strained analysis. They point out that in 1981 we published our findings on Greenwood Land and Mining Company's request for a determination of valid existing rights to conduct underground coal mining operations in the Daniel Boone National Forest in Pulaski and McCreary Counties, Kentucky. 46 FR 36758, July 15, 1981. These commenters assert that the discussion of the finding of valid existing rights in that instance makes clear that:

(1) Valid existing rights was considered by OSM to be applicable to underground mining activities under section 522(e) lands;

(2) The application of section 522(e) was not limited to face-up areas and those surface areas on which were sited support facilities, but also included the surface overlying underground workings; and

(3) The determination of VER was unrelated to potential subsidence effects but rather attached to the geographic extent of underground mine workings beneath protected lands. 46 FR 36759, July 15, 1981; 47 FR 56192–3, Dec. 15, 1982.

We do not agree with this characterization of our interpretation in the Greenwood VER decision. In the July 15, 1981 FR notice laying out the VER findings in Greenwood, we noted that VER was requested for three mines, one of which would have five face-ups directed at the same seam of coal. Our VER notice stated:

> OSM is in the process of obtaining additional information in order to determine the physical extent of the valid existing rights claimed by Greenwood. OSM is considering basically two alternatives in delineating the exact extent of the VER: (1) have VER over the surface area affected by the face-up and support activities incident to the underground mining; or (2) have VER over those areas (including surface overlying underground workings) contemplated to be affected under the operating plans submitted to the Forest Service prior to August 3, 1977.
>
> * * * OSM considers that Greenwood's valid existing rights should have the same geographical extent as the mining Greenwood contemplated and was committed to on August 3, 1977 * * *.
>
> Because the geographical limits of VER will depend on the evidence available, OSM has decided to reserve the right to use either or both of these alternatives in defining the extent of Greenwood's VER * * *. While the second alternative is preferable and precise geographical limits will be determined wherever possible, there may be cases where such a determination is impossible. In those cases, the first alternative would have to be used.

46 FR 36759, July 15, 1981.

Having concluded that the VER requester had established that it met the ''all permits'' VER test, the 1981 determination addressed the extent of the geographical area to which VER would apply. If available documentation delineated for some mines or face-ups only the surface area to be affected by face-up and support activities, VER would be found for only that surface area. The areas over underground workings were not to be delineated on the basis of whether subsidence would occur, but rather solely on the basis of the documentation in mining plans, of the area which Greenwood had committed to mine. If documentation for a particular mine or face-up did not show that, as of 1977, the requester was

committed to a specific location and extent for associated underground workings, then VER would extend only to the areas that documentation as of 1977 showed would be affected by surface face-ups and support activities. Thus, in this 1981 VER determination, we considered VER to attach to those areas for which documentation demonstrated that the mineral owner had committed to mine, as of August 3, 1977.

We note that we issued a similar VER determination approximately one year earlier. That determination, concerning a VER request from Mower Lumber Company, used a similar rationale for a VER determination concerning a similar fact pattern. The requester proposed multiple mines on National Forest lands, but the Forest Service required only that the company show the planned extent of mining for six-month intervals. Because there was evidentiary difficulty in determining geographical limits for VER, we had proposed two options for determining the geographical extent of VER. 45 FR 52468, Aug. 7, 1980.

> Under the first alternative, the VER for the actual surface disturbance, face-up, haul roads, etc., would be precisely defined, but *the company would be free to deep mine as much coal from the permitted seam(s) as could be reasonably reached by current mining methods using the precisely limited surface disturbances.* Under the second alternative, precise geographical limits would be set for both the surface and underground workings. [Emphasis added.]

Notice of the final Mower VER determination was published on September 17, 1980 (45 FR 61798). In that decision, we affirmed that Mower had VER at the five mines in question, but reserved decision on the exact extent of VER at all of the mines. We stated that

> * * * [A]s a result of limited State and Federal regulation prior to the passage of the Act, there is a limited amount of information relevant to a precise definition of the extent of VER. While the second alternative is preferable and precise geographical limits will be determined wherever possible, there may be cases where such determination is impossible. In those cases, the first alternative would have to be used.

Id.

Although the language of the two decisions is quite similar, it is not clear whether we were assuming in the later Greenwood case that the same consequences specified in Mower would follow when documentation as of 1977 showed only areas affected by surface activities. That is, if documentation showed only areas to be disturbed by surface activities, the operator would have VER only for those disturbed surface areas, but could mine all areas reasonably reached using the surface disturbances. And we reach no conclusion as to whether either alternative for VER determination should be read to say that subsidence is prohibited under 522(e), since the decisions did not specifically address whether subsidence was prohibited in the absence of VER. We are not aware of any previous or subsequent VER determinations that utilized the rationale of Greenwood or Mower. However, to the extent that either decision may be read to be inconsistent with this final rule, this final rule supersedes those earlier decisions.

Commenters believe that the Secretary [sic] reaffirmed the prohibition on subsidence within section 522(e) areas in the decision regarding privately held mining claims within the Otter Creek Wilderness in West Virginia. The commenter notes the Secretary [sic] stated that ''certain surface impacts to the wilderness could not be avoided, namely subsidence and hydrologic effects. Thus, even the 22 percent accessible from outside the wilderness could not be recovered without causing prohibited surface impacts inside the wilderness area.'' 49 FR 31228, 31233, Aug. 3, 1984. To further support this point of view, these commenters also point to a decision by OSM to require two mining companies about to conduct underground mining operations which would disturb the surface of federal lands to obtain permits under SMCRA and subject them to the provisions of section 522(e)(2). *Ramex Mining Corp.* v. *Watt,* 753 F.2d 521, 523 (6th Cir. 1985). As noted above, in Part II.B.3. of this preamble, we agree that the *Otter Creek* decision did conclude that subsidence from underground mining is a prohibited surface impact under section 522(e). However, in part for the reasons set out in Part III. A. of this preamble, we do not agree that *Ramex* clearly supports the commenter's point. It is not clear from the decision whether the Ramex operation would have included surface activities on the national forest lands in question, and to conduct such activities would require VER under any interpretation.

Commenters also allege that the proposed interpretation is an abrupt substantive change from the 1988 proposed rule which proposed two options: banning all subsidence, or banning subsidence causing material damage; but did not seriously contemplate denying the applicability of the prohibitions to any surface impacts associated with underground mining. These commenters also assert that the preamble to that proposed rule stated that ''The definition of 'surface operations and * * * impacts incident to an underground coal mine,' was promulgated specifically to apply to 30 CFR 761.11(b), the rule which implements the section 522(e)(2) prohibition against mining on Federal lands in National forests.'' We indicated in our 1978–79 rulemaking that, at a minimum, subsidence causing material damage was prohibited in section 522(e)(2) areas[.]'' Citing 53 FR 52381, Dec. 27, 1988.

In December 1988, we proposed two alternative policies on the applicability of section 522(e) to subsidence. One proposal was that all subsidence would be subject to the prohibitions of section 522(e). The other proposal was that subsidence causing material damage would be subject to section 522(e). 53 FR 52374, Dec. 27, 1988. We withdrew the 1988 proposed rule. That withdrawal was not challenged , and no policy was established by the 1988 proposal. Therefore, we are not required to justify any changes from that withdrawn proposed rule. Nonetheless, we did discuss in the 1997 proposed rule our reasons for departing from the alternatives considered in the 1988 proposed rule. Those reasons, which continue to apply, can be summarized as follows:

One alternative proposed in 1988 was based on the argument that subsidence is a surface impact of underground mining, that surface impacts of underground mining are surface coal mining operations under section 701(28), and thus that all subsidence is a surface coal mining operation prohibited under section 522(e). One problem with this interpretation is that subsidence may or may not cause surface damage. We believe that Congress did not intend to prevent subsidence that causes no surface damage. All of the congressional concern about subsidence from underground mining is expressed in discussions of the damage caused by subsidence, and Congress repeatedly recognized that there was little concern about subsidence that caused no significant damage to surface features or uses or to human life or safety. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71–72 (1976); H.R. Rep. No.896, 94th Cong., 2d Sess. 7374 (1976); H.R. Rep. No. 45, 94th Cong. 1st Sess. 115–116 (1976); H.R. Rep. No. 1072, 93d Cong., 2d Sess. 108–109 (1974). Indeed, there is little reason to regulate or prohibit subsidence that does not impair surface features and uses and does not endanger human life or safety.

Thus, we conclude that application of the section 522(e) prohibition to all subsidence would be unnecessarily restrictive, in light of Congress' recognition that subsidence would typically cause no significant damage to agriculture and similar uses. Many of the types of features listed in section 522(e) are low-intensity uses that are similar to agricultural land uses in that they have relatively low vulnerability to significant damage from subsidence.

This 1988 proposed alternative was also based in part on the argument that, given the serious congressional concern about subsidence, it would be illogical to conclude that Congress did not intend to include subsidence within the definition of ''surface coal mining operations'' or that Congress would have allowed subsidence within the areas protected by section 522(e). For two reasons, we do not now find this argument persuasive.

First, under SMCRA, certain impacts of coal mining are subject to regulation even if they are not included in the definition of a surface coal mining operation and are therefore not subject to the prohibitions of section 522(e). For example, offsite water supply diminution and air and water pollution attendant to erosion are also specifically regulated under SMCRA, even though they are not surface coal mining operations per se. SMCRA sections 515(b)(4) and 717. 30 U.S.C. 1265(b)(4) and 1307. The same is true for subsidence. Therefore, it is not necessary to include subsidence within the definition of a surface coal mining operation in order to regulate subsidence under sections 516 and 720.

Second, as noted above, there are no significant lapses in regulatory coverage under our proposed reading of SMCRA, since subsidence is fully and specifically regulated under sections 516 and 720. The requirements of the existing regulatory scheme for subsidence apply equally in areas covered by section 522(e) and in those not so covered.

The other alternative that we proposed in 1988 was that subsidence causing material damage is a surface coal mining operation subject to section 522(e). Proponents of this alternative contend that Congress intended that only subsidence that causes material damage be precluded. Prohibition of material damage would not preclude underground mining of all section 522(e)(4) and (e)(5) areas, because an operator could either negotiate a waiver of the prohibition or purchase the protected features.

We did not find the arguments for a material damage standard persuasive for several reasons. First, as outlined above, a material damage standard does not comport with the parsing of the definition at SMCRA section 701(28)(A),which we believe best gives meaning to all of the words of the statutory provision and therefore is the best and most reasonable interpretation of the language of section 701(28).

Second, as outlined above, we believe the best interpretation is that Congress intended to regulate subsidence under sections 516 [and subsequently 720], rather than under section 522(e), as indicated by both the provisions of the Act and the legislative history.

Third, application of a material damage test might result in significant costs and impairment of underground mining. This is because section 516(b)(1) requires prevention of material damage only ''to the extent technologically and economically feasible,'' while a material damage threshold for applying section 522(e) would require prevention of all material damage.

We believe that, if subsidence causing material damage were prohibited, an operator would be precluded from causing subsidence except to the extent the operator could demonstrate that:

(1) Although subsidence might occur under the protected features, no material damage would occur from the subsidence;

(2) The operation would avoid mining within the area from which subsidence could damage the protected features; or

(3) Under the exceptions in section 522(e), the operator had, for example, obtained waivers from homeowners or permission from the regulatory authority concerning subsidence under public roads.

To the extent that these requirements would significantly increase the costs of mining, or significantly decrease the amount of coal available for mining, the material damage standard also would frustrate Congress' expressed intent to encourage full utilization of coal, to ensure an expanding underground mining industry and to encourage longwall mining. For example, as we determined in the EIS concerning this rulemaking, withholding of 10 percent of waivers for 522(e)(5) homes could make longwall mining economically infeasible. See Final EIS, 1999.

It is true that section 522(e) and section 561(c) would not be coextensive in their coverage, assuming section 522(e) applied to subsidence. Nevertheless, there would be a substantial overlap between the two provisions. Moreover, as discussed above, we conclude that subsidence was not intended to be addressed in section 522(e), and to apply the prohibitions of section 522(e) to material damage from subsidence would frustrate congressional aims in a way that is not mandated by the terms of the Act or supported by its legislative history.

Commenters also note that the coal states that already apply the prohibitions of section 522(e) to subsidence must have concluded that the prohibitions are fully consistent with a healthy coal industry. We do not agree. As discussed above, with the exception of Colorado, Illinois, Indiana, and Montana, states with active underground coal mining do not prohibit subsidence in areas protected under section 522(e). Rather, states regulate the effects of subsidence pursuant to sections 516 and 720 of SMCRA. Those regulations provide for the mitigation, repair, and compensation for subsidence and material damage to certain structures and to lands. As discussed, Montana has no defined policy regarding the regulation of subsidence. This is due in part to the fact that the State has only one underground mine, which has not begun production. Montana did not submit comments on the proposed rule. No states have commented that requiring states to apply the 522(e) prohibitions to subsidence is appropriate. In fact, states commented that the proposed rule would clarify, once and for all, that certain prohibitions on surface mining near occupied dwellings, public roads, and on federal lands within national forests, do not apply to subsidence from underground mining.

State commenters unanimously support continuation of the status quo; that is, the prohibitions of section 522(e) do not apply to subsidence. State commenters agree with our analysis that adequate means of control are available to the states and the federal government through existing statutory provisions to insure that the effects of subsidence are mitigated. The State commenters welcome clarification of the statutory requirements and assert that the interpretation enables the States to retain the flexibility that regulatory authorities need to effectively regulate coal mining operations and protect the environment.

The State of Colorado concurs with our interpretation, and indicates that the State has ''always concurred with this interpretation by practice.'' Colorado commented that the State prohibits material damage to any structure through State regulations pursuant, in part, to section 516 of SMCRA. Further, the State noted that, although it does not invoke the prohibitions of section 522(e)

in addressing subsidence impacts of proposed underground coal mining, the State consistently requires subsidence inventories and control plans to identify and mitigate any potential ''material damage'' due to subsidence of structures or renewable resource lands. Colorado confirmed that it does not allow material damage to structures even with landowner waivers or VER.

Illinois also supports our interpretation inasmuch as Illinois prohibits *planned* subsidence in section 522(e) areas. Illinois indicates that they have ''historically applied the prohibitions of section 761.11 ''indirectly'''. An internal State policy was intended to provide protective procedures when planned, predictable and controlled subsidence was proposed under dwellings and roads. Under the State program, planned subsidence operations are required to establish VER via a ''takings test'' prior to subsiding the protected lands and features. However, absent VER, Illinois would allow subsidence within the established buffer zones if:

(1) The right to subside within the buffer zone was established, and

(2) The protected land or feature in question would not be materially damaged or adversely impacted by the adjacent subsidence operations.

In their comments, Illinois agrees with our analysis that existing regulations and the Federal subsidence regulations (60 FR 16722, Mar. 31, 1995) provide adequate safeguards to protect the public without applying the prohibitions enumerated under section 761.11. Illinois also points out that if VER were to apply, the good faith all permits standard would effectively eliminate longwall mining under most protected features. Illinois believes the ability to permit planned subsidence that would either not impact a protected feature, or could be effectively mitigated would be arbitrarily lost as few operators could pass the good faith all permits standard.

Indiana also supports our interpretation that the prohibitions of section 522(e) do not apply to subsidence because it best fits Congressional intent to encourage underground mining in SMCRA. Indiana applies the 522(e) prohibitions unless a waiver or other form of ''subsidence right'' is obtained. Indiana requires proof of acquisition of the right to subjacent support, or a waiver, to conduct planned subsidence mine operations. Indiana indicates that adoption of the proposed interpretation will not change Indiana's regulatory program because either one of these two conditions is necessary regardless of the existence of 522(e) buffer zones. Indiana notes that our interpretation protects both Indiana homeowners and the development of Indiana's valuable natural energy resources as required by Congress.

Indiana believes that:

(1) A change from the proposed rule would require a major overhaul of its regulatory program without a commensurate benefit to the citizens, the environment, the economy or the State; (2) without a demonstrated need, a requirement to overhaul the state subsidence programs would waste state and federal resources provided by the taxpayers;

(3) The regulations, and in some cases Indiana's SMCRA, would need to be rewritten which would take several years;

(4) The rules would have to be written to require the entire shadow area to be included in the permit area, and therefore bonding for the shadow area would be required; and

(5) Rules would be needed to address bond release for revegetation and structural restoration requirements.

D. Regulatory Gap—Adequacy of SMCRA Protection of 522(e) Features From Subsidence Damage

Some commenters disagree with our statement in the proposed rule preamble (62 FR 4868–69, 4871, Jan. 31, 1997) that sections 516 and 720 adequately address subsidence. Commenters believe the mandatory duty, imposed by the first clause of section 516(b)(1), to prevent subsidence damage is softened by (1) limiting its scope to cover only ''material'' subsidence damage and (2) including a feasibility standard ''to the extent economically and technologically feasible''. We do not agree. Other commenters believe that the ''material damage'' standard for regulating subsidence from underground mines is a flexible enough concept to provide heightened scrutiny of any permit application for mining beneath (e)(1) areas. We believe that subsidence protections under section 516 and 720 are adequate. We believe the legislative history demonstrates that these sections address the subsidence impacts Congress was concerned about, and we believe it is clear Congress intended to impose these limitations.

Some commenters assert that section 522(e) reflects Congress's determination that certain special areas require more protection than section 516(b)(1) can offer. Furthermore, in these limited areas, commenters believe Congress imposed on operators a mandatory duty not only to prevent subsidence from causing material damage to the extent feasible, but to prevent it altogether. They also note that the Secretary advanced, and the D.C. Circuit upheld, an interpretation providing that section 516(b)(1) does not mandate the restoration of structures damaged by subsidence. [This interpretation predated enactment of SMCRA section 720.] *National Wildlife Fed'n* v. *Lujan*, 928 F.2d 453 at 456–60 (D.C. Cir. 1991). These commenters allege that, if the Secretary [sic] believes Congress intended this interpretation of section 516(b)(1), it is all the less likely Congress intended dwellings and the other important structures listed in section 522(e) to be left without the benefit of section 522(e)'s preventive mandate. We do not agree. We believe that in section 522(e) areas, Congress did not intend to prohibit subsidence, but rather to prohibit those surface activities and those areas and features resulting from, incident to, or affected by surface activities, that are surface coal mining operations within the terms of 701(28).

Commenters point to a discussion of the 1988 proposed rule in the M-Op: ''[M]any of the types of features listed in section 522(e) are low-intensity uses that are similar to agricultural land uses in that they have low vulnerability to significant damage from subsidence.'' These commenters believe Congress included national parks, wilderness areas, and other key recreational lands in section 522(e), but excluded agricultural land, and that the Secretary [sic] ignored this fact. The commenters further conclude that Congress did not consider farmland ''similar'' for purposes of section 522(e). Moreover, referring to a draft EIS that accompanied an earlier VER proposed rule, the commenters submit that the Secretary conceded that the impacts of subsidence on such ''low-intensity'' land uses as national parks and wilderness areas are quite serious indeed.

We disagree with these commenters' conclusions. We continue to believe many features protected under section 522(e) have low intensity uses that are not particularly vulnerable to subsidence damage, similar to certain low-intensity uses viewed by Congress as having low vulnerability. The fact that Congress did not address agricultural lands in section 522(e) is not particularly relevant to this point.

We believe the EIS accompanying this rulemaking best evaluates the relative impacts of the alternatives considered for this rulemaking. An extensive discussion of this issue can be found in Chapter IV of the EIS accompanying this rulemaking. See Final EIS, 1999.

Section 522(e) areas with low-intensity uses that are not particularly vulnerable to significant damage from subsidence may include many (e)(1), (2), (3), and (4) areas, as well as many (e)(5) public parks. But in any case, we do not argue that subsidence will never have impacts on the surface of 522(e) lands. And, as discussed above, we believe Congress was concerned with subsidence only insofar as it causes significant damage or danger, and was focused on control rather than prohibition of subsidence.

Another group of commenters argue that nothing in sections 516 and 720 purports to modify either section 522(e) or the definition of ''surface coal mining operations'' in section 701(28). The commenters go on to note that Congress has clearly provided in sections 516 and 720 that subsidence is (subject to exceptions) prohibited in section 522(e) areas and that it is not the Secretary's [sic]'s prerogative to substitute the Department's views of public policy for Congress's.

We agree that neither section 516 nor section 720 modifies section 522(e) or section 701(28). However, we disagree with these commenters' other conclusions. Based on a plain reading of the language of the relevant provisions we also believe that neither section 516 nor section 720 includes provisions that specifically interpret 522(e) and its applicability to subsidence. We believe that Congress intended section 516(c) [and subsequently 720], in combination with other regulatory provisions of SMCRA, to offer sufficient regulation of subsidence damage to those features that Congress considered vulnerable to significant impairment from subsidence. We believe that the existence of this comprehensive regulatory scheme in section 516 [and subsequently 720] makes it unlikely that Congress also intended to prohibit subsidence under section 522(e).

Another group of commenters argue that our interpretation of the language at section 516(d), as well as the language itself, confirms that subsidence is a ''surface impact [ ] incident to an underground coal mine'' within the meaning of sections 701(28) and 522(e). These commenters further note that section 516(d) applies to ''surface operations and surface impacts incident to an underground coal mine'', and that this is essentially the same language used in sections 701(28)(A) and 522(e)(2)(A).

Commenters also argue that our rulemaking invoking section 516(d) as authority for a regulation requiring bonds for subsidence demonstrates that we have in the past deemed subsidence to fall within the scope of this key phrase. We agree that subsidence can be a surface impact incident to an underground coal mine. However, as outlined above, we do not agree that a surface coal mining operation includes surface impacts *per se;* rather this term includes surface activities (under section 701(28)(A)) and the surface features affected by those activities (under section 701(28)(B)).

One group of commenters argues that our reasoning that subsidence must be regulated only by sections 516 and 720 is nullified since sections 516 and 720 do not contain all the requirements which apply to underground activities. Commenters argue that subsidence is also regulated under other sections. As noted above, we agree that other SMCRA provisions may apply to subsidence and subsidence-related impacts. However, performance standards for subsidence are set out primarily in sections 516 and 720. And, we believe that no regulatory gap results when section 522(e) does not apply to subsidence because sections 516 and 720 provide ample authority to regulate surface effects of underground mining under existing regulations. The detailed description of the existing relevant regulations in Part I of this preamble demonstrates that our permanent program regulations implementing sections 516 and 720 provide broad subsidence protection; that a prohibition of subsidence within the buffer zones around dwellings, roads, and other surface features listed in section 522(e) would be superfluous; and that no regulatory gap results from our interpretation. We have full authority under sections 516 and 720 and other SMCRA provisions, to develop additional regulations to protect any environmental values or public interests that warrant additional protection beyond that currently provided.

Some commenters assert that section 720 does not provide complete protection against mining impacts, and certainly does not give the same protection to the interests of surface landowners that section 522(e) would give if applied to subsidence under homes. Furthermore, commenters believe that while the law requires water supply replacement and subsidence compensation or repair, implementation of that law is problematic in the best of circumstances. Commenters argue that even in cases where subsidence is the causation, it is difficult to prove that the water loss is mine-related. Commenters also note that there can be a cost to the homeowner for hiring counsel or private consultants to develop evidence; and that it can take months or years to get water replacement. Commenters further argue that such replacement is rarely of comparable quality, and certain state laws, such as Pennsylvania law, do not extend the full protections intended by section 720. Further, commenters believe that some losses and impacts, even where mine-related, are not addressed by provisions other than section 522(e). Commenters note that unremediated impacts may include: the loss of use or habitability of a structure due to water loss, cost of temporary housing during such water loss; the ruined pumps, stained clothing and fixtures; and destroyed washers, dryers and other appliances. We agree that the impacts of subsidence on property owners are very real. These impacts can include, for example, emotional stress from the process of being subject to subsidence, lost productivity, potentially depressed property values, and other economic impacts. However, we believe that SMCRA addresses these impacts under sections 516 and 720, and related regulatory provisions, to the extent that Congress intended to address them in SMCRA.

Commenters allege that the subsidence regulations published in March 1995, as mandated by EPAct, are very limited and inadequate to protect section 522(e) resources from subsidence. Furthermore, commenters believe the EPAct is limited to subsidence damage ''to any occupied residential dwelling and structures related thereto, or non-commercial building'' and damage to ''any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit''. Commenters assert that many section 522(e) structures are among the areas that lack EPAct protection. During the preparation of the final regulation implementing EPAct, timely comments concerning the merits of the rulemaking were considered; and further comments on the adequacy of the protection established by Congress in EPAct's provisions on subsidence protection, or on the rules implementing those provisions, are outside the scope of this rulemaking.

Commenters point to a lawsuit that was subsequently filed against the Department of the Interior, alleging that our 1995 subsidence regulations, (62 FR 16722, Mar. 31, 1995) went beyond the intent of the Energy Policy Act. Commenters argue that even if the EPAct regulations are upheld, every provision will likely be the subject of prolonged disputes, appeals and

litigation by coal operators who are reluctant to minimize damage, pay compensation or make repairs. Commenters assert that the existence of *any* real or imagined basis for dispute will be exploited by coal operators who will delay resolution for years until courts provide absolute answers and that these disputes will cause major delays and lack of repair and compensation. We disagree with the commenters' assumption regarding anticipated problems in implementation. We expect the rules will be implemented in good faith, and that any disputes as to proper implementation are appropriately handled through existing administrative and judicial procedures on a case-by-case basis. Further, these comments address anticipated concerns about implementation of a separate rulemaking and are outside the scope of this rulemaking.

Commenters express concerns that the Secretary's [sic] interpretation will place an additional economic burden on homeowners and will threaten the recreational value of national parks and other protected lands. These commenters point to statements in the M–Op that:

> We have seen no firm or final conclusion as to the extent to which costs and impairment would occur. Review of a preliminary draft Environment [sic] Impact Statement indicates that OSM has initially determined that there would be no significant decrease in coal production from application of a material damage standard.

Citing M–Op at 21, n.27 [100 I.D. 85 at 99, fn 27].

Commenters then point to another statement in the M–Op:

> [If] that is true, interpreting section 522(e) as prohibiting subsidence causing material damage would add nothing to the protections already afforded by section 516(b)(1).'' *Id.*

Commenters argue that application of section 522(e) to subsidence, while not adversely affecting coal supply or price, will provide key benefits by shifting subsidence-prone underground mining outside of the important areas protected by section 522(e).

These commenters are addressing statements that are not included or relied on in either the proposed or final rule. The referenced statements were made by the Solicitor in a footnote in the 1991 M–Op before preparation of the Draft EIS or Final EIS for this rulemaking. As quoted by the commenters, the Solicitor noted that at the time of preparing the M–Op he had seen no firm or final conclusion as to the extent to which costs and impairment would occur. Thus, the Solicitor acknowledged that his tentative evaluation in the 1991 footnote had no basis in current and firm analysis by OSM. We believe the Final EIS and EA that accompany this rulemaking best evaluate the relative impacts of the alternatives considered in this rulemaking. See Final EIS, 1999; Final E A, 1999.

Those documents indicate that the application of section 522(e) prohibitions to subsidence would have relatively small impact on the overall extent of mineable coal reserves. However, we do not agree that there would be little impact on coal costs for the nation. The Economic Analysis, which was prepared under guidelines issued by the Office of Management and Budget (OMB), demonstrates that, if waiver withholding rates were to exceed 10% a substantial part of the longwall mining industry could be shut down. Mining would shift to alternative coal reserves but at an additional cost to the nation estimated to be upwards of $2.65 billion over the next 20 years. The commenter is referred to Chapter V of the Final EA for additional details. We considered both costs and benefits in analyzing alternative rules concerning the application of 522(e) prohibitions to subsidence. In our EIS and EA, we attempted to analyze sufficient cost and benefit information (both quantitative and qualitative) to determine the relative magnitude of net costs and benefits for the entire country from alternative subsidence rules.

Commenters also charge that the SMCRA post-subsidence bonding regulations are inadequate to protect the homeowner, particularly if subsidence does not occur for several years. The commenters allege that when the bond is needed to cover subsidence-related damage, the company that caused the subsidence may have been dissolved, gone bankrupt or lack sufficient resources to ensure an adequate bond. These comments address anticipated concerns about implementation of a separate rulemaking addressing subsidence issues (60 FR 16722, Mar. 31, 1995), and therefore the comments are outside the scope of this rulemaking. We expect that any disputes as to proper implementation are appropriately handled through existing administrative and judicial procedures.

One commenter referenced a local (Alabama) study that concluded that, after eight years the subsidence over a longwall panel is still measurable. The commenter believes this study supports his assertion that subsidence is not a short term effect. The commenter believes that subsidence precludes the area above longwall mining from use for any significant residential or other structures. He further notes that in addition to the protracted changes that subsidence brings, all affected insurance companies studied have terminated casualty homeowner's insurance in the vicinity of longwall mining. The commenter provided no documentation of this allegation, but we agree this may be a serious concern. However, it appears that this concern is primarily the result of local insurance practices, and outside the scope of this rulemaking. We did not receive any other comments to this effect.

E. Impacts on Underground Mining if Prohibitions Do Apply to Subsidence

As discussed in this preamble, after considering the comments on this matter, we continue to believe that subsidence is possible from room-and-pillar underground mining and other underground technologies, and is a virtually inevitable consequence of longwall mining. Therefore, prohibiting subsidence below homes, roads, and other features specified in section 522(e) could make mining substantially less feasible and could substantially reduce coal recovery in areas where these features are common .

As discussed previously in this preamble, if the section 522(e) prohibitions applied to subsidence from underground mining, mining would be precluded in all portions of the underground workings where mining would cause subsidence affecting a protected surface feature. Thus, to ensure that subsidence would not take place within a surface area specified in section 522(e), underground mine operations would be required to leave coal in place around each protected feature for a horizontal distance much larger than the protected area. In many cases, the amount of coal left in place to support dwellings would result in a pattern of irregular mined areas that would eliminate the contiguous coal reserves needed to make longwall operations economic. Consequently, few new longwall mines would be opened. As discussed in the Economic Analysis, if waiver withholding rates were to exceed 10% a substantial part of the longwall mining industry could be shut down. Mining would shift to alternative coal reserves but at an additional cost to the nation estimated to be upwards of $2.65 billion over the next 20 years.

F. Codification of the final rule

In the proposed rule (62 FR 4871, Jan. 31, 1997) , we solicited comments on the need to amend 30 CFR Chapter VII to codify our interpretation that section 522(e) does not apply to subsidence from underground coal mining

activities, or the underground activities that may lead to subsidence. A group of commenters suggested that we should codify this interpretation. We agree and have codified the interpretation at 30 CFR 761.200. Codification will allow interested persons to ascertain our policy from the regulations at 30 CFR part 761, without having to locate and refer to the **Federal Register** preamble for this rulemaking.

IV. Procedural Matters

A. Executive Order 12866: Regulatory Planning and Review

This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

(a) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This determination is based on a cost benefit analysis which was prepared for the final rule. The cost benefit analysis indicated that the cost increase resulting from the rule will be negligible. A copy of the analysis is available for inspection at the Office of Surface Mining, Administrative Record—Room 101, 1951 Constitution Avenue, NW, Washington, D.C. 20240. A single copy may be obtained by writing OSM or calling 202–208–2847. You may also request a copy via the Internet at: osmrules@osmre.gov.

(b) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule will not significantly change costs to industry or to the Federal, State, or local governments. Furthermore, the rule will have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients because the rule does not effect such items.

(d) This rule does raise novel legal and policy issues as discussed in the preamble.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the findings that the rule will not significantly change costs to industry or to the Federal, State, or local governments. Furthermore, the rule will have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act, because it will not:

—Have an annual effect on the economy of $100 million or more.

—Cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions because the rule does not impose any substantial new requirements on the coal mining industry, consumers, or State and local governments. It essentially codifies current policy.

—Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.—based enterprises to compete with foreign-based enterprises for the reasons stated above.

D. Unfunded Mandates Reform Act of 1995

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments or the private sector. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (1 U.S.C. 1531, *et seq.*) is not required.

E. Executive Order 12630: Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. The rule is an interpretative rule which does not alter existing regulatory requirements.

F. Executive Order 13132: Federalism

In accordance with Executive Order 13132, this rule does not have Federalism implications. The rule does not impose any new regulatory requirements. The rule:

(a) Does not substantially and directly affect the relationship between the Federal and State governments;

(b) Does not impose substantial direct compliance costs on States or localities; and

(c) Does not preempt State law.

G. Executive Order 12988: Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule (1) does not unduly burden the judicial system and (2) meets the requirements of sections 3(a) and 3(b)(2) of the order.

H. Paperwork Reduction Act

This rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

I. National Environmental Policy Act of 1969 and Record of Decision

This rule, issued in conjunction with the rule defining Valid Existing Rights (RIN 1029–AB42), constitutes a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA). Therefore, we have prepared a final environmental impact statement (EIS) pursuant to section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). A separate notice of the availability of the EIS was published by the Environmental Protection Agency in this edition of the **Federal Register**. A copy of the final EIS, *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,* OSM–EIS–29 (July, 1999) is available for inspection at the Office of Surface Mining, Administrative Record—Room 101, 1951 Constitution Avenue, NW, Washington, D.C. 20240. A single copy may be obtained by writing OSM or calling 202–208–2847. You may also request a copy via the Internet at: osmrules@osmre.gov.

This preamble serves as the *Record of Decision* under NEPA. Because of the length of the preamble, the following is offered as a concise summary. The EIS that was prepared addressed the general setting of the proposal, its purpose and need, the alternatives considered, existing environmental protection measures, the affected environment, the environmental consequences, and overall consultation and coordination activities. In addition, the EIS discussed the regulatory protections of SMCRA.

We used a generic mine impact analysis on a hypothetical site-specific basis to describe impacts to certain

resources when surface and underground mining operations are conducted within, and adjacent to, section 522(e) areas (see Chapter IV of the EIS). In addition, we estimated the coal resources within the areas defined by section 522(e) and subjected them to various tests and assumptions to provide an estimate of the number of acres over a 20 year period (1995 to 2015) that could be affected. Using the generic mine impact analysis and the potentially affected acreage of section 522(e) areas, we was able to provide a measure of the relative degree of potential impacts under each alternative. Finally, we evaluated the combined effects of the VER and the Prohibitions alternatives to describe the impacts of underground mining.

Alternatives Considered

We identified five alternatives for determining the applicability of the section 522(e) prohibitions to subsidence resulting from underground coal mining. None of the alternatives authorizes mining. A person must submit a permit application that complies with all applicable permitting requirements in order to obtain a permit to mine. All Federal permitting decisions require site-specific NEPA compliance in addition to this EIS. The alternatives considered are No Action, Prohibitions Apply, Prohibitions Apply If There Is Material Damage, Prohibitions Apply If There Is Subsidence, and Prohibitions Do Not Apply (preferred prohibitions alternative).

No Action (NA) Alternative: Under the NA alternative, we would not promulgate rules and we would be guided by the Solicitor's Memorandum Opinion (M–36971) of July 10, 1991, which advised that subsidence from underground mining is properly regulated solely under SMCRA section 516 and not under section 522(e). Under this alternative, States would continue to regulate subsidence as provided in their approved regulatory programs.

Prohibitions Do Not Apply (PDNA) Alternative: This was the preferred alternative. Under this alternative we would determine through rulemaking that subsidence is not a surface coal mining operation subject to the prohibitions of section 522(e). This rulemaking would conclude, consistent with the Solicitor's opinion, that the SMCRA definition of surface coal mining operations, set out in SMCRA Section 701(28), includes only surface activities and the facilities and areas affected by or incidental to these surface activities, and that subsidence from underground mining would not be deemed a surface coal mining operation. The performance standards in sections 516 and 720 of SMCRA and the implementing regulations in 30 CFR Parts 783, 784, and 817 would still apply. Surface activities and surface features affected by surface activities in connection with underground coal mining would be subject to the prohibitions of section 522(e).

Prohibitions Apply If There Is Material Damage (PAMD) Alternative: Under this alternative we would determine through rulemaking that subsidence causing material damage would be a surface coal mining operation subject to the prohibitions of section 522(e). Unless an operator could demonstrate that underground mining would not reasonably be expected to result in subsidence that causes material damage, underground mining would be prohibited in section 522(e) areas.

Prohibitions Apply If There Is Subsidence (PAS) Alternative: Under this alternative we would determine through rulemaking that subsidence would be considered a surface mining activity subject to the prohibitions of section 522(e). Mining operations that would cause subsidence within section 522(e) areas in the reasonably foreseeable future would be prohibited unless the applicant could demonstrate to the regulatory authority that no subsidence would occur in the foreseeable future.

Prohibitions Apply (PA) Alternative: Under this alternative we would determine through rulemaking that any potential subsidence would be considered a surface coal mining operation subject to the prohibitions of section 522(e). Depending on the angle of draw, depth, and overburden and seam characteristics, some coal extraction activities located outside the protected area would also be prohibited if it would cause subsidence within the protected area.

Decision

For the reasons set forth in this preamble, OSM interprets section 522(e) as not applying to subsidence from underground mining. This decision is based on an extensive analysis of the statute, the legislative history, relevant case authority, public comments, and our regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining. With certain exceptions, section 522(e) prohibits ''surface coal mining operations'' on certain congressionally designated areas. The best reading of section 701(28) is that ''surface coal mining operations'' does not include subsidence, and that therefore the prohibitions of section 522(e) do not apply to subsidence from underground mining. This is consistent with legislative intent. Subsidence is properly regulated under sections 516 and 720 and related provisions of SMCRA and not under section 522(e). Although regulation under sections 516 and 720 and related provisions may not have precisely the same effect as regulation under section 522(e), regulation under sections 516 and 720 will achieve full protection of the environmental values which Congress sought to protect from subsidence under SMCRA while encouraging longwall mining. This interpretation will promote the general statutory scheme of SMCRA and fully protect the environment and the public interest. We also believe this interpretation best balances all relevant policy considerations, including the competing environmental and economic considerations involved in this rulemaking.

The language of SMCRA demonstrates that Congress intended to encourage underground mining, especially full-extraction methods such as longwall mining, and application of the prohibitions of section 522(e) to subsidence could substantially impede longwall and other full-extraction mining methods. Therefore, including subsidence in the definition of ''surface coal mining operations'' at section 701(28), and application of the section 522(e) prohibitions to subsidence, would fail to accommodate congressional recognition of the importance of underground mining and longwall mining in particular.

The final decision balances the interests of surface owners and industry, maintains stability in SMCRA implementation, promotes safety, acknowledges existing property rights, and results in no regulatory gap. The following points discuss the findings with respect to these considerations.

(a) *Balances the interests of surface owners and industry:* Our interpretation recognizes that in most cases the mineral owner purchased the property right to undermine, and probably to subside, upon acquisition. Thus, our interpretation best balances both the surface and mineral owner's interests, because our interpretation ensures that both the public interest and the property rights of the surface owner are protected under SMCRA's subsidence control requirements while allowing the mineral owner to make the safest and most efficient use of their mineral rights consistent with those subsidence control requirements.

(b) *Maintains stability in SMCRA implementation:* The final rule will cause minimal disruption to existing and longstanding State and Federal regulatory programs and the expectations associated with them. The existing provisions adequately protect section 522(e) features and therefore do not require change. Thus, this rule avoids unnecessary change in state administration of regulatory programs, enables the states to retain flexibility in regulating coal mining operations and protecting the environment, and allows states to address differences in terrain, geology, and other conditions when regulating subsidence.

Finally, application of the section 522(e) prohibition to subsidence could require a major overhaul of State regulatory programs without a commensurate benefit to the citizens, the environment, the economy or the State. Existing subsidence controls pursuant to State and Federal programs properly implement SMCRA. Without a clearly demonstrated need, a requirement to impose new administrative burdens and costs would waste State and Federal resources.

(c) *Promotes safety:* Longwall mining has become the safest and most productive and economic underground mining method. The result of this mining technique is almost immediate subsidence that is highly predictable as to how much the surface will subside. In terms of worker safety, the longwall system also offers a number of advantages over room-and-pillar mining. It improves safety through better roof control and reduction in the use of moving equipment. It eliminates roof bolting at the working face to support the mine roof, and it minimizes the need for dusting mine passages with inert material to prevent coal dust explosions. It involves no blasting and attendant dangers. It also recovers more coal from deeper coalbeds than does room-and-pillar mining. Thus, if longwall mining is not precluded, it will continue to provide greater safety and faster, more controlled, and more quickly mitigated subsidence damage.

(d) *Acknowledges existing property rights:* The final rule recognizes existing property rights and avoids certain potential compensable takings of property interests. In most cases of severed coal rights, the severance also conveys the property right to undermine the surface, and may include the right to subside; and any such rights would still limit or burden the surface property rights. We believe failure to allow exercise of these conveyed rights would be inequitable and could risk compensable takings. The final rule allows the holder of such mining and subsidence rights to continue to exercise them, subject to existing SMCRA regulation.

(e) *No regulatory gap:* Under the final rule, no regulatory gap occurs as a result of section 522(e) not applying to subsidence, because sections 516 and 720 and related SMCRA provisions provide ample authority to regulate surface effects of underground mining under existing regulations. Our regulations implementing sections 516 and 720 provide broad subsidence protection. A prohibition of subsidence within the buffer zones around dwellings, roads, and other surface features listed in section 522(e) would be superfluous. In addition, if there are any environmental values or public interests that warrant additional protection beyond what is currently provided, we have full authority under sections 516 and 720 and other SMCRA provisions, to develop additional regulations to protect such values or interests, without the disruption in the longwall mining industry that would result from applying section 522(e) prohibitions to subsidence.

Environmental Effects of the Alternatives

With the exception of section 522(e)(2) National Forest lands and (e)(3) historic sites, impacts to the protected areas under the prohibitions alternatives would be influenced by the choice of the VER standard. In general, the less restrictive VER alternatives (Ownership and Authority (O&A), Bifurcated (BF), and in some cases Good Faith All Permits or Takings (GFAP/T)) would allow mining that might otherwise be restricted under the PA, PAS, and PAMD prohibitions alternatives. If a more restrictive VER definition were applied (Good Faith All Permits (GFAP), and in some cases GFAP/T), the protections that are generally envisioned under the PA, PAS, and PAMD prohibitions alternatives would continue to apply to the 522(e) areas.

PDNA Alternative: Under the PDNA Alternative, disturbances from subsidence to protected resources, other than the (e)(5) public parks, are predicted to be consistent under all VER alternatives. For (e)(5) public parks, the GFAP VER alternative restricts the mining of coal resources because operations are unable to install surface facilities (ventilation shafts, roads, mine face-ups, and coal handling areas) within the protected areas. Such a restriction was predicted to result in as much as 45% less acreage disturbed than under the other PDNA alternative combinations. Under the PDNA Alternative, it appears that approximately 3,560 acres of section 522(e)(1) areas would be affected by subsidence over the next 20 years. The current DOI buy-out policy is not triggered by underground activities causing subsidence, under the PDNA Alternative.

The greatest level of impact from this alternative is predicted for 522(e)(5) occupied dwellings. The model predicts that approximately 158,161 acres (29,600 dwellings) would be affected over a 20 year (1995 to 2015) period. While this predicted impact would be partially mitigated through regulatory subsidence control requirements, it does represent a significant amount of disruption to the dwelling owners, families, and communities. It is the same level of impact that is predicted if OSM merely maintained the status quo by choosing the No Action Alternative.

No Action Alternative: The impacts that would result from selection of the No Action Alternative would be essentially the same as the PDNA alternative in combination with the GFAP VER Alternative.

PA, PAS, and PAMD Alternatives: The impacts predicted for these alternatives are influenced by the VER definition in place. If any of these prohibitions alternatives were combined with the O&A and BF VER definitions, the acres impacted would be essentially the same as under the PDNA Alternative. Applying a more restrictive VER definition would decrease the level of subsidence impact on the protected resources. Under the GFAP/T VER definition, section 522(e)(1) and (e)(5) public parks would still be predicted to be impacted because the model predicts that VER would be granted in many cases. Potential impacts on the 522(e)(1) lands and (e)(5) public parks would be substantially reduced if the GFAP VER definition were applied. Use of the GFAP alternative would also eliminate much of the projected DOI buy-out cost.

The PA, PAS, and PAMD Alternatives, in combination with either the GFAP or GFAP/T VER alternative, would allow occupied dwelling owners to withhold waivers when projected subsidence impacts reached the threshold level. In the absence of a waiver under these alternatives, the prohibition would preclude subsidence impacts on dwellings. It appears that the acres affected under the PA, PAS, and PAMD alternatives would be 7.0%, 5.7%, and 5.4% less (respectively) than those disturbed under alternatives where the prohibitions were not applicable.

In terms of economic effect, the PA, PAS, and PAMD alternatives in combination with the GFAP or GFAP/T alternatives would prevent new eastern longwall mining operations. This effect would begin to occur where dwelling waiver denial rates approached 10%. In summary, if the PA, PAS, or PAMD alternative were selected by the agency and the waiver denial rate were between 2% to 8%, the effect on the economy would likely be a savings of $5 to $7.7 million dollars with little or no increase in the cost of coal production. If the waiver denial rate is 10% or greater, the savings to the economy in reduced house and road repair would range from $15.2 to $62.4 million over a 20 year period. This savings, however, would be offset for the national economy by at least an additional $2.6 billion dollars in coal production and transportation costs.

Based upon potential impacts to Section 522(e) acres, the PA standard is the environmentally preferable alternative. The PA standard would minimize impacts to important environmental resources and would give surface owners a greater degree of control over subsidence impacts to the land. However, based upon the statutory, economic, technical, environmental, and other policy considerations discussed in this preamble, OSM has selected the PDNA alternative.

Mitigation, Monitoring and Enforcement

We have adopted all practicable means to avoid or minimize environmental harm from the alternatives selected. Under SMCRA performance standards, impacts to important resources are avoided or mitigated. The performance standards address: topsoils and subsoils, hydrologic balance, explosives, excess spoil, coal mine waste disposal, fish and wildlife, backfilling and grading, revegetation, subsidence, postmining land use, public safety, and exploration.

The primary purposes of SMCRA include: establishing a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations; assuring that the rights of surface landowners and other persons with a legal interest in the land are fully protected from such operations; assuring that surface coal mining operations are not conducted where reclamation required by SMCRA is not feasible; and assuring that surface coal mining operations are conducted so as to protect the environment.

The regulatory structure establishes five levels of protection. These five levels are SMCRA Performance Standards, SMCRA Permitting Process, Bonding, Inspection and Enforcement, and Lands Unsuitable for Mining. These five levels of environmental protection provided by SMCRA are integral parts of all approved regulatory programs and all have been determined to be no less effective than the Federal regulations. During the operation of a mine, violations would be identified through the inspection and enforcement programs. These routine inspections assure that the operations are in compliance with the conditions of the permit and the performance standards. Should an operator be found out of compliance, a notice of violation would be issued and the operator would be required to abate the violation in a timely manner commensurate with the seriousness of the problem.

SMCRA and the implementing regulations include a variety of subsidence control requirements, which are summarized in this preamble. As amended, SMCRA also requires repair and/or compensation for subsidence damage to occupied dwellings and non-commercial structures and replacement of domestic water supplies that have been adversely affected by underground mining.

This completes the Record of Decision for the 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.

Timing of Agency Action

The regulations of the Council on Environmental Quality at 40 CFR 1506.10(b)(2) allow an agency engaged in rulemaking under the Administrative Procedure Act to publish a decision on the final rule simultaneous with the publication of the notice of availability of the final EIS. Under section 526(a) of SMCRA, 30 U.S.C. 1276(a), those wishing to challenge the agency's decision may do so by filing suit in the United States District Court for the District of Columbia within 60 days of the date the final rule is published in the **Federal Register**.

Author

The principal author of this rule is Nancy R. Broderick, Office of Surface Mining Reclamation and Enforcement, Room 210, South Interior Building, 1951 Constitution Avenue, N.W., Washington, DC 20240. Telephone: (202) 208–2700. E-mail address: nbroderi@osmre.gov.

List of Subjects in 30 CFR Part 761

Historic preservation, National forests, National parks, National trails system, National wild and scenic rivers system, Surface mining, Underground mining, Wilderness areas, Wildlife refuges.

Dated: September 3, 1999.

Sylvia V. Baca,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons given in the preamble, OSM is amending part 761 as set forth below.

PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

1. The authority citation for Part 761 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*.

2. Section 761.200 is added to read as follows:

§ 761.200 Interpretative rule related to subsistence due to underground coal mining in areas designated by Act of Congress.

OSM has adopted the following interpretation of rules promulgated in part 761.

(a) *Interpretation of § 761.11—Areas where mining is prohibited or limited.* Subsidence due to underground coal mining is not included in the definition of surface coal mining operations under section 701(28) of the Act and § 700.5 of this chapter and therefore is not prohibited in areas protected under section 522(e) of the Act.

(b) [Reserved]

[FR Doc. 99–30893 Filed 12–16–99; 8:45 am]

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federal register

Friday
December 17, 1999

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1000 et al.

Milk in the New England and Other Marketing Areas; Order Amending the Orders; Final Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1002, 1004, 1005, 1006, 1007, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1076, 1079, 1106, 1124, 1126, 1131, 1134, 1135, 1137, 1138 and 1139

[DA–97–12]

Milk in the New England and Other Marketing Areas; Order Amending the Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule; Modification and Implementation of Rule.

7 CFR Part	Marketing area
1000	General Provisions of Federal Milk Marketing Orders
1001	New England
1002	New York-New Jersey
1004	Middle Atlantic
1005	Carolina
1006	Upper Florida
1007	Southeast
1012	Tampa Bay
1013	Southeastern Florida
1030	Chicago Regional
1032	Southern Illinois-Eastern Missouri
1033	Ohio Valley
1036	Eastern Ohio-Western Pennsylvania
1040	Southern Michigan
1044	Michigan Upper Peninsula
1046	Louisville-Lexington-Evansville
1049	Indiana
1050	Central Illinois
1064	Greater Kansas City
1065	Nebraska-Western Iowa
1068	Upper Midwest
1076	Eastern South Dakota
1079	Iowa
1106	Southwest Plains
1124	Pacific Northwest
1126	Texas
1131	Central Arizona
1134	Western Colorado
1135	Southwestern Idaho-Eastern Oregon
1137	Eastern Colorado
1138	New Mexico-West Texas
1139	Great Basin

SUMMARY: This document modifies and announces the effective date for the final rule published in the **Federal Register** on September 1, 1999, consolidating the current 31 Federal milk marketing orders into 11 orders and changes the Class I differentials contained therein. The Consolidated Appropriations Act, 2000, requires that the September 1 final rule be revised so that Class I milk is priced utilizing the Class I differentials contained in the proposed rule published on January 30, 1998, as corrected and modified through April 2, 1999. The Consolidated Appropriations Act also provides that the revised final rule be implemented on January 1, 2000.

EFFECTIVE DATE: The final rule published on September 1, 1999 (64 FR 47898) and delayed by the rule published October 5, 1999 (64 FR 53885), as amended in this rule is effective January 1, 2000.

FOR FURTHER INFORMATION CONTACT: John F. Borovies, Branch Chief, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 720–6274, e-mail address John.Borovies@usda.gov.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding:

Proposed Rule: Issued January 21, 1998; published January 30, 1998 (63 FR 4802).

Correction: Issued February 19, 1998; published February 25, 1998 (63 FR 9686).

Extension of Time: Issued March 10, 1998; published March 13, 1998 (63 FR 12417).

Final Decision on Proposed Amendments: Issued March 12, 1999; published April 2, 1999 (64 FR 16026).

Correction: Issued July 8, 1999; published July 14, 1999 (64 FR 37892).

Notice of Referenda: Issued July 14, 1999; published July 21, 1999 (64 FR 39092).

Final Rule: Issued August 23, 1999; published September 1, 1999 (64 FR 47898).

Delay of Effective Date: Issued September 30, 1999; published October 5, 1999 (64 FR 53885).

SUPPLEMENTARY INFORMATION: The Consolidated Appropriations Act, 2000, (P.L. 106–113, 115 Stat. 1501), signed into law on November 29, 1999, requires that the final rule published in the **Federal Register** on September 1, 1999 (64 FR 47898) consolidating the current 31 Federal milk marketing orders into 11 orders become effective on January 1, 2000, utilizing the Class I differentials contained in the proposed rule published on January 30, 1998 (63 FR 4802) as corrected and modified through April 2, 1999. A document issued on September 30, 1999, and published in the **Federal Register** on October 5, 1999 (64 FR 53885) delayed until further notice the October 1, 1999, effective date for consolidating the orders because of a temporary restraining order, issued by the U.S. District Court for the District of Vermont, which enjoined the Secretary of Agriculture from implementing the amendments consolidating the orders.

The Class I differentials required by the Consolidated Appropriations Act, 2000, referred to as Option 1A-Location Specific Differentials, were published in the proposed rule on January 30, 1998 (63 FR 4802). These differentials were corrected in a docket published on February 25, 1998 (63 FR 9686). The final decision published on April 2, 1999 (64 FR 16026) discussed additional modifications made to the Option 1A differentials issued in the proposed rule. A correction to the final decision was published in the **Federal Register** on July 14, 1999 (64 FR 37892).

Further, the Consolidated Appropriations Act, 2000, exempts the modification and implementation of this final rule from notice and hearing requirements of section 8c(3) of the Agriculture Adjustment Act (7 U.S.C. 608c(3)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937 and the referendum provisions of the 1937 Act, the notice and comment provisions of section 553 of title 5, United States Code, and the statement of policy of the Secretary of Agriculture (36 FR 13804) relating to notices of proposed rulemaking and public participation in such rulemaking. The Act also exempts this final rule from the Paperwork Reduction Act (44 U.S.C. chapter 35). Lastly, the Consolidated Appropriations Act stated that implementation of this final rule is not to be subject to any decision, restraining order, or injunction issued by a United States court before the date of the enactment of the legislation.

Since the Consolidated Appropriations Act enacted into positive law the Secretary's final rule (with express amendments), the validity of the final rule does not depend on procedural or substantive administrative rulemaking requirements. Nonetheless, during the rulemaking process which resulted in the September 1, 1999, final rule consolidating and amending the Federal milk marketing orders in compliance with the 1996 Farm Bill (7 U.S.C. 7253) and the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P.L. 105–277, October 21, 1998, the Department considered and discussed all applicable regulatory decisionmaking requirements. These included Executive Order 12866, Executive Order 12988, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable requirements concerning the rulemaking. The Department prepared a regulatory impact analysis pertaining to the costs and benefits of the revised regulatory milk marketing structure. Based on its consideration and analysis

of all pertinent information, the Department concluded that the economic impact would be minimal when compared to the total values in the Federal order system and in the U.S. The Department further found that this conclusion would also be true with the alternative pricing options which were considered during the rulemaking.

The Consolidated Appropriations Act requires that ''the final rule shall take effect, and be implemented by the Secretary of Agriculture, on the first day of the first month beginning at least 30 days after the date of the enactment of this Act.'' It was enacted into law on November 29, 1999, therefore the amendments to the New England and other orders must become effective January 1, 2000. Further, the changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers.

Accordingly, pursuant to the provisions of the Consolidated Appropriations Act for FY 2000, the final rule issued August 23, 1999, and published in the **Federal Register** on September 1, 1999, at 64 FR 47898, implementing the consolidated 11 Federal milk marketing orders is amended as specified herein and becomes effective on January 1, 2000.

List of Subjects in 7 CFR Part 1000

Milk marketing orders.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in each of the aforesaid marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as hereby amended.

For the reasons set forth in the preamble and under the authority set forth in Title 7, chapter X, the final rule amending Parts 1000, 1001, 1002, 1004, 1005, 1006, 1007, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1076, 1079, 1106, 1124, 1126, 1131, 1134, 1135, 1137, 1138 and 1139 published at 64 FR 47898 and delayed at 64 FR 53885 is effective January 1, 2000, with Part 1000 amended as follows:

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

1. The authority citation for part 1000 continues to read as follows:

Authority: 7 U.S.C. 601–674, 7253, and P.L. 106–113, 115 Stat. 1501.

2. Section 1000.52 is revised to read as follows:

§ 1000.52 Adjusted Class I differentials.

The Class I differential adjusted for location to be used in § 1000.50(b) and (c) shall be as follows:

County/parish/city	State	FIPS code	Class I differential adjusted for location
AUTAUGA	AL	01001	3.30
BALDWIN	AL	01003	3.50
BARBOUR	AL	01005	3.45
BIBB	AL	01007	3.10
BLOUNT	AL	01009	3.10
BULLOCK	AL	01011	3.30
BUTLER	AL	01013	3.45
CALHOUN	AL	01015	3.10
CHAMBERS	AL	01017	3.10
CHEROKEE	AL	01019	3.10
CHILTON	AL	01021	3.10
CHOCTAW	AL	01023	3.30
CLARKE	AL	01025	3.45
CLAY	AL	01027	3.10
CLEBURNE	AL	01029	3.10
COFFEE	AL	01031	3.45
COLBERT	AL	01033	2.90
CONECUH	AL	01035	3.45
COOSA	AL	01037	3.10
COVINGTON	AL	01039	3.45
CRENSHAW	AL	01041	3.45
CULLMAN	AL	01043	3.10
DALE	AL	01045	3.45
DALLAS	AL	01047	3.30
DE KALB	AL	01049	2.90
ELMORE	AL	01051	3.30
ESCAMBIA	AL	01053	3.45
ETOWAH	AL	01055	3.10
FAYETTE	AL	01057	3.10
FRANKLIN	AL	01059	2.90
GENEVA	AL	01061	3.45
GREENE	AL	01063	3.10
HALE	AL	01065	3.10
HENRY	AL	01067	3.45
HOUSTON	AL	01069	3.45
JACKSON	AL	01071	2.90
JEFFERSON	AL	01073	3.10
LAMAR	AL	01075	3.10
LAUDERDALE	AL	01077	2.90
LAWRENCE	AL	01079	2.90
LEE	AL	01081	3.30
LIMESTONE	AL	01083	2.90
LOWNDES	AL	01085	3.30
MACON	AL	01087	3.30

County/parish/city	State	FIPS code	Class I differential adjusted for location
MADISON	AL	01089	2.90
MARENGO	AL	01091	3.30
MARION	AL	01093	3.10
MARSHALL	AL	01095	2.90
MOBILE	AL	01097	3.50
MONROE	AL	01099	3.45
MONTGOMERY	AL	01101	3.30
MORGAN	AL	01103	2.90
PERRY	AL	01105	3.10
PICKENS	AL	01107	3.10
PIKE	AL	01109	3.45
RANDOLPH	AL	01111	3.10
RUSSELL	AL	01113	3.30
SHELBY	AL	01117	3.10
ST. CLAIR	AL	01115	3.10
SUMTER	AL	01119	3.10
TALLADEGA	AL	01121	3.10
TALLAPOOSA	AL	01123	3.10
TUSCALOOSA	AL	01125	3.10
WALKER	AL	01127	3.10
WASHINGTON	AL	01129	3.45
WILCOX	AL	01131	3.30
WINSTON	AL	01133	3.10
ARKANSAS	AR	05001	2.90
ASHLEY	AR	05003	3.10
BAXTER	AR	05005	2.60
BENTON	AR	05007	2.60
BOONE	AR	05009	2.60
BRADLEY	AR	05011	2.90
CALHOUN	AR	05013	2.90
CARROLL	AR	05015	2.60
CHICOT	AR	05017	3.10
CLARK	AR	05019	2.90
CLAY	AR	05021	2.60
CLEBURNE	AR	05023	2.80
CLEVELAND	AR	05025	2.90
COLUMBIA	AR	05027	3.10
CONWAY	AR	05029	2.80
CRAIGHEAD	AR	05031	2.60
CRAWFORD	AR	05033	2.80
CRITTENDEN	AR	05035	2.80
CROSS	AR	05037	2.80
DALLAS	AR	05039	2.90
DESHA	AR	05041	2.90
DREW	AR	05043	2.90
FAULKNER	AR	05045	2.80
FRANKLIN	AR	05047	2.80
FULTON	AR	05049	2.60
GARLAND	AR	05051	2.80
GRANT	AR	05053	2.90
GREENE	AR	05055	2.60
HEMPSTEAD	AR	05057	2.90
HOT SPRING	AR	05059	2.90
HOWARD	AR	05061	2.90
INDEPENDENCE	AR	05063	2.60
IZARD	AR	05065	2.60
JACKSON	AR	05067	2.60
JEFFERSON	AR	05069	2.90
JOHNSON	AR	05071	2.80
LAFAYETTE	AR	05073	3.10
LAWRENCE	AR	05075	2.60
LEE	AR	05077	2.80
LINCOLN	AR	05079	2.90
LITTLE RIVER	AR	05081	2.90
LOGAN	AR	05083	2.80
LONOKE	AR	05085	2.80
MADISON	AR	05087	2.60
MARION	AR	05089	2.60
MILLER	AR	05091	3.10
MISSISSIPPI	AR	05093	2.60
MONROE	AR	05095	2.80
MONTGOMERY	AR	05097	2.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
NEVADA	AR	05099	2.90
NEWTON	AR	05101	2.60
OUACHITA	AR	05103	2.90
PERRY	AR	05105	2.80
PHILLIPS	AR	05107	2.90
PIKE	AR	05109	2.90
POINSETT	AR	05111	2.60
POLK	AR	05113	2.80
POPE	AR	05115	2.80
PRAIRIE	AR	05117	2.80
PULASKI	AR	05119	2.80
RANDOLPH	AR	05121	2.60
SALINE	AR	05125	2.80
SCOTT	AR	05127	2.80
SEARCY	AR	05129	2.60
SEBASTIAN	AR	05131	2.80
SEVIER	AR	05133	2.90
SHARP	AR	05135	2.60
ST. FRANCIS	AR	05123	2.80
STONE	AR	05137	2.60
UNION	AR	05139	3.10
VAN BUREN	AR	05141	2.80
WASHINGTON	AR	05143	2.60
WHITE	AR	05145	2.80
WOODRUFF	AR	05147	2.80
YELL	AR	05149	2.80
APACHE	AZ	04001	1.90
COCHISE	AZ	04003	2.10
COCONINO	AZ	04005	1.90
GILA	AZ	04007	2.10
GRAHAM	AZ	04009	2.10
GREENLEE	AZ	04011	2.10
LA PAZ	AZ	04012	2.10
MARICOPA	AZ	04013	2.35
MOHAVE	AZ	04015	1.90
NAVAJO	AZ	04017	1.90
PIMA	AZ	04019	2.35
PINAL	AZ	04021	2.35
SANTA CRUZ	AZ	04023	2.10
YAVAPAI	AZ	04025	1.90
YUMA	AZ	04027	2.10
ALAMEDA	CA	06001	1.80
ALPINE	CA	06003	1.70
AMADOR	CA	06005	1.70
BUTTE	CA	06007	1.70
CALAVERAS	CA	06009	1.70
COLUSA	CA	06011	1.70
CONTRA COSTA	CA	06013	1.80
DEL NORTE	CA	06015	1.80
EL DORADO	CA	06017	1.70
FRESNO	CA	06019	1.60
GLENN	CA	06021	1.70
HUMBOLDT	CA	06023	1.80
IMPERIAL	CA	06025	2.00
INYO	CA	06027	1.60
KERN	CA	06029	1.80
KINGS	CA	06031	1.60
LAKE	CA	06033	1.80
LASSEN	CA	06035	1.70
LOS ANGELES	CA	06037	2.10
MADERA	CA	06039	1.60
MARIN	CA	06041	1.80
MARIPOSA	CA	06043	1.70
MENDOCINO	CA	06045	1.80
MERCED	CA	06047	1.70
MODOC	CA	06049	1.70
MONO	CA	06051	1.60
MONTEREY	CA	06053	1.80
NAPA	CA	06055	1.80
NEVADA	CA	06057	1.70
ORANGE	CA	06059	2.10
PLACER	CA	06061	1.70

County/parish/city	State	FIPS code	Class I differential adjusted for location
PLUMAS	CA	06063	1.70
RIVERSIDE	CA	06065	2.00
SACRAMENTO	CA	06067	1.70
SAN BENITO	CA	06069	1.80
SAN BERNARDINO	CA	06071	1.80
SAN DIEGO	CA	06073	2.10
SAN FRANCISCO	CA	06075	1.80
SAN JOAQUIN	CA	06077	1.70
SAN LUIS OBISPO	CA	06079	1.80
SAN MATEO	CA	06081	1.80
SANTA BARBARA	CA	06083	1.80
SANTA CLARA	CA	06085	1.80
SANTA CRUZ	CA	06087	1.80
SHASTA	CA	06089	1.70
SIERRA	CA	06091	1.70
SISKIYOU	CA	06093	1.80
SOLANO	CA	06095	1.80
SONOMA	CA	06097	1.80
STANISLAUS	CA	06099	1.70
SUTTER	CA	06101	1.70
TEHAMA	CA	06103	1.70
TRINITY	CA	06105	1.80
TULARE	CA	06107	1.60
TUOLUMNE	CA	06109	1.70
VENTURA	CA	06111	1.80
YOLO	CA	06113	1.70
YUBA	CA	06115	1.70
ADAMS	CO	08001	2.55
ALAMOSA	CO	08003	1.90
ARAPAHOE	CO	08005	2.55
ARCHULETA	CO	08007	1.90
BACA	CO	08009	2.35
BENT	CO	08011	2.35
BOULDER	CO	08013	2.45
CHAFFEE	CO	08015	1.90
CHEYENNE	CO	08017	2.35
CLEAR CREEK	CO	08019	2.45
CONEJOS	CO	08021	1.90
COSTILLA	CO	08023	1.90
CROWLEY	CO	08025	2.45
CUSTER	CO	08027	2.45
DELTA	CO	08029	2.00
DENVER	CO	08031	2.55
DOLORES	CO	08033	1.90
DOUGLAS	CO	08035	2.55
EAGLE	CO	08037	1.90
EL PASO	CO	08041	2.55
ELBERT	CO	08039	2.45
FREMONT	CO	08043	2.45
GARFIELD	CO	08045	2.00
GILPIN	CO	08047	2.45
GRAND	CO	08049	1.90
GUNNISON	CO	08051	1.90
HINSDALE	CO	08053	1.90
HUERFANO	CO	08055	2.45
JACKSON	CO	08057	1.90
JEFFERSON	CO	08059	2.55
KIOWA	CO	08061	2.35
KIT CARSON	CO	08063	2.35
LA PLATA	CO	08067	1.90
LAKE	CO	08065	1.90
LARIMER	CO	08069	2.45
LAS ANIMAS	CO	08071	2.35
LINCOLN	CO	08073	2.45
LOGAN	CO	08075	2.35
MESA	CO	08077	2.00
MINERAL	CO	08079	1.90
MOFFAT	CO	08081	1.90
MONTEZUMA	CO	08083	1.90
MONTROSE	CO	08085	2.00
MORGAN	CO	08087	2.35
OTERO	CO	08089	2.45

County/parish/city	State	FIPS code	Class I differential adjusted for location
OURAY	CO	08091	1.90
PARK	CO	08093	2.45
PHILLIPS	CO	08095	2.35
PITKIN	CO	08097	1.90
PROWERS	CO	08099	2.35
PUEBLO	CO	08101	2.45
RIO BLANCO	CO	08103	1.90
RIO GRANDE	CO	08105	1.90
ROUTT	CO	08107	1.90
SAGUACHE	CO	08109	1.90
SAN JUAN	CO	08111	1.90
SAN MIGUEL	CO	08113	1.90
SEDGWICK	CO	08115	2.35
SUMMIT	CO	08117	1.90
TELLER	CO	08119	2.45
WASHINGTON	CO	08121	2.35
WELD	CO	08123	2.45
YUMA	CO	08125	2.35
FAIRFIELD	CT	09001	3.10
HARTFORD	CT	09003	3.10
LITCHFIELD	CT	09005	3.00
MIDDLESEX	CT	09007	3.10
NEW HAVEN	CT	09009	3.10
NEW LONDON	CT	09011	3.10
TOLLAND	CT	09013	3.10
WINDHAM	CT	09015	3.10
DISTRICT OF COLUMBIA	DC	11001	3.00
KENT	DE	10001	3.00
NEW CASTLE	DE	10003	3.00
SUSSEX	DE	10005	3.00
ALACHUA	FL	12001	3.70
BAKER	FL	12003	3.70
BAY	FL	12005	3.70
BRADFORD	FL	12007	3.70
BREVARD	FL	12009	4.00
BROWARD	FL	12011	4.30
CALHOUN	FL	12013	3.70
CHARLOTTE	FL	12015	4.30
CITRUS	FL	12017	4.00
CLAY	FL	12019	3.70
COLLIER	FL	12021	4.30
COLUMBIA	FL	12023	3.70
DADE	FL	12025	4.30
DE SOTO	FL	12027	4.30
DIXIE	FL	12029	3.70
DUVAL	FL	12031	3.70
ESCAMBIA	FL	12033	3.45
FLAGLER	FL	12035	4.00
FRANKLIN	FL	12037	3.70
GADSDEN	FL	12039	3.70
GILCHRIST	FL	12041	3.70
GLADES	FL	12043	4.30
GULF	FL	12045	3.70
HAMILTON	FL	12047	3.70
HARDEE	FL	12049	4.30
HENDRY	FL	12051	4.30
HERNANDO	FL	12053	4.00
HIGHLANDS	FL	12055	4.30
HILLSBOROUGH	FL	12057	4.00
HOLMES	FL	12059	3.70
INDIAN RIVER	FL	12061	4.00
JACKSON	FL	12063	3.70
JEFFERSON	FL	12065	3.70
LAFAYETTE	FL	12067	3.70
LAKE	FL	12069	4.00
LEE	FL	12071	4.30
LEON	FL	12073	3.70
LEVY	FL	12075	4.00
LIBERTY	FL	12077	3.70
MADISON	FL	12079	3.70
MANATEE	FL	12081	4.30
MARION	FL	12083	4.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
MARTIN	FL	12085	4.30
MONROE	FL	12087	4.30
NASSAU	FL	12089	3.70
OKALOOSA	FL	12091	3.45
OKEECHOBEE	FL	12093	4.30
ORANGE	FL	12095	4.00
OSCEOLA	FL	12097	4.00
PALM BEACH	FL	12099	4.30
PASCO	FL	12101	4.00
PINELLAS	FL	12103	4.00
POLK	FL	12105	4.00
PUTNAM	FL	12107	3.70
SANTA ROSA	FL	12113	3.45
SARASOTA	FL	12115	4.30
SEMINOLE	FL	12117	4.00
ST. JOHNS	FL	12109	3.70
ST. LUCIE	FL	12111	4.30
SUMTER	FL	12119	4.00
SUWANNEE	FL	12121	3.70
TAYLOR	FL	12123	3.70
UNION	FL	12125	3.70
VOLUSIA	FL	12127	4.00
WAKULLA	FL	12129	3.70
WALTON	FL	12131	3.45
WASHINGTON	FL	12133	3.70
APPLING	GA	13001	3.45
ATKINSON	GA	13003	3.45
BACON	GA	13005	3.45
BAKER	GA	13007	3.45
BALDWIN	GA	13009	3.10
BANKS	GA	13011	3.10
BARROW	GA	13013	3.10
BARTOW	GA	13015	3.10
BEN HILL	GA	13017	3.45
BERRIEN	GA	13019	3.45
BIBB	GA	13021	3.30
BLECKLEY	GA	13023	3.30
BRANTLEY	GA	13025	3.45
BROOKS	GA	13027	3.45
BRYAN	GA	13029	3.45
BULLOCH	GA	13031	3.30
BURKE	GA	13033	3.30
BUTTS	GA	13035	3.10
CALHOUN	GA	13037	3.45
CAMDEN	GA	13039	3.45
CANDLER	GA	13043	3.30
CARROLL	GA	13045	3.10
CATOOSA	GA	13047	2.80
CHARLTON	GA	13049	3.45
CHATHAM	GA	13051	3.45
CHATTAHOOCHEE	GA	13053	3.30
CHATTOOGA	GA	13055	2.80
CHEROKEE	GA	13057	3.10
CLARKE	GA	13059	3.10
CLAY	GA	13061	3.45
CLAYTON	GA	13063	3.10
CLINCH	GA	13065	3.45
COBB	GA	13067	3.10
COFFEE	GA	13069	3.45
COLQUITT	GA	13071	3.45
COLUMBIA	GA	13073	3.10
COOK	GA	13075	3.45
COWETA	GA	13077	3.10
CRAWFORD	GA	13079	3.30
CRISP	GA	13081	3.45
DADE	GA	13083	2.80
DAWSON	GA	13085	3.10
DE KALB	GA	13089	3.10
DECATUR	GA	13087	3.45
DODGE	GA	13091	3.45
DOOLY	GA	13093	3.45
DOUGHERTY	GA	13095	3.45

County/parish/city	State	FIPS code	Class I differential adjusted for location
DOUGLAS	GA	13097	3.10
EARLY	GA	13099	3.45
ECHOLS	GA	13101	3.45
EFFINGHAM	GA	13103	3.30
ELBERT	GA	13105	3.10
EMANUEL	GA	13107	3.30
EVANS	GA	13109	3.45
FANNIN	GA	13111	2.80
FAYETTE	GA	13113	3.10
FLOYD	GA	13115	3.10
FORSYTH	GA	13117	3.10
FRANKLIN	GA	13119	3.10
FULTON	GA	13121	3.10
GILMER	GA	13123	3.10
GLASCOCK	GA	13125	3.10
GLYNN	GA	13127	3.45
GORDON	GA	13129	3.10
GRADY	GA	13131	3.45
GREENE	GA	13133	3.10
GWINNETT	GA	13135	3.10
HABERSHAM	GA	13137	3.10
HALL	GA	13139	3.10
HANCOCK	GA	13141	3.10
HARALSON	GA	13143	3.10
HARRIS	GA	13145	3.30
HART	GA	13147	3.10
HEARD	GA	13149	3.10
HENRY	GA	13151	3.10
HOUSTON	GA	13153	3.30
IRWIN	GA	13155	3.45
JACKSON	GA	13157	3.10
JASPER	GA	13159	3.10
JEFF DAVIS	GA	13161	3.45
JEFFERSON	GA	13163	3.30
JENKINS	GA	13165	3.30
JOHNSON	GA	13167	3.30
JONES	GA	13169	3.10
LAMAR	GA	13171	3.10
LANIER	GA	13173	3.45
LAURENS	GA	13175	3.30
LEE	GA	13177	3.45
LIBERTY	GA	13179	3.45
LINCOLN	GA	13181	3.10
LONG	GA	13183	3.45
LOWNDES	GA	13185	3.45
LUMPKIN	GA	13187	3.10
MACON	GA	13193	3.30
MADISON	GA	13195	3.10
MARION	GA	13197	3.30
MCDUFFIE	GA	13189	3.10
MCINTOSH	GA	13191	3.45
MERIWETHER	GA	13199	3.10
MILLER	GA	13201	3.45
MITCHELL	GA	13205	3.45
MONROE	GA	13207	3.10
MONTGOMERY	GA	13209	3.45
MORGAN	GA	13211	3.10
MURRAY	GA	13213	2.80
MUSCOGEE	GA	13215	3.30
NEWTON	GA	13217	3.10
OCONEE	GA	13219	3.10
OGLETHORPE	GA	13221	3.10
PAULDING	GA	13223	3.10
PEACH	GA	13225	3.30
PICKENS	GA	13227	3.10
PIERCE	GA	13229	3.45
PIKE	GA	13231	3.10
POLK	GA	13233	3.10
PULASKI	GA	13235	3.45
PUTNAM	GA	13237	3.10
QUITMAN	GA	13239	3.45
RABUN	GA	13241	3.10

County/parish/city	State	FIPS code	Class I differential adjusted for location
RANDOLPH	GA	13243	3.45
RICHMOND	GA	13245	3.30
ROCKDALE	GA	13247	3.10
SCHLEY	GA	13249	3.30
SCREVEN	GA	13251	3.30
SEMINOLE	GA	13253	3.45
SPALDING	GA	13255	3.10
STEPHENS	GA	13257	3.10
STEWART	GA	13259	3.45
SUMTER	GA	13261	3.45
TALBOT	GA	13263	3.30
TALIAFERRO	GA	13265	3.10
TATTNALL	GA	13267	3.45
TAYLOR	GA	13269	3.30
TELFAIR	GA	13271	3.45
TERRELL	GA	13273	3.45
THOMAS	GA	13275	3.45
TIFT	GA	13277	3.45
TOOMBS	GA	13279	3.45
TOWNS	GA	13281	3.10
TREUTLEN	GA	13283	3.30
TROUP	GA	13285	3.10
TURNER	GA	13287	3.45
TWIGGS	GA	13289	3.30
UNION	GA	13291	3.10
UPSON	GA	13293	3.10
WALKER	GA	13295	2.80
WALTON	GA	13297	3.10
WARE	GA	13299	3.45
WARREN	GA	13301	3.10
WASHINGTON	GA	13303	3.30
WAYNE	GA	13305	3.45
WEBSTER	GA	13307	3.45
WHEELER	GA	13309	3.45
WHITE	GA	13311	3.10
WHITFIELD	GA	13313	2.80
WILCOX	GA	13315	3.45
WILKES	GA	13317	3.10
WILKINSON	GA	13319	3.30
WORTH	GA	13321	3.45
ADAIR	IA	19001	1.80
ADAMS	IA	19003	1.80
ALLAMAKEE	IA	19005	1.75
APPANOOSE	IA	19007	1.80
AUDUBON	IA	19009	1.80
BENTON	IA	19011	1.80
BLACK HAWK	IA	19013	1.75
BOONE	IA	19015	1.80
BREMER	IA	19017	1.75
BUCHANAN	IA	19019	1.75
BUENA VISTA	IA	19021	1.75
BUTLER	IA	19023	1.75
CALHOUN	IA	19025	1.75
CARROLL	IA	19027	1.80
CASS	IA	19029	1.80
CEDAR	IA	19031	1.80
CERRO GORDO	IA	19033	1.75
CHEROKEE	IA	19035	1.75
CHICKASAW	IA	19037	1.75
CLARKE	IA	19039	1.80
CLAY	IA	19041	1.75
CLAYTON	IA	19043	1.75
CLINTON	IA	19045	1.80
CRAWFORD	IA	19047	1.80
DALLAS	IA	19049	1.80
DAVIS	IA	19051	1.80
DECATUR	IA	19053	1.80
DELAWARE	IA	19055	1.75
DES MOINES	IA	19057	1.80
DICKINSON	IA	19059	1.75
DUBUQUE	IA	19061	1.75
EMMET	IA	19063	1.75

County/parish/city	State	FIPS code	Class I differential adjusted for location
FAYETTE	IA	19065	1.75
FLOYD	IA	19067	1.75
FRANKLIN	IA	19069	1.75
FREMONT	IA	19071	1.85
GREENE	IA	19073	1.80
GRUNDY	IA	19075	1.75
GUTHRIE	IA	19077	1.80
HAMILTON	IA	19079	1.75
HANCOCK	IA	19081	1.75
HARDIN	IA	19083	1.75
HARRISON	IA	19085	1.80
HENRY	IA	19087	1.80
HOWARD	IA	19089	1.75
HUMBOLDT	IA	19091	1.75
IDA	IA	19093	1.75
IOWA	IA	19095	1.80
JACKSON	IA	19097	1.80
JASPER	IA	19099	1.80
JEFFERSON	IA	19101	1.80
JOHNSON	IA	19103	1.80
JONES	IA	19105	1.80
KEOKUK	IA	19107	1.80
KOSSUTH	IA	19109	1.75
LEE	IA	19111	1.80
LINN	IA	19113	1.80
LOUISA	IA	19115	1.80
LUCAS	IA	19117	1.80
LYON	IA	19119	1.75
MADISON	IA	19121	1.80
MAHASKA	IA	19123	1.80
MARION	IA	19125	1.80
MARSHALL	IA	19127	1.80
MILLS	IA	19129	1.85
MITCHELL	IA	19131	1.75
MONONA	IA	19133	1.80
MONROE	IA	19135	1.80
MONTGOMERY	IA	19137	1.80
MUSCATINE	IA	19139	1.80
O'BRIEN	IA	19141	1.75
OSCEOLA	IA	19143	1.75
PAGE	IA	19145	1.80
PALO ALTO	IA	19147	1.75
PLYMOUTH	IA	19149	1.75
POCAHONTAS	IA	19151	1.75
POLK	IA	19153	1.80
POTTAWATTAMIE	IA	19155	1.85
POWESHIEK	IA	19157	1.80
RINGGOLD	IA	19159	1.80
SAC	IA	19161	1.75
SCOTT	IA	19163	1.80
SHELBY	IA	19165	1.80
SIOUX	IA	19167	1.75
STORY	IA	19169	1.80
TAMA	IA	19171	1.80
TAYLOR	IA	19173	1.80
UNION	IA	19175	1.80
VAN BUREN	IA	19177	1.80
WAPELLO	IA	19179	1.80
WARREN	IA	19181	1.80
WASHINGTON	IA	19183	1.80
WAYNE	IA	19185	1.80
WEBSTER	IA	19187	1.75
WINNEBAGO	IA	19189	1.75
WINNESHIEK	IA	19191	1.75
WOODBURY	IA	19193	1.75
WORTH	IA	19195	1.75
WRIGHT	IA	19197	1.75
ADA	ID	16001	1.60
ADAMS	ID	16003	1.60
BANNOCK	ID	16005	1.60
BEAR LAKE	ID	16007	1.60
BENEWAH	ID	16009	1.90

County/parish/city	State	FIPS code	Class I differential adjusted for location
BINGHAM	ID	16011	1.60
BLAINE	ID	16013	1.60
BOISE	ID	16015	1.60
BONNER	ID	16017	1.90
BONNEVILLE	ID	16019	1.60
BOUNDARY	ID	16021	1.90
BUTTE	ID	16023	1.60
CAMAS	ID	16025	1.60
CANYON	ID	16027	1.60
CARIBOU	ID	16029	1.60
CASSIA	ID	16031	1.60
CLARK	ID	16033	1.60
CLEARWATER	ID	16035	1.60
CUSTER	ID	16037	1.60
ELMORE	ID	16039	1.60
FRANKLIN	ID	16041	1.60
FREMONT	ID	16043	1.60
GEM	ID	16045	1.60
GOODING	ID	16047	1.60
IDAHO	ID	16049	1.60
JEFFERSON	ID	16051	1.60
JEROME	ID	16053	1.60
KOOTENAI	ID	16055	1.90
LATAH	ID	16057	1.90
LEMHI	ID	16059	1.60
LEWIS	ID	16061	1.60
LINCOLN	ID	16063	1.60
MADISON	ID	16065	1.60
MINIDOKA	ID	16067	1.60
NEZ PERCE	ID	16069	1.60
ONEIDA	ID	16071	1.60
OWYHEE	ID	16073	1.60
PAYETTE	ID	16075	1.60
POWER	ID	16077	1.60
SHOSHONE	ID	16079	1.90
TETON	ID	16081	1.60
TWIN FALLS	ID	16083	1.60
VALLEY	ID	16085	1.60
WASHINGTON	ID	16087	1.60
ADAMS	IL	17001	1.80
ALEXANDER	IL	17003	2.20
BOND	IL	17005	2.00
BOONE	IL	17007	1.75
BROWN	IL	17009	1.80
BUREAU	IL	17011	1.80
CALHOUN	IL	17013	2.00
CARROLL	IL	17015	1.80
CASS	IL	17017	1.80
CHAMPAIGN	IL	17019	1.80
CHRISTIAN	IL	17021	2.00
CLARK	IL	17023	2.00
CLAY	IL	17025	2.00
CLINTON	IL	17027	2.00
COLES	IL	17029	2.00
COOK	IL	17031	1.80
CRAWFORD	IL	17033	2.00
CUMBERLAND	IL	17035	2.00
DE KALB	IL	17037	1.80
DE WITT	IL	17039	1.80
DOUGLAS	IL	17041	2.00
DU PAGE	IL	17043	1.80
EDGAR	IL	17045	2.00
EDWARDS	IL	17047	2.20
EFFINGHAM	IL	17049	2.00
FAYETTE	IL	17051	2.00
FORD	IL	17053	1.80
FRANKLIN	IL	17055	2.20
FULTON	IL	17057	1.80
GALLATIN	IL	17059	2.20
GREENE	IL	17061	2.00
GRUNDY	IL	17063	1.80
HAMILTON	IL	17065	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
HANCOCK	IL	17067	1.80
HARDIN	IL	17069	2.20
HENDERSON	IL	17071	1.80
HENRY	IL	17073	1.80
IROQUOIS	IL	17075	1.80
JACKSON	IL	17077	2.20
JASPER	IL	17079	2.00
JEFFERSON	IL	17081	2.00
JERSEY	IL	17083	2.00
JO DAVIESS	IL	17085	1.75
JOHNSON	IL	17087	2.20
KANE	IL	17089	1.80
KANKAKEE	IL	17091	1.80
KENDALL	IL	17093	1.80
KNOX	IL	17095	1.80
LA SALLE	IL	17099	1.80
LAKE	IL	17097	1.80
LAWRENCE	IL	17101	2.00
LEE	IL	17103	1.80
LIVINGSTON	IL	17105	1.80
LOGAN	IL	17107	1.80
MACON	IL	17115	1.80
MACOUPIN	IL	17117	2.00
MADISON	IL	17119	2.00
MARION	IL	17121	2.00
MARSHALL	IL	17123	1.80
MASON	IL	17125	1.80
MASSAC	IL	17127	2.20
MCDONOUGH	IL	17109	1.80
MCHENRY	IL	17111	1.80
MCLEAN	IL	17113	1.80
MENARD	IL	17129	1.80
MERCER	IL	17131	1.80
MONROE	IL	17133	2.00
MONTGOMERY	IL	17135	2.00
MORGAN	IL	17137	1.80
MOULTRIE	IL	17139	2.00
OGLE	IL	17141	1.80
PEORIA	IL	17143	1.80
PERRY	IL	17145	2.00
PIATT	IL	17147	1.80
PIKE	IL	17149	1.80
POPE	IL	17151	2.20
PULASKI	IL	17153	2.20
PUTNAM	IL	17155	1.80
RANDOLPH	IL	17157	2.00
RICHLAND	IL	17159	2.00
ROCK ISLAND	IL	17161	1.80
SALINE	IL	17165	2.20
SANGAMON	IL	17167	1.80
SCHUYLER	IL	17169	1.80
SCOTT	IL	17171	1.80
SHELBY	IL	17173	2.00
ST. CLAIR	IL	17163	2.00
STARK	IL	17175	1.80
STEPHENSON	IL	17177	1.75
TAZEWELL	IL	17179	1.80
UNION	IL	17181	2.20
VERMILION	IL	17183	1.80
WABASH	IL	17185	2.20
WARREN	IL	17187	1.80
WASHINGTON	IL	17189	2.00
WAYNE	IL	17191	2.20
WHITE	IL	17193	2.20
WHITESIDE	IL	17195	1.80
WILL	IL	17197	1.80
WILLIAMSON	IL	17199	2.20
WINNEBAGO	IL	17201	1.75
WOODFORD	IL	17203	1.80
ADAMS	IN	18001	1.80
ALLEN	IN	18003	1.80
BARTHOLOMEW	IN	18005	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
BENTON	IN	18007	1.80
BLACKFORD	IN	18009	1.80
BOONE	IN	18011	2.00
BROWN	IN	18013	2.20
CARROLL	IN	18015	1.80
CASS	IN	18017	1.80
CLARK	IN	18019	2.20
CLAY	IN	18021	2.00
CLINTON	IN	18023	1.80
CRAWFORD	IN	18025	2.20
DAVIESS	IN	18027	2.20
DEKALB	IN	18033	1.80
DEARBORN	IN	18029	2.20
DECATUR	IN	18031	2.20
DELAWARE	IN	18035	2.00
DUBOIS	IN	18037	2.20
ELKHART	IN	18039	1.80
FAYETTE	IN	18041	2.00
FLOYD	IN	18043	2.20
FOUNTAIN	IN	18045	1.80
FRANKLIN	IN	18047	2.00
FULTON	IN	18049	1.80
GIBSON	IN	18051	2.20
GRANT	IN	18053	1.80
GREENE	IN	18055	2.20
HAMILTON	IN	18057	2.00
HANCOCK	IN	18059	2.00
HARRISON	IN	18061	2.20
HENDRICKS	IN	18063	2.00
HENRY	IN	18065	2.00
HOWARD	IN	18067	1.80
HUNTINGTON	IN	18069	1.80
JACKSON	IN	18071	2.20
JASPER	IN	18073	1.80
JAY	IN	18075	1.80
JEFFERSON	IN	18077	2.20
JENNINGS	IN	18079	2.20
JOHNSON	IN	18081	2.00
KNOX	IN	18083	2.20
KOSCIUSKO	IN	18085	1.80
LA PORTE	IN	18091	1.80
LAGRANGE	IN	18087	1.80
LAKE	IN	18089	1.80
LAWRENCE	IN	18093	2.20
MADISON	IN	18095	2.00
MARION	IN	18097	2.00
MARSHALL	IN	18099	1.80
MARTIN	IN	18101	2.20
MIAMI	IN	18103	1.80
MONROE	IN	18105	2.20
MONTGOMERY	IN	18107	2.00
MORGAN	IN	18109	2.00
NEWTON	IN	18111	1.80
NOBLE	IN	18113	1.80
OHIO	IN	18115	2.20
ORANGE	IN	18117	2.20
OWEN	IN	18119	2.00
PARKE	IN	18121	2.00
PERRY	IN	18123	2.20
PIKE	IN	18125	2.20
PORTER	IN	18127	1.80
POSEY	IN	18129	2.20
PULASKI	IN	18131	1.80
PUTNAM	IN	18133	2.00
RANDOLPH	IN	18135	2.00
RIPLEY	IN	18137	2.20
RUSH	IN	18139	2.00
SCOTT	IN	18143	2.20
SHELBY	IN	18145	2.00
SPENCER	IN	18147	2.20
ST. JOSEPH	IN	18141	1.80
STARKE	IN	18149	1.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
STEUBEN	IN	18151	1.80
SULLIVAN	IN	18153	2.20
SWITZERLAND	IN	18155	2.20
TIPPECANOE	IN	18157	1.80
TIPTON	IN	18159	1.80
UNION	IN	18161	2.00
VANDERBURGH	IN	18163	2.20
VERMILLION	IN	18165	2.00
VIGO	IN	18167	2.00
WABASH	IN	18169	1.80
WARREN	IN	18171	1.80
WARRICK	IN	18173	2.20
WASHINGTON	IN	18175	2.20
WAYNE	IN	18177	2.00
WELLS	IN	18179	1.80
WHITE	IN	18181	1.80
WHITLEY	IN	18183	1.80
ALLEN	KS	20001	2.20
ANDERSON	KS	20003	2.00
ATCHISON	KS	20005	2.00
BARBER	KS	20007	2.20
BARTON	KS	20009	2.20
BOURBON	KS	20011	2.20
BROWN	KS	20013	2.00
BUTLER	KS	20015	2.20
CHASE	KS	20017	2.20
CHAUTAUQUA	KS	20019	2.20
CHEROKEE	KS	20021	2.20
CHEYENNE	KS	20023	2.20
CLARK	KS	20025	2.20
CLAY	KS	20027	2.00
CLOUD	KS	20029	2.00
COFFEY	KS	20031	2.00
COMANCHE	KS	20033	2.20
COWLEY	KS	20035	2.20
CRAWFORD	KS	20037	2.20
DECATUR	KS	20039	2.00
DICKINSON	KS	20041	2.00
DONIPHAN	KS	20043	2.00
DOUGLAS	KS	20045	2.00
EDWARDS	KS	20047	2.20
ELK	KS	20049	2.20
ELLIS	KS	20051	2.00
ELLSWORTH	KS	20053	2.00
FINNEY	KS	20055	2.20
FORD	KS	20057	2.20
FRANKLIN	KS	20059	2.00
GEARY	KS	20061	2.00
GOVE	KS	20063	2.20
GRAHAM	KS	20065	2.00
GRANT	KS	20067	2.20
GRAY	KS	20069	2.20
GREELEY	KS	20071	2.20
GREENWOOD	KS	20073	2.20
HAMILTON	KS	20075	2.20
HARPER	KS	20077	2.20
HARVEY	KS	20079	2.20
HASKELL	KS	20081	2.20
HODGEMAN	KS	20083	2.20
JACKSON	KS	20085	2.00
JEFFERSON	KS	20087	2.00
JEWELL	KS	20089	2.00
JOHNSON	KS	20091	2.00
KEARNY	KS	20093	2.20
KINGMAN	KS	20095	2.20
KIOWA	KS	20097	2.20
LABETTE	KS	20099	2.20
LANE	KS	20101	2.20
LEAVENWORTH	KS	20103	2.00
LINCOLN	KS	20105	2.00
LINN	KS	20107	2.00
LOGAN	KS	20109	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
LYON	KS	20111	2.00
MARION	KS	20115	2.20
MARSHALL	KS	20117	2.00
MCPHERSON	KS	20113	2.20
MEADE	KS	20119	2.20
MIAMI	KS	20121	2.00
MITCHELL	KS	20123	2.00
MONTGOMERY	KS	20125	2.20
MORRIS	KS	20127	2.00
MORTON	KS	20129	2.20
NEMAHA	KS	20131	2.00
NEOSHO	KS	20133	2.20
NESS	KS	20135	2.20
NORTON	KS	20137	2.00
OSAGE	KS	20139	2.00
OSBORNE	KS	20141	2.00
OTTAWA	KS	20143	2.00
PAWNEE	KS	20145	2.20
PHILLIPS	KS	20147	2.00
POTTAWATOMIE	KS	20149	2.00
PRATT	KS	20151	2.20
RAWLINS	KS	20153	2.00
RENO	KS	20155	2.20
REPUBLIC	KS	20157	2.00
RICE	KS	20159	2.20
RILEY	KS	20161	2.00
ROOKS	KS	20163	2.00
RUSH	KS	20165	2.20
RUSSELL	KS	20167	2.00
SALINE	KS	20169	2.00
SCOTT	KS	20171	2.20
SEDGWICK	KS	20173	2.20
SEWARD	KS	20175	2.20
SHAWNEE	KS	20177	2.00
SHERIDAN	KS	20179	2.00
SHERMAN	KS	20181	2.20
SMITH	KS	20183	2.00
STAFFORD	KS	20185	2.20
STANTON	KS	20187	2.20
STEVENS	KS	20189	2.20
SUMNER	KS	20191	2.20
THOMAS	KS	20193	2.00
TREGO	KS	20195	2.20
WABAUNSEE	KS	20197	2.00
WALLACE	KS	20199	2.20
WASHINGTON	KS	20201	2.00
WICHITA	KS	20203	2.20
WILSON	KS	20205	2.20
WOODSON	KS	20207	2.20
WYANDOTTE	KS	20209	2.00
ADAIR	KY	21001	2.40
ALLEN	KY	21003	2.40
ANDERSON	KY	21005	2.20
BALLARD	KY	21007	2.40
BARREN	KY	21009	2.40
BATH	KY	21011	2.20
BELL	KY	21013	2.40
BOONE	KY	21015	2.20
BOURBON	KY	21017	2.20
BOYD	KY	21019	2.20
BOYLE	KY	21021	2.20
BRACKEN	KY	21023	2.20
BREATHITT	KY	21025	2.20
BRECKINRIDGE	KY	21027	2.20
BULLITT	KY	21029	2.20
BUTLER	KY	21031	2.40
CALDWELL	KY	21033	2.40
CALLOWAY	KY	21035	2.40
CAMPBELL	KY	21037	2.20
CARLISLE	KY	21039	2.40
CARROLL	KY	21041	2.20
CARTER	KY	21043	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
CASEY	KY	21045	2.40
CHRISTIAN	KY	21047	2.40
CLARK	KY	21049	2.20
CLAY	KY	21051	2.40
CLINTON	KY	21053	2.40
CRITTENDEN	KY	21055	2.40
CUMBERLAND	KY	21057	2.40
DAVIESS	KY	21059	2.20
EDMONSON	KY	21061	2.40
ELLIOTT	KY	21063	2.20
ESTILL	KY	21065	2.20
FAYETTE	KY	21067	2.20
FLEMING	KY	21069	2.20
FLOYD	KY	21071	2.20
FRANKLIN	KY	21073	2.20
FULTON	KY	21075	2.40
GALLATIN	KY	21077	2.20
GARRARD	KY	21079	2.20
GRANT	KY	21081	2.20
GRAVES	KY	21083	2.40
GRAYSON	KY	21085	2.40
GREEN	KY	21087	2.40
GREENUP	KY	21089	2.20
HANCOCK	KY	21091	2.20
HARDIN	KY	21093	2.20
HARLAN	KY	21095	2.40
HARRISON	KY	21097	2.20
HART	KY	21099	2.40
HENDERSON	KY	21101	2.20
HENRY	KY	21103	2.20
HICKMAN	KY	21105	2.40
HOPKINS	KY	21107	2.40
JACKSON	KY	21109	2.20
JEFFERSON	KY	21111	2.20
JESSAMINE	KY	21113	2.20
JOHNSON	KY	21115	2.20
KENTON	KY	21117	2.20
KNOTT	KY	21119	2.40
KNOX	KY	21121	2.40
LARUE	KY	21123	2.20
LAUREL	KY	21125	2.40
LAWRENCE	KY	21127	2.20
LEE	KY	21129	2.20
LESLIE	KY	21131	2.40
LETCHER	KY	21133	2.40
LEWIS	KY	21135	2.20
LINCOLN	KY	21137	2.20
LIVINGSTON	KY	21139	2.40
LOGAN	KY	21141	2.40
LYON	KY	21143	2.40
MADISON	KY	21151	2.20
MAGOFFIN	KY	21153	2.20
MARION	KY	21155	2.20
MARSHALL	KY	21157	2.40
MARTIN	KY	21159	2.20
MASON	KY	21161	2.20
MCCRACKEN	KY	21145	2.40
MCCREARY	KY	21147	2.40
MCLEAN	KY	21149	2.20
MEADE	KY	21163	2.20
MENIFEE	KY	21165	2.20
MERCER	KY	21167	2.20
METCALFE	KY	21169	2.40
MONROE	KY	21171	2.40
MONTGOMERY	KY	21173	2.20
MORGAN	KY	21175	2.20
MUHLENBERG	KY	21177	2.40
NELSON	KY	21179	2.20
NICHOLAS	KY	21181	2.20
OHIO	KY	21183	2.40
OLDHAM	KY	21185	2.20
OWEN	KY	21187	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
OWSLEY	KY	21189	2.20
PENDLETON	KY	21191	2.20
PERRY	KY	21193	2.40
PIKE	KY	21195	2.40
POWELL	KY	21197	2.20
PULASKI	KY	21199	2.40
ROBERTSON	KY	21201	2.20
ROCKCASTLE	KY	21203	2.20
ROWAN	KY	21205	2.20
RUSSELL	KY	21207	2.40
SCOTT	KY	21209	2.20
SHELBY	KY	21211	2.20
SIMPSON	KY	21213	2.40
SPENCER	KY	21215	2.20
TAYLOR	KY	21217	2.40
TODD	KY	21219	2.40
TRIGG	KY	21221	2.40
TRIMBLE	KY	21223	2.20
UNION	KY	21225	2.20
WARREN	KY	21227	2.40
WASHINGTON	KY	21229	2.20
WAYNE	KY	21231	2.40
WEBSTER	KY	21233	2.40
WHITLEY	KY	21235	2.40
WOLFE	KY	21237	2.20
WOODFORD	KY	21239	2.20
ACADIA	LA	22001	3.50
ALLEN	LA	22003	3.50
ASCENSION	LA	22005	3.60
ASSUMPTION	LA	22007	3.60
AVOYELLES	LA	22009	3.40
BEAUREGARD	LA	22011	3.50
BIENVILLE	LA	22013	3.30
BOSSIER	LA	22015	3.10
CADDO	LA	22017	3.10
CALCASIEU	LA	22019	3.50
CALDWELL	LA	22021	3.30
CAMERON	LA	22023	3.60
CATAHOULA	LA	22025	3.40
CLAIBORNE	LA	22027	3.10
CONCORDIA	LA	22029	3.40
DE SOTO	LA	22031	3.30
EAST BATON ROUGE	LA	22033	3.60
EAST CARROLL	LA	22035	3.10
EAST FELICIANA	LA	22037	3.50
EVANGELINE	LA	22039	3.50
FRANKLIN	LA	22041	3.30
GRANT	LA	22043	3.40
IBERIA	LA	22045	3.60
IBERVILLE	LA	22047	3.60
JACKSON	LA	22049	3.30
JEFFERSON	LA	22051	3.60
JEFFERSON DAVIS	LA	22053	3.50
LA SALLE	LA	22059	3.40
LAFAYETTE	LA	22055	3.60
LAFOURCHE	LA	22057	3.60
LINCOLN	LA	22061	3.10
LIVINGSTON	LA	22063	3.60
MADISON	LA	22065	3.30
MOREHOUSE	LA	22067	3.10
NATCHITOCHES	LA	22069	3.30
ORLEANS	LA	22071	3.60
OUACHITA	LA	22073	3.10
PLAQUEMINES	LA	22075	3.60
POINTE COUPEE	LA	22077	3.50
RAPIDES	LA	22079	3.40
RED RIVER	LA	22081	3.30
RICHLAND	LA	22083	3.10
SABINE	LA	22085	3.30
ST. BERNARD	LA	22087	3.60
ST. CHARLES	LA	22089	3.60
ST. HELENA	LA	22091	3.50

County/parish/city	State	FIPS code	Class I differential adjusted for location
ST. JAMES	LA	22093	3.60
ST. JOHN THE BAPTIST	LA	22095	3.60
ST. LANDRY	LA	22097	3.50
ST. MARTIN	LA	22099	3.60
ST. MARY	LA	22101	3.60
ST. TAMMANY	LA	22103	3.50
TANGIPAHOA	LA	22105	3.60
TENSAS	LA	22107	3.30
TERREBONNE	LA	22109	3.60
UNION	LA	22111	3.10
VERMILION	LA	22113	3.60
VERNON	LA	22115	3.40
WASHINGTON	LA	22117	3.50
WEBSTER	LA	22119	3.10
WEST BATON ROUGE	LA	22121	3.60
WEST CARROLL	LA	22123	3.10
WEST FELICIANA	LA	22125	3.50
WINN	LA	22127	3.30
BARNSTABLE	MA	25001	3.25
BERKSHIRE	MA	25003	2.80
BRISTOL	MA	25005	3.25
DUKES	MA	25007	3.25
ESSEX	MA	25009	3.25
FRANKLIN	MA	25011	3.00
HAMPDEN	MA	25013	3.00
HAMPSHIRE	MA	25015	3.00
MIDDLESEX	MA	25017	3.25
NANTUCKET	MA	25019	3.25
NORFOLK	MA	25021	3.25
PLYMOUTH	MA	25023	3.25
SUFFOLK	MA	25025	3.25
WORCESTER	MA	25027	3.10
ALLEGANY	MD	24001	2.60
ANNE ARUNDEL	MD	24003	3.00
BALTIMORE	MD	24005	3.00
BALTIMORE CITY	MD	24510	3.00
CALVERT	MD	24009	3.00
CAROLINE	MD	24011	3.00
CARROLL	MD	24013	2.80
CECIL	MD	24015	3.00
CHARLES	MD	24017	3.00
DORCHESTER	MD	24019	3.00
FREDERICK	MD	24021	2.80
GARRETT	MD	24023	2.60
HARFORD	MD	24025	3.00
HOWARD	MD	24027	3.00
KENT	MD	24029	3.00
MONTGOMERY	MD	24031	3.00
PRINCE GEORGE'S	MD	24033	3.00
QUEEN ANNE'S	MD	24035	3.00
SOMERSET	MD	24039	3.00
ST. MARY'S	MD	24037	3.00
TALBOT	MD	24041	3.00
WASHINGTON	MD	24043	2.80
WICOMICO	MD	24045	3.00
WORCESTER	MD	24047	3.00
ANDROSCOGGIN	ME	23001	2.80
AROOSTOOK	ME	23003	2.60
CUMBERLAND	ME	23005	3.00
FRANKLIN	ME	23007	2.60
HANCOCK	ME	23009	2.80
KENNEBEC	ME	23011	2.80
KNOX	ME	23013	2.80
LINCOLN	ME	23015	2.80
OXFORD	ME	23017	2.80
PENOBSCOT	ME	23019	2.80
PISCATAQUIS	ME	23021	2.60
SAGADAHOC	ME	23023	2.80
SOMERSET	ME	23025	2.60
WALDO	ME	23027	2.80
WASHINGTON	ME	23029	2.80
YORK	ME	23031	3.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
ALCONA	MI	26001	1.80
ALGER	MI	26003	1.80
ALLEGAN	MI	26005	1.80
ALPENA	MI	26007	1.80
ANTRIM	MI	26009	1.80
ARENAC	MI	26011	1.80
BARAGA	MI	26013	1.70
BARRY	MI	26015	1.80
BAY	MI	26017	1.80
BENZIE	MI	26019	1.80
BERRIEN	MI	26021	1.80
BRANCH	MI	26023	1.80
CALHOUN	MI	26025	1.80
CASS	MI	26027	1.80
CHARLEVOIX	MI	26029	1.80
CHEBOYGAN	MI	26031	1.80
CHIPPEWA	MI	26033	1.80
CLARE	MI	26035	1.80
CLINTON	MI	26037	1.80
CRAWFORD	MI	26039	1.80
DELTA	MI	26041	1.70
DICKINSON	MI	26043	1.70
EATON	MI	26045	1.80
EMMET	MI	26047	1.80
GENESEE	MI	26049	1.80
GLADWIN	MI	26051	1.80
GOGEBIC	MI	26053	1.70
GRAND TRAVERSE	MI	26055	1.80
GRATIOT	MI	26057	1.80
HILLSDALE	MI	26059	1.80
HOUGHTON	MI	26061	1.70
HURON	MI	26063	1.80
INGHAM	MI	26065	1.80
IONIA	MI	26067	1.80
IOSCO	MI	26069	1.80
IRON	MI	26071	1.70
ISABELLA	MI	26073	1.80
JACKSON	MI	26075	1.80
KALAMAZOO	MI	26077	1.80
KALKASKA	MI	26079	1.80
KENT	MI	26081	1.80
KEWEENAW	MI	26083	1.70
LAKE	MI	26085	1.80
LAPEER	MI	26087	1.80
LEELANAU	MI	26089	1.80
LENAWEE	MI	26091	1.80
LIVINGSTON	MI	26093	1.80
LUCE	MI	26095	1.80
MACKINAC	MI	26097	1.80
MACOMB	MI	26099	1.80
MANISTEE	MI	26101	1.80
MARQUETTE	MI	26103	1.80
MASON	MI	26105	1.80
MECOSTA	MI	26107	1.80
MENOMINEE	MI	26109	1.70
MIDLAND	MI	26111	1.80
MISSAUKEE	MI	26113	1.80
MONROE	MI	26115	1.80
MONTCALM	MI	26117	1.80
MONTMORENCY	MI	26119	1.80
MUSKEGON	MI	26121	1.80
NEWAYGO	MI	26123	1.80
OAKLAND	MI	26125	1.80
OCEANA	MI	26127	1.80
OGEMAW	MI	26129	1.80
ONTONAGON	MI	26131	1.70
OSCEOLA	MI	26133	1.80
OSCODA	MI	26135	1.80
OTSEGO	MI	26137	1.80
OTTAWA	MI	26139	1.80
PRESQUE ISLE	MI	26141	1.80
ROSCOMMON	MI	26143	1.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
SAGINAW	MI	26145	1.80
SANILAC	MI	26151	1.80
SCHOOLCRAFT	MI	26153	1.80
SHIAWASSEE	MI	26155	1.80
ST. CLAIR	MI	26147	1.80
ST. JOSEPH	MI	26149	1.80
TUSCOLA	MI	26157	1.80
VAN BUREN	MI	26159	1.80
WASHTENAW	MI	26161	1.80
WAYNE	MI	26163	1.80
WEXFORD	MI	26165	1.80
AITKIN	MN	27001	1.65
ANOKA	MN	27003	1.70
BECKER	MN	27005	1.65
BELTRAMI	MN	27007	1.65
BENTON	MN	27009	1.70
BIG STONE	MN	27011	1.70
BLUE EARTH	MN	27013	1.70
BROWN	MN	27015	1.70
CARLTON	MN	27017	1.65
CARVER	MN	27019	1.70
CASS	MN	27021	1.65
CHIPPEWA	MN	27023	1.70
CHISAGO	MN	27025	1.70
CLAY	MN	27027	1.65
CLEARWATER	MN	27029	1.65
COOK	MN	27031	1.65
COTTONWOOD	MN	27033	1.70
CROW WING	MN	27035	1.65
DAKOTA	MN	27037	1.70
DODGE	MN	27039	1.70
DOUGLAS	MN	27041	1.70
FARIBAULT	MN	27043	1.70
FILLMORE	MN	27045	1.70
FREEBORN	MN	27047	1.70
GOODHUE	MN	27049	1.70
GRANT	MN	27051	1.70
HENNEPIN	MN	27053	1.70
HOUSTON	MN	27055	1.70
HUBBARD	MN	27057	1.65
ISANTI	MN	27059	1.70
ITASCA	MN	27061	1.65
JACKSON	MN	27063	1.70
KANABEC	MN	27065	1.70
KANDIYOHI	MN	27067	1.70
KITTSON	MN	27069	1.60
KOOCHICHING	MN	27071	1.65
LAC QUI PARLE	MN	27073	1.70
LAKE	MN	27075	1.65
LAKE OF THE WOODS	MN	27077	1.60
LE SUEUR	MN	27079	1.70
LINCOLN	MN	27081	1.70
LYON	MN	27083	1.70
MAHNOMEN	MN	27087	1.65
MARSHALL	MN	27089	1.65
MARTIN	MN	27091	1.70
MCLEOD	MN	27085	1.70
MEEKER	MN	27093	1.70
MILLE LACS	MN	27095	1.70
MORRISON	MN	27097	1.70
MOWER	MN	27099	1.70
MURRAY	MN	27101	1.70
NICOLLET	MN	27103	1.70
NOBLES	MN	27105	1.70
NORMAN	MN	27107	1.65
OLMSTED	MN	27109	1.70
OTTER TAIL	MN	27111	1.65
PENNINGTON	MN	27113	1.65
PINE	MN	27115	1.70
PIPESTONE	MN	27117	1.70
POLK	MN	27119	1.65
POPE	MN	27121	1.70

County/parish/city	State	FIPS code	Class I differential adjusted for location
RAMSEY	MN	27123	1.70
RED LAKE	MN	27125	1.65
REDWOOD	MN	27127	1.70
RENVILLE	MN	27129	1.70
RICE	MN	27131	1.70
ROCK	MN	27133	1.70
ROSEAU	MN	27135	1.60
SCOTT	MN	27139	1.70
SHERBURNE	MN	27141	1.70
SIBLEY	MN	27143	1.70
ST. LOUIS	MN	27137	1.65
STEARNS	MN	27145	1.70
STEELE	MN	27147	1.70
STEVENS	MN	27149	1.70
SWIFT	MN	27151	1.70
TODD	MN	27153	1.70
TRAVERSE	MN	27155	1.70
WABASHA	MN	27157	1.70
WADENA	MN	27159	1.65
WASECA	MN	27161	1.70
WASHINGTON	MN	27163	1.70
WATONWAN	MN	27165	1.70
WILKIN	MN	27167	1.65
WINONA	MN	27169	1.70
WRIGHT	MN	27171	1.70
YELLOW MEDICINE	MN	27173	1.70
ADAIR	MO	29001	1.80
ANDREW	MO	29003	1.80
ATCHISON	MO	29005	1.80
AUDRAIN	MO	29007	2.00
BARRY	MO	29009	2.20
BARTON	MO	29011	2.20
BATES	MO	29013	2.00
BENTON	MO	29015	2.00
BOLLINGER	MO	29017	2.20
BOONE	MO	29019	2.00
BUCHANAN	MO	29021	1.80
BUTLER	MO	29023	2.20
CALDWELL	MO	29025	1.80
CALLAWAY	MO	29027	2.00
CAMDEN	MO	29029	2.00
CAPE GIRARDEAU	MO	29031	2.20
CARROLL	MO	29033	1.80
CARTER	MO	29035	2.20
CASS	MO	29037	2.00
CEDAR	MO	29039	2.20
CHARITON	MO	29041	1.80
CHRISTIAN	MO	29043	2.20
CLARK	MO	29045	1.80
CLAY	MO	29047	1.80
CLINTON	MO	29049	1.80
COLE	MO	29051	2.00
COOPER	MO	29053	2.00
CRAWFORD	MO	29055	2.00
DADE	MO	29057	2.20
DALLAS	MO	29059	2.20
DAVIESS	MO	29061	1.80
DE KALB	MO	29063	1.80
DENT	MO	29065	2.00
DOUGLAS	MO	29067	2.20
DUNKLIN	MO	29069	2.20
FRANKLIN	MO	29071	2.00
GASCONADE	MO	29073	2.00
GENTRY	MO	29075	1.80
GREENE	MO	29077	2.20
GRUNDY	MO	29079	1.80
HARRISON	MO	29081	1.80
HENRY	MO	29083	2.00
HICKORY	MO	29085	2.00
HOLT	MO	29087	1.80
HOWARD	MO	29089	2.00
HOWELL	MO	29091	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
IRON	MO	29093	2.00
JACKSON	MO	29095	2.00
JASPER	MO	29097	2.20
JEFFERSON	MO	29099	2.00
JOHNSON	MO	29101	2.00
KNOX	MO	29103	1.80
LACLEDE	MO	29105	2.20
LAFAYETTE	MO	29107	2.00
LAWRENCE	MO	29109	2.20
LEWIS	MO	29111	1.80
LINCOLN	MO	29113	2.00
LINN	MO	29115	1.80
LIVINGSTON	MO	29117	1.80
MACON	MO	29121	1.80
MADISON	MO	29123	2.20
MARIES	MO	29125	2.00
MARION	MO	29127	1.80
MCDONALD	MO	29119	2.20
MERCER	MO	29129	1.80
MILLER	MO	29131	2.00
MISSISSIPPI	MO	29133	2.20
MONITEAU	MO	29135	2.00
MONROE	MO	29137	1.80
MONTGOMERY	MO	29139	2.00
MORGAN	MO	29141	2.00
NEW MADRID	MO	29143	2.20
NEWTON	MO	29145	2.20
NODAWAY	MO	29147	1.80
OREGON	MO	29149	2.20
OSAGE	MO	29151	2.00
OZARK	MO	29153	2.20
PEMISCOT	MO	29155	2.20
PERRY	MO	29157	2.20
PETTIS	MO	29159	2.00
PHELPS	MO	29161	2.00
PIKE	MO	29163	2.00
PLATTE	MO	29165	1.80
POLK	MO	29167	2.20
PULASKI	MO	29169	2.20
PUTNAM	MO	29171	1.80
RALLS	MO	29173	2.00
RANDOLPH	MO	29175	1.80
RAY	MO	29177	1.80
REYNOLDS	MO	29179	2.20
RIPLEY	MO	29181	2.20
SALINE	MO	29195	2.00
SCHUYLER	MO	29197	1.80
SCOTLAND	MO	29199	1.80
SCOTT	MO	29201	2.20
SHANNON	MO	29203	2.20
SHELBY	MO	29205	1.80
ST. CHARLES	MO	29183	2.00
ST. CLAIR	MO	29185	2.00
ST. FRANCOIS	MO	29187	2.00
ST. LOUIS	MO	29189	2.00
ST. LOUIS CITY	MO	29510	2.00
STE. GENEVIEVE	MO	29186	2.00
STODDARD	MO	29207	2.20
STONE	MO	29209	2.20
SULLIVAN	MO	29211	1.80
TANEY	MO	29213	2.20
TEXAS	MO	29215	2.20
VERNON	MO	29217	2.20
WARREN	MO	29219	2.00
WASHINGTON	MO	29221	2.00
WAYNE	MO	29223	2.20
WEBSTER	MO	29225	2.20
WORTH	MO	29227	1.80
WRIGHT	MO	29229	2.20
ADAMS	MS	28001	3.40
ALCORN	MS	28003	2.90
AMITE	MS	28005	3.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
ATTALA	MS	28007	3.10
BENTON	MS	28009	2.90
BOLIVAR	MS	28011	3.10
CALHOUN	MS	28013	3.10
CARROLL	MS	28015	3.10
CHICKASAW	MS	28017	3.10
CHOCTAW	MS	28019	3.10
CLAIBORNE	MS	28021	3.30
CLARKE	MS	28023	3.30
CLAY	MS	28025	3.10
COAHOMA	MS	28027	2.90
COPIAH	MS	28029	3.30
COVINGTON	MS	28031	3.40
DE SOTO	MS	28033	2.90
FORREST	MS	28035	3.40
FRANKLIN	MS	28037	3.40
GEORGE	MS	28039	3.40
GREENE	MS	28041	3.40
GRENADA	MS	28043	3.10
HANCOCK	MS	28045	3.50
HARRISON	MS	28047	3.50
HINDS	MS	28049	3.30
HOLMES	MS	28051	3.10
HUMPHREYS	MS	28053	3.10
ISSAQUENA	MS	28055	3.10
ITAWAMBA	MS	28057	2.90
JACKSON	MS	28059	3.50
JASPER	MS	28061	3.30
JEFFERSON	MS	28063	3.40
JEFFERSON DAVIS	MS	28065	3.40
JONES	MS	28067	3.40
KEMPER	MS	28069	3.10
LAFAYETTE	MS	28071	2.90
LAMAR	MS	28073	3.40
LAUDERDALE	MS	28075	3.30
LAWRENCE	MS	28077	3.40
LEAKE	MS	28079	3.10
LEE	MS	28081	2.90
LEFLORE	MS	28083	3.10
LINCOLN	MS	28085	3.40
LOWNDES	MS	28087	3.10
MADISON	MS	28089	3.10
MARION	MS	28091	3.40
MARSHALL	MS	28093	2.90
MONROE	MS	28095	3.10
MONTGOMERY	MS	28097	3.10
NESHOBA	MS	28099	3.10
NEWTON	MS	28101	3.30
NOXUBEE	MS	28103	3.10
OKTIBBEHA	MS	28105	3.10
PANOLA	MS	28107	2.90
PEARL RIVER	MS	28109	3.40
PERRY	MS	28111	3.40
PIKE	MS	28113	3.40
PONTOTOC	MS	28115	2.90
PRENTISS	MS	28117	2.90
QUITMAN	MS	28119	2.90
RANKIN	MS	28121	3.30
SCOTT	MS	28123	3.30
SHARKEY	MS	28125	3.10
SIMPSON	MS	28127	3.30
SMITH	MS	28129	3.30
STONE	MS	28131	3.40
SUNFLOWER	MS	28133	3.10
TALLAHATCHIE	MS	28135	3.10
TATE	MS	28137	2.90
TIPPAH	MS	28139	2.90
TISHOMINGO	MS	28141	2.90
TUNICA	MS	28143	2.90
UNION	MS	28145	2.90
WALTHALL	MS	28147	3.40
WARREN	MS	28149	3.30

County/parish/city	State	FIPS code	Class I differential adjusted for location
WASHINGTON	MS	28151	3.10
WAYNE	MS	28153	3.40
WEBSTER	MS	28155	3.10
WILKINSON	MS	28157	3.40
WINSTON	MS	28159	3.10
YALOBUSHA	MS	28161	3.10
YAZOO	MS	28163	3.10
BEAVERHEAD	MT	30001	1.60
BIG HORN	MT	30003	1.60
BLAINE	MT	30005	1.60
BROADWATER	MT	30007	1.60
CARBON	MT	30009	1.60
CARTER	MT	30011	1.65
CASCADE	MT	30013	1.60
CHOUTEAU	MT	30015	1.60
CUSTER	MT	30017	1.60
DANIELS	MT	30019	1.60
DAWSON	MT	30021	1.60
DEER LODGE	MT	30023	1.60
FALLON	MT	30025	1.65
FERGUS	MT	30027	1.60
FLATHEAD	MT	30029	1.60
GALLATIN	MT	30031	1.60
GARFIELD	MT	30033	1.60
GLACIER	MT	30035	1.60
GOLDEN VALLEY	MT	30037	1.60
GRANITE	MT	30039	1.60
HILL	MT	30041	1.60
JEFFERSON	MT	30043	1.60
JUDITH BASIN	MT	30045	1.60
LAKE	MT	30047	1.60
LEWIS AND CLARK	MT	30049	1.60
LIBERTY	MT	30051	1.60
LINCOLN	MT	30053	1.80
MADISON	MT	30057	1.60
MCCONE	MT	30055	1.60
MEAGHER	MT	30059	1.60
MINERAL	MT	30061	1.80
MISSOULA	MT	30063	1.60
MUSSELSHELL	MT	30065	1.60
PARK	MT	30067	1.60
PETROLEUM	MT	30069	1.60
PHILLIPS	MT	30071	1.60
PONDERA	MT	30073	1.60
POWDER RIVER	MT	30075	1.60
POWELL	MT	30077	1.60
PRAIRIE	MT	30079	1.60
RAVALLI	MT	30081	1.60
RICHLAND	MT	30083	1.60
ROOSEVELT	MT	30085	1.60
ROSEBUD	MT	30087	1.60
SANDERS	MT	30089	1.80
SHERIDAN	MT	30091	1.60
SILVER BOW	MT	30093	1.60
STILLWATER	MT	30095	1.60
SWEET GRASS	MT	30097	1.60
TETON	MT	30099	1.60
TOOLE	MT	30101	1.60
TREASURE	MT	30103	1.60
VALLEY	MT	30105	1.60
WHEATLAND	MT	30107	1.60
WIBAUX	MT	30109	1.60
YELLOWSTONE	MT	30111	1.60
YELLOWSTONE NAT. PARK	MT	30113	1.60
ALAMANCE	NC	37001	3.10
ALEXANDER	NC	37003	2.95
ALLEGHANY	NC	37005	2.95
ANSON	NC	37007	3.10
ASHE	NC	37009	2.95
AVERY	NC	37011	2.95
BEAUFORT	NC	37013	3.20
BERTIE	NC	37015	3.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
BLADEN	NC	37017	3.30
BRUNSWICK	NC	37019	3.30
BUNCOMBE	NC	37021	2.95
BURKE	NC	37023	2.95
CABARRUS	NC	37025	3.10
CALDWELL	NC	37027	2.95
CAMDEN	NC	37029	3.20
CARTERET	NC	37031	3.20
CASWELL	NC	37033	3.10
CATAWBA	NC	37035	3.10
CHATHAM	NC	37037	3.10
CHEROKEE	NC	37039	2.95
CHOWAN	NC	37041	3.20
CLAY	NC	37043	2.95
CLEVELAND	NC	37045	3.10
COLUMBUS	NC	37047	3.30
CRAVEN	NC	37049	3.20
CUMBERLAND	NC	37051	3.30
CURRITUCK	NC	37053	3.20
DARE	NC	37055	3.20
DAVIDSON	NC	37057	3.10
DAVIE	NC	37059	3.10
DUPLIN	NC	37061	3.30
DURHAM	NC	37063	3.10
EDGECOMBE	NC	37065	3.20
FORSYTH	NC	37067	3.10
FRANKLIN	NC	37069	3.10
GASTON	NC	37071	3.10
GATES	NC	37073	3.20
GRAHAM	NC	37075	2.95
GRANVILLE	NC	37077	3.10
GREENE	NC	37079	3.20
GUILFORD	NC	37081	3.10
HALIFAX	NC	37083	3.10
HARNETT	NC	37085	3.30
HAYWOOD	NC	37087	2.95
HENDERSON	NC	37089	2.95
HERTFORD	NC	37091	3.20
HOKE	NC	37093	3.30
HYDE	NC	37095	3.20
IREDELL	NC	37097	3.10
JACKSON	NC	37099	2.95
JOHNSTON	NC	37101	3.20
JONES	NC	37103	3.20
LEE	NC	37105	3.10
LENOIR	NC	37107	3.20
LINCOLN	NC	37109	3.10
MACON	NC	37113	2.95
MADISON	NC	37115	2.95
MARTIN	NC	37117	3.20
MCDOWELL	NC	37111	2.95
MECKLENBURG	NC	37119	3.10
MITCHELL	NC	37121	2.95
MONTGOMERY	NC	37123	3.10
MOORE	NC	37125	3.10
NASH	NC	37127	3.10
NEW HANOVER	NC	37129	3.30
NORTHAMPTON	NC	37131	3.10
ONSLOW	NC	37133	3.30
ORANGE	NC	37135	3.10
PAMLICO	NC	37137	3.20
PASQUOTANK	NC	37139	3.20
PENDER	NC	37141	3.30
PERQUIMANS	NC	37143	3.20
PERSON	NC	37145	3.10
PITT	NC	37147	3.20
POLK	NC	37149	3.10
RANDOLPH	NC	37151	3.10
RICHMOND	NC	37153	3.10
ROBESON	NC	37155	3.30
ROCKINGHAM	NC	37157	2.95
ROWAN	NC	37159	3.10

County/parish/city	State	FIPS code	Class I differential adjusted for location
RUTHERFORD	NC	37161	3.10
SAMPSON	NC	37163	3.30
SCOTLAND	NC	37165	3.30
STANLY	NC	37167	3.10
STOKES	NC	37169	2.95
SURRY	NC	37171	2.95
SWAIN	NC	37173	2.95
TRANSYLVANIA	NC	37175	2.95
TYRRELL	NC	37177	3.20
UNION	NC	37179	3.10
VANCE	NC	37181	3.10
WAKE	NC	37183	3.10
WARREN	NC	37185	3.10
WASHINGTON	NC	37187	3.30
WATAUGA	NC	37189	2.95
WAYNE	NC	37191	3.20
WILKES	NC	37193	2.95
WILSON	NC	37195	3.20
YADKIN	NC	37197	3.10
YANCEY	NC	37199	2.95
ADAMS	ND	38001	1.65
BARNES	ND	38003	1.65
BENSON	ND	38005	1.60
BILLINGS	ND	38007	1.60
BOTTINEAU	ND	38009	1.60
BOWMAN	ND	38011	1.65
BURKE	ND	38013	1.60
BURLEIGH	ND	38015	1.65
CASS	ND	38017	1.65
CAVALIER	ND	38019	1.60
DICKEY	ND	38021	1.65
DIVIDE	ND	38023	1.60
DUNN	ND	38025	1.60
EDDY	ND	38027	1.65
EMMONS	ND	38029	1.65
FOSTER	ND	38031	1.65
GOLDEN VALLEY	ND	38033	1.60
GRAND FORKS	ND	38035	1.65
GRANT	ND	38037	1.65
GRIGGS	ND	38039	1.65
HETTINGER	ND	38041	1.65
KIDDER	ND	38043	1.65
LA MOURE	ND	38045	1.65
LOGAN	ND	38047	1.65
MCHENRY	ND	38049	1.60
MCINTOSH	ND	38051	1.65
MCKENZIE	ND	38053	1.60
MCLEAN	ND	38055	1.60
MERCER	ND	38057	1.60
MORTON	ND	38059	1.65
MOUNTRAIL	ND	38061	1.60
NELSON	ND	38063	1.65
OLIVER	ND	38065	1.60
PEMBINA	ND	38067	1.60
PIERCE	ND	38069	1.60
RAMSEY	ND	38071	1.60
RANSOM	ND	38073	1.65
RENVILLE	ND	38075	1.60
RICHLAND	ND	38077	1.65
ROLETTE	ND	38079	1.60
SARGENT	ND	38081	1.65
SHERIDAN	ND	38083	1.60
SIOUX	ND	38085	1.65
SLOPE	ND	38087	1.65
STARK	ND	38089	1.60
STEELE	ND	38091	1.65
STUTSMAN	ND	38093	1.65
TOWNER	ND	38095	1.60
TRAILL	ND	38097	1.65
WALSH	ND	38099	1.60
WARD	ND	38101	1.60
WELLS	ND	38103	1.65

County/parish/city	State	FIPS code	Class I differential adjusted for location
WILLIAMS	ND	38105	1.60
ADAMS	NE	31001	1.80
ANTELOPE	NE	31003	1.75
ARTHUR	NE	31005	1.80
BANNER	NE	31007	1.80
BLAINE	NE	31009	1.75
BOONE	NE	31011	1.80
BOX BUTTE	NE	31013	1.80
BOYD	NE	31015	1.75
BROWN	NE	31017	1.75
BUFFALO	NE	31019	1.80
BURT	NE	31021	1.80
BUTLER	NE	31023	1.80
CASS	NE	31025	1.85
CEDAR	NE	31027	1.75
CHASE	NE	31029	1.80
CHERRY	NE	31031	1.75
CHEYENNE	NE	31033	1.80
CLAY	NE	31035	1.80
COLFAX	NE	31037	1.80
CUMING	NE	31039	1.80
CUSTER	NE	31041	1.80
DAKOTA	NE	31043	1.75
DAWES	NE	31045	1.80
DAWSON	NE	31047	1.80
DEUEL	NE	31049	1.80
DIXON	NE	31051	1.75
DODGE	NE	31053	1.80
DOUGLAS	NE	31055	1.85
DUNDY	NE	31057	1.80
FILLMORE	NE	31059	1.80
FRANKLIN	NE	31061	1.80
FRONTIER	NE	31063	1.80
FURNAS	NE	31065	1.80
GAGE	NE	31067	1.85
GARDEN	NE	31069	1.80
GARFIELD	NE	31071	1.75
GOSPER	NE	31073	1.80
GRANT	NE	31075	1.75
GREELEY	NE	31077	1.80
HALL	NE	31079	1.80
HAMILTON	NE	31081	1.80
HARLAN	NE	31083	1.80
HAYES	NE	31085	1.80
HITCHCOCK	NE	31087	1.80
HOLT	NE	31089	1.75
HOOKER	NE	31091	1.75
HOWARD	NE	31093	1.80
JEFFERSON	NE	31095	1.80
JOHNSON	NE	31097	1.85
KEARNEY	NE	31099	1.80
KEITH	NE	31101	1.80
KEYA PAHA	NE	31103	1.75
KIMBALL	NE	31105	1.80
KNOX	NE	31107	1.75
LANCASTER	NE	31109	1.85
LINCOLN	NE	31111	1.80
LOGAN	NE	31113	1.80
LOUP	NE	31115	1.75
MADISON	NE	31119	1.80
MCPHERSON	NE	31117	1.80
MERRICK	NE	31121	1.80
MORRILL	NE	31123	1.80
NANCE	NE	31125	1.80
NEMAHA	NE	31127	1.85
NUCKOLLS	NE	31129	1.80
OTOE	NE	31131	1.85
PAWNEE	NE	31133	1.85
PERKINS	NE	31135	1.80
PHELPS	NE	31137	1.80
PIERCE	NE	31139	1.75
PLATTE	NE	31141	1.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
POLK	NE	31143	1.80
RED WILLOW	NE	31145	1.80
RICHARDSON	NE	31147	1.85
ROCK	NE	31149	1.75
SALINE	NE	31151	1.80
SARPY	NE	31153	1.85
SAUNDERS	NE	31155	1.85
SCOTTS BLUFF	NE	31157	1.80
SEWARD	NE	31159	1.80
SHERIDAN	NE	31161	1.80
SHERMAN	NE	31163	1.80
SIOUX	NE	31165	1.80
STANTON	NE	31167	1.80
THAYER	NE	31169	1.80
THOMAS	NE	31171	1.75
THURSTON	NE	31173	1.75
VALLEY	NE	31175	1.80
WASHINGTON	NE	31177	1.85
WAYNE	NE	31179	1.75
WEBSTER	NE	31181	1.80
WHEELER	NE	31183	1.75
YORK	NE	31185	1.80
BELKNAP	NH	33001	2.80
CARROLL	NH	33003	2.80
CHESHIRE	NH	33005	2.80
COOS	NH	33007	2.60
GRAFTON	NH	33009	2.60
HILLSBOROUGH	NH	33011	3.00
MERRIMACK	NH	33013	3.00
ROCKINGHAM	NH	33015	3.00
STRAFFORD	NH	33017	3.00
SULLIVAN	NH	33019	2.80
ATLANTIC	NJ	34001	3.00
BERGEN	NJ	34003	3.15
BURLINGTON	NJ	34005	3.00
CAMDEN	NJ	34007	3.00
CAPE MAY	NJ	34009	3.00
CUMBERLAND	NJ	34011	3.00
ESSEX	NJ	34013	3.15
GLOUCESTER	NJ	34015	3.00
HUDSON	NJ	34017	3.15
HUNTERDON	NJ	34019	3.10
MERCER	NJ	34021	3.10
MIDDLESEX	NJ	34023	3.10
MONMOUTH	NJ	34025	3.10
MORRIS	NJ	34027	3.10
OCEAN	NJ	34029	3.10
PASSAIC	NJ	34031	3.15
SALEM	NJ	34033	3.00
SOMERSET	NJ	34035	3.10
SUSSEX	NJ	34037	3.10
UNION	NJ	34039	3.15
WARREN	NJ	34041	3.10
BERNALILLO	NM	35001	2.35
CATRON	NM	35003	2.10
CHAVES	NM	35005	2.10
CIBOLA	NM	35006	1.90
COLFAX	NM	35007	2.35
CURRY	NM	35009	2.10
DE BACA	NM	35011	2.10
DONA ANA	NM	35013	2.10
EDDY	NM	35015	2.10
GRANT	NM	35017	2.10
GUADALUPE	NM	35019	2.35
HARDING	NM	35021	2.35
HIDALGO	NM	35023	2.10
LEA	NM	35025	2.10
LINCOLN	NM	35027	2.10
LOS ALAMOS	NM	35028	2.35
LUNA	NM	35029	2.10
MCKINLEY	NM	35031	1.90
MORA	NM	35033	2.35

County/parish/city	State	FIPS code	Class I differential adjusted for location
OTERO	NM	35035	2.10
QUAY	NM	35037	2.35
RIO ARRIBA	NM	35039	1.90
ROOSEVELT	NM	35041	2.10
SAN JUAN	NM	35045	1.90
SAN MIGUEL	NM	35047	2.35
SANDOVAL	NM	35043	2.35
SANTA FE	NM	35049	2.35
SIERRA	NM	35051	2.10
SOCORRO	NM	35053	2.10
TAOS	NM	35055	1.90
TORRANCE	NM	35057	2.35
UNION	NM	35059	2.35
VALENCIA	NM	35061	2.35
CARSON CITY	NV	32510	1.70
CHURCHILL	NV	32001	1.70
CLARK	NV	32003	2.00
DOUGLAS	NV	32005	1.70
ELKO	NV	32007	1.90
ESMERALDA	NV	32009	1.60
EUREKA	NV	32011	1.70
HUMBOLDT	NV	32013	1.70
LANDER	NV	32015	1.70
LINCOLN	NV	32017	1.60
LYON	NV	32019	1.70
MINERAL	NV	32021	1.60
NYE	NV	32023	1.60
PERSHING	NV	32027	1.70
STOREY	NV	32029	1.70
WASHOE	NV	32031	1.70
WHITE PINE	NV	32033	1.90
ALBANY	NY	36001	2.60
ALLEGANY	NY	36003	2.30
BRONX	NY	36005	3.15
BROOME	NY	36007	2.60
CATTARAUGUS	NY	36009	2.10
CAYUGA	NY	36011	2.30
CHAUTAUQUA	NY	36013	2.10
CHEMUNG	NY	36015	2.40
CHENANGO	NY	36017	2.40
CLINTON	NY	36019	2.20
COLUMBIA	NY	36021	2.80
CORTLAND	NY	36023	2.40
DELAWARE	NY	36025	2.60
DUTCHESS	NY	36027	2.80
ERIE	NY	36029	2.20
ESSEX	NY	36031	2.40
FRANKLIN	NY	36033	2.20
FULTON	NY	36035	2.60
GENESEE	NY	36037	2.20
GREENE	NY	36039	2.60
HAMILTON	NY	36041	2.40
HERKIMER	NY	36043	2.40
JEFFERSON	NY	36045	2.20
KINGS	NY	36047	3.15
LEWIS	NY	36049	2.20
LIVINGSTON	NY	36051	2.30
MADISON	NY	36053	2.40
MONROE	NY	36055	2.30
MONTGOMERY	NY	36057	2.60
NASSAU	NY	36059	3.15
NEW YORK	NY	36061	3.15
NIAGARA	NY	36063	2.20
ONEIDA	NY	36065	2.40
ONONDAGA	NY	36067	2.40
ONTARIO	NY	36069	2.30
ORANGE	NY	36071	3.00
ORLEANS	NY	36073	2.20
OSWEGO	NY	36075	2.30
OTSEGO	NY	36077	2.60
PUTNAM	NY	36079	3.00
QUEENS	NY	36081	3.15

County/parish/city	State	FIPS code	Class I differential adjusted for location
RENSSELAER	NY	36083	2.60
RICHMOND	NY	36085	3.15
ROCKLAND	NY	36087	3.15
SARATOGA	NY	36091	2.60
SCHENECTADY	NY	36093	2.60
SCHOHARIE	NY	36095	2.60
SCHUYLER	NY	36097	2.30
SENECA	NY	36099	2.30
ST. LAWRENCE	NY	36089	2.20
STEUBEN	NY	36101	2.30
SUFFOLK	NY	36103	3.15
SULLIVAN	NY	36105	2.80
TIOGA	NY	36107	2.40
TOMPKINS	NY	36109	2.40
ULSTER	NY	36111	2.80
WARREN	NY	36113	2.60
WASHINGTON	NY	36115	2.60
WAYNE	NY	36117	2.30
WESTCHESTER	NY	36119	3.15
WYOMING	NY	36121	2.20
YATES	NY	36123	2.30
ADAMS	OH	39001	2.20
ALLEN	OH	39003	2.00
ASHLAND	OH	39005	2.00
ASHTABULA	OH	39007	2.00
ATHENS	OH	39009	2.00
AUGLAIZE	OH	39011	2.00
BELMONT	OH	39013	2.00
BROWN	OH	39015	2.20
BUTLER	OH	39017	2.00
CARROLL	OH	39019	2.00
CHAMPAIGN	OH	39021	2.00
CLARK	OH	39023	2.00
CLERMONT	OH	39025	2.20
CLINTON	OH	39027	2.00
COLUMBIANA	OH	39029	2.00
COSHOCTON	OH	39031	2.00
CRAWFORD	OH	39033	2.00
CUYAHOGA	OH	39035	2.00
DARKE	OH	39037	2.00
DEFIANCE	OH	39039	1.80
DELAWARE	OH	39041	2.00
ERIE	OH	39043	2.00
FAIRFIELD	OH	39045	2.00
FAYETTE	OH	39047	2.00
FRANKLIN	OH	39049	2.00
FULTON	OH	39051	1.80
GALLIA	OH	39053	2.20
GEAUGA	OH	39055	2.00
GREENE	OH	39057	2.00
GUERNSEY	OH	39059	2.00
HAMILTON	OH	39061	2.20
HANCOCK	OH	39063	2.00
HARDIN	OH	39065	2.00
HARRISON	OH	39067	2.00
HENRY	OH	39069	1.80
HIGHLAND	OH	39071	2.20
HOCKING	OH	39073	2.00
HOLMES	OH	39075	2.00
HURON	OH	39077	2.00
JACKSON	OH	39079	2.20
JEFFERSON	OH	39081	2.00
KNOX	OH	39083	2.00
LAKE	OH	39085	2.00
LAWRENCE	OH	39087	2.20
LICKING	OH	39089	2.00
LOGAN	OH	39091	2.00
LORAIN	OH	39093	2.00
LUCAS	OH	39095	1.80
MADISON	OH	39097	2.00
MAHONING	OH	39099	2.00
MARION	OH	39101	2.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
MEDINA	OH	39103	2.00
MEIGS	OH	39105	2.00
MERCER	OH	39107	2.00
MIAMI	OH	39109	2.00
MONROE	OH	39111	2.00
MONTGOMERY	OH	39113	2.00
MORGAN	OH	39115	2.00
MORROW	OH	39117	2.00
MUSKINGUM	OH	39119	2.00
NOBLE	OH	39121	2.00
OTTAWA	OH	39123	2.00
PAULDING	OH	39125	1.80
PERRY	OH	39127	2.00
PICKAWAY	OH	39129	2.00
PIKE	OH	39131	2.20
PORTAGE	OH	39133	2.00
PREBLE	OH	39135	2.00
PUTNAM	OH	39137	1.80
RICHLAND	OH	39139	2.00
ROSS	OH	39141	2.00
SANDUSKY	OH	39143	2.00
SCIOTO	OH	39145	2.20
SENECA	OH	39147	2.00
SHELBY	OH	39149	2.00
STARK	OH	39151	2.00
SUMMIT	OH	39153	2.00
TRUMBULL	OH	39155	2.00
TUSCARAWAS	OH	39157	2.00
UNION	OH	39159	2.00
VAN WERT	OH	39161	1.80
VINTON	OH	39163	2.00
WARREN	OH	39165	2.00
WASHINGTON	OH	39167	2.00
WAYNE	OH	39169	2.00
WILLIAMS	OH	39171	1.80
WOOD	OH	39173	2.00
WYANDOT	OH	39175	2.00
ADAIR	OK	40001	2.60
ALFALFA	OK	40003	2.40
ATOKA	OK	40005	2.80
BEAVER	OK	40007	2.40
BECKHAM	OK	40009	2.40
BLAINE	OK	40011	2.40
BRYAN	OK	40013	2.80
CADDO	OK	40015	2.60
CANADIAN	OK	40017	2.60
CARTER	OK	40019	2.80
CHEROKEE	OK	40021	2.60
CHOCTAW	OK	40023	2.80
CIMARRON	OK	40025	2.40
CLEVELAND	OK	40027	2.60
COAL	OK	40029	2.80
COMANCHE	OK	40031	2.60
COTTON	OK	40033	2.80
CRAIG	OK	40035	2.40
CREEK	OK	40037	2.60
CUSTER	OK	40039	2.40
DELAWARE	OK	40041	2.40
DEWEY	OK	40043	2.40
ELLIS	OK	40045	2.40
GARFIELD	OK	40047	2.40
GARVIN	OK	40049	2.60
GRADY	OK	40051	2.60
GRANT	OK	40053	2.40
GREER	OK	40055	2.60
HARMON	OK	40057	2.60
HARPER	OK	40059	2.40
HASKELL	OK	40061	2.80
HUGHES	OK	40063	2.60
JACKSON	OK	40065	2.60
JEFFERSON	OK	40067	2.80
JOHNSTON	OK	40069	2.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
KAY	OK	40071	2.40
KINGFISHER	OK	40073	2.40
KIOWA	OK	40075	2.60
LATIMER	OK	40077	2.80
LE FLORE	OK	40079	2.80
LINCOLN	OK	40081	2.60
LOGAN	OK	40083	2.40
LOVE	OK	40085	2.80
MAJOR	OK	40093	2.40
MARSHALL	OK	40095	2.80
MAYES	OK	40097	2.40
MCCLAIN	OK	40087	2.60
MCCURTAIN	OK	40089	2.80
MCINTOSH	OK	40091	2.60
MURRAY	OK	40099	2.80
MUSKOGEE	OK	40101	2.60
NOBLE	OK	40103	2.40
NOWATA	OK	40105	2.40
OKFUSKEE	OK	40107	2.60
OKLAHOMA	OK	40109	2.60
OKMULGEE	OK	40111	2.60
OSAGE	OK	40113	2.40
OTTAWA	OK	40115	2.40
PAWNEE	OK	40117	2.40
PAYNE	OK	40119	2.40
PITTSBURG	OK	40121	2.80
PONTOTOC	OK	40123	2.80
POTTAWATOMIE	OK	40125	2.60
PUSHMATAHA	OK	40127	2.80
ROGER MILLS	OK	40129	2.40
ROGERS	OK	40131	2.40
SEMINOLE	OK	40133	2.60
SEQUOYAH	OK	40135	2.80
STEPHENS	OK	40137	2.80
TEXAS	OK	40139	2.40
TILLMAN	OK	40141	2.60
TULSA	OK	40143	2.60
WAGONER	OK	40145	2.60
WASHINGTON	OK	40147	2.40
WASHITA	OK	40149	2.40
WOODS	OK	40151	2.40
WOODWARD	OK	40153	2.40
BAKER	OR	41001	1.60
BENTON	OR	41003	1.90
CLACKAMAS	OR	41005	1.90
CLATSOP	OR	41007	1.90
COLUMBIA	OR	41009	1.90
COOS	OR	41011	1.90
CROOK	OR	41013	1.75
CURRY	OR	41015	1.90
DESCHUTES	OR	41017	1.75
DOUGLAS	OR	41019	1.90
GILLIAM	OR	41021	1.75
GRANT	OR	41023	1.60
HARNEY	OR	41025	1.60
HOOD RIVER	OR	41027	1.90
JACKSON	OR	41029	1.90
JEFFERSON	OR	41031	1.75
JOSEPHINE	OR	41033	1.90
KLAMATH	OR	41035	1.75
LAKE	OR	41037	1.75
LANE	OR	41039	1.90
LINCOLN	OR	41041	1.90
LINN	OR	41043	1.90
MALHEUR	OR	41045	1.60
MARION	OR	41047	1.90
MORROW	OR	41049	1.75
MULTNOMAH	OR	41051	1.90
POLK	OR	41053	1.90
SHERMAN	OR	41055	1.75
TILLAMOOK	OR	41057	1.90
UMATILLA	OR	41059	1.75

County/parish/city	State	FIPS code	Class I differential adjusted for location
UNION	OR	41061	1.60
WALLOWA	OR	41063	1.60
WASCO	OR	41065	1.75
WASHINGTON	OR	41067	1.90
WHEELER	OR	41069	1.75
YAMHILL	OR	41071	1.90
ADAMS	PA	42001	2.80
ALLEGHENY	PA	42003	2.10
ARMSTRONG	PA	42005	2.30
BEAVER	PA	42007	2.10
BEDFORD	PA	42009	2.30
BERKS	PA	42011	2.80
BLAIR	PA	42013	2.30
BRADFORD	PA	42015	2.40
BUCKS	PA	42017	3.00
BUTLER	PA	42019	2.10
CAMBRIA	PA	42021	2.30
CAMERON	PA	42023	2.30
CARBON	PA	42025	2.80
CENTRE	PA	42027	2.30
CHESTER	PA	42029	3.00
CLARION	PA	42031	2.30
CLEARFIELD	PA	42033	2.30
CLINTON	PA	42035	2.30
COLUMBIA	PA	42037	2.60
CRAWFORD	PA	42039	2.10
CUMBERLAND	PA	42041	2.80
DAUPHIN	PA	42043	2.80
DELAWARE	PA	42045	3.00
ELK	PA	42047	2.30
ERIE	PA	42049	2.10
FAYETTE	PA	42051	2.30
FOREST	PA	42053	2.30
FRANKLIN	PA	42055	2.80
FULTON	PA	42057	2.60
GREENE	PA	42059	2.10
HUNTINGDON	PA	42061	2.30
INDIANA	PA	42063	2.30
JEFFERSON	PA	42065	2.30
JUNIATA	PA	42067	2.60
LACKAWANNA	PA	42069	2.60
LANCASTER	PA	42071	2.80
LAWRENCE	PA	42073	2.10
LEBANON	PA	42075	2.80
LEHIGH	PA	42077	2.80
LUZERNE	PA	42079	2.60
LYCOMING	PA	42081	2.60
MCKEAN	PA	42083	2.30
MERCER	PA	42085	2.10
MIFFLIN	PA	42087	2.60
MONROE	PA	42089	2.80
MONTGOMERY	PA	42091	3.00
MONTOUR	PA	42093	2.60
NORTHAMPTON	PA	42095	2.80
NORTHUMBERLAND	PA	42097	2.60
PERRY	PA	42099	2.60
PHILADELPHIA	PA	42101	3.00
PIKE	PA	42103	2.80
POTTER	PA	42105	2.30
SCHUYLKILL	PA	42107	2.80
SNYDER	PA	42109	2.60
SOMERSET	PA	42111	2.30
SULLIVAN	PA	42113	2.60
SUSQUEHANNA	PA	42115	2.60
TIOGA	PA	42117	2.30
UNION	PA	42119	2.60
VENANGO	PA	42121	2.10
WARREN	PA	42123	2.10
WASHINGTON	PA	42125	2.10
WAYNE	PA	42127	2.60
WESTMORELAND	PA	42129	2.30
WYOMING	PA	42131	2.60

County/parish/city	State	FIPS code	Class I differential adjusted for location
YORK	PA	42133	2.80
BRISTOL	RI	44001	3.25
KENT	RI	44003	3.25
NEWPORT	RI	44005	3.25
PROVIDENCE	RI	44007	3.25
WASHINGTON	RI	44009	3.25
ABBEVILLE	SC	45001	3.10
AIKEN	SC	45003	3.30
ALLENDALE	SC	45005	3.30
ANDERSON	SC	45007	3.10
BAMBERG	SC	45009	3.30
BARNWELL	SC	45011	3.30
BEAUFORT	SC	45013	3.30
BERKELEY	SC	45015	3.30
CALHOUN	SC	45017	3.30
CHARLESTON	SC	45019	3.30
CHEROKEE	SC	45021	3.10
CHESTER	SC	45023	3.10
CHESTERFIELD	SC	45025	3.30
CLARENDON	SC	45027	3.30
COLLETON	SC	45029	3.30
DARLINGTON	SC	45031	3.30
DILLON	SC	45033	3.30
DORCHESTER	SC	45035	3.30
EDGEFIELD	SC	45037	3.30
FAIRFIELD	SC	45039	3.30
FLORENCE	SC	45041	3.30
GEORGETOWN	SC	45043	3.30
GREENVILLE	SC	45045	3.10
GREENWOOD	SC	45047	3.10
HAMPTON	SC	45049	3.30
HORRY	SC	45051	3.30
JASPER	SC	45053	3.30
KERSHAW	SC	45055	3.30
LANCASTER	SC	45057	3.10
LAURENS	SC	45059	3.10
LEE	SC	45061	3.30
LEXINGTON	SC	45063	3.30
MARION	SC	45067	3.30
MARLBORO	SC	45069	3.30
MCCORMICK	SC	45065	3.10
NEWBERRY	SC	45071	3.30
OCONEE	SC	45073	3.10
ORANGEBURG	SC	45075	3.30
PICKENS	SC	45077	3.10
RICHLAND	SC	45079	3.30
SALUDA	SC	45081	3.30
SPARTANBURG	SC	45083	3.10
SUMTER	SC	45085	3.30
UNION	SC	45087	3.10
WILLIAMSBURG	SC	45089	3.30
YORK	SC	45091	3.10
AURORA	SD	46003	1.70
BEADLE	SD	46005	1.70
BENNETT	SD	46007	1.70
BON HOMME	SD	46009	1.75
BROOKINGS	SD	46011	1.70
BROWN	SD	46013	1.70
BRULE	SD	46015	1.70
BUFFALO	SD	46017	1.70
BUTTE	SD	46019	1.65
CAMPBELL	SD	46021	1.65
CHARLES MIX	SD	46023	1.75
CLARK	SD	46025	1.70
CLAY	SD	46027	1.75
CODINGTON	SD	46029	1.70
CORSON	SD	46031	1.65
CUSTER	SD	46033	1.80
DAVISON	SD	46035	1.70
DAY	SD	46037	1.70
DEUEL	SD	46039	1.70
DEWEY	SD	46041	1.65

County/parish/city	State	FIPS code	Class I differential adjusted for location
DOUGLAS	SD	46043	1.75
EDMUNDS	SD	46045	1.70
FALL RIVER	SD	46047	1.80
FAULK	SD	46049	1.70
GRANT	SD	46051	1.70
GREGORY	SD	46053	1.75
HAAKON	SD	46055	1.70
HAMLIN	SD	46057	1.70
HAND	SD	46059	1.70
HANSON	SD	46061	1.70
HARDING	SD	46063	1.65
HUGHES	SD	46065	1.70
HUTCHINSON	SD	46067	1.75
HYDE	SD	46069	1.70
JACKSON	SD	46071	1.70
JERAULD	SD	46073	1.70
JONES	SD	46075	1.70
KINGSBURY	SD	46077	1.70
LAKE	SD	46079	1.70
LAWRENCE	SD	46081	1.80
LINCOLN	SD	46083	1.75
LYMAN	SD	46085	1.70
MARSHALL	SD	46091	1.70
MCCOOK	SD	46087	1.70
MCPHERSON	SD	46089	1.70
MEADE	SD	46093	1.65
MELLETTE	SD	46095	1.70
MINER	SD	46097	1.70
MINNEHAHA	SD	46099	1.70
MOODY	SD	46101	1.70
PENNINGTON	SD	46103	1.80
PERKINS	SD	46105	1.65
POTTER	SD	46107	1.70
ROBERTS	SD	46109	1.70
SANBORN	SD	46111	1.70
SHANNON	SD	46113	1.80
SPINK	SD	46115	1.70
STANLEY	SD	46117	1.70
SULLY	SD	46119	1.70
TODD	SD	46121	1.70
TRIPP	SD	46123	1.70
TURNER	SD	46125	1.75
UNION	SD	46127	1.75
WALWORTH	SD	46129	1.70
YANKTON	SD	46135	1.75
ZIEBACH	SD	46137	1.65
ANDERSON	TN	47001	2.80
BEDFORD	TN	47003	2.60
BENTON	TN	47005	2.60
BLEDSOE	TN	47007	2.60
BLOUNT	TN	47009	2.80
BRADLEY	TN	47011	2.80
CAMPBELL	TN	47013	2.80
CANNON	TN	47015	2.60
CARROLL	TN	47017	2.60
CARTER	TN	47019	2.80
CHEATHAM	TN	47021	2.60
CHESTER	TN	47023	2.80
CLAIBORNE	TN	47025	2.80
CLAY	TN	47027	2.60
COCKE	TN	47029	2.80
COFFEE	TN	47031	2.60
CROCKETT	TN	47033	2.60
CUMBERLAND	TN	47035	2.80
DAVIDSON	TN	47037	2.60
DE KALB	TN	47041	2.60
DECATUR	TN	47039	2.60
DICKSON	TN	47043	2.60
DYER	TN	47045	2.60
FAYETTE	TN	47047	2.80
FENTRESS	TN	47049	2.60
FRANKLIN	TN	47051	2.80

County/parish/city	State	FIPS code	Class I differential adjusted for location
GIBSON	TN	47053	2.60
GILES	TN	47055	2.80
GRAINGER	TN	47057	2.80
GREENE	TN	47059	2.80
GRUNDY	TN	47061	2.60
HAMBLEN	TN	47063	2.80
HAMILTON	TN	47065	2.80
HANCOCK	TN	47067	2.80
HARDEMAN	TN	47069	2.80
HARDIN	TN	47071	2.80
HAWKINS	TN	47073	2.80
HAYWOOD	TN	47075	2.60
HENDERSON	TN	47077	2.60
HENRY	TN	47079	2.60
HICKMAN	TN	47081	2.60
HOUSTON	TN	47083	2.60
HUMPHREYS	TN	47085	2.60
JACKSON	TN	47087	2.60
JEFFERSON	TN	47089	2.80
JOHNSON	TN	47091	2.80
KNOX	TN	47093	2.80
LAKE	TN	47095	2.60
LAUDERDALE	TN	47097	2.60
LAWRENCE	TN	47099	2.80
LEWIS	TN	47101	2.60
LINCOLN	TN	47103	2.80
LOUDON	TN	47105	2.80
MACON	TN	47111	2.60
MADISON	TN	47113	2.60
MARION	TN	47115	2.80
MARSHALL	TN	47117	2.60
MAURY	TN	47119	2.60
MCMINN	TN	47107	2.80
MCNAIRY	TN	47109	2.80
MEIGS	TN	47121	2.80
MONROE	TN	47123	2.80
MONTGOMERY	TN	47125	2.60
MOORE	TN	47127	2.80
MORGAN	TN	47129	2.80
OBION	TN	47131	2.60
OVERTON	TN	47133	2.60
PERRY	TN	47135	2.60
PICKETT	TN	47137	2.60
POLK	TN	47139	2.80
PUTNAM	TN	47141	2.60
RHEA	TN	47143	2.80
ROANE	TN	47145	2.80
ROBERTSON	TN	47147	2.60
RUTHERFORD	TN	47149	2.60
SCOTT	TN	47151	2.80
SEQUATCHIE	TN	47153	2.80
SEVIER	TN	47155	2.80
SHELBY	TN	47157	2.80
SMITH	TN	47159	2.60
STEWART	TN	47161	2.60
SULLIVAN	TN	47163	2.80
SUMNER	TN	47165	2.60
TIPTON	TN	47167	2.80
TROUSDALE	TN	47169	2.60
UNICOI	TN	47171	2.80
UNION	TN	47173	2.80
VAN BUREN	TN	47175	2.60
WARREN	TN	47177	2.60
WASHINGTON	TN	47179	2.80
WAYNE	TN	47181	2.80
WEAKLEY	TN	47183	2.60
WHITE	TN	47185	2.60
WILLIAMSON	TN	47187	2.60
WILSON	TN	47189	2.60
ANDERSON	TX	48001	3.15
ANDREWS	TX	48003	2.40
ANGELINA	TX	48005	3.15

County/parish/city	State	FIPS code	Class I differential adjusted for location
ARANSAS	TX	48007	3.65
ARCHER	TX	48009	2.80
ARMSTRONG	TX	48011	2.40
ATASCOSA	TX	48013	3.45
AUSTIN	TX	48015	3.60
BAILEY	TX	48017	2.40
BANDERA	TX	48019	3.30
BASTROP	TX	48021	3.30
BAYLOR	TX	48023	2.60
BEE	TX	48025	3.65
BELL	TX	48027	3.15
BEXAR	TX	48029	3.45
BLANCO	TX	48031	3.30
BORDEN	TX	48033	2.40
BOSQUE	TX	48035	3.15
BOWIE	TX	48037	3.00
BRAZORIA	TX	48039	3.60
BRAZOS	TX	48041	3.30
BREWSTER	TX	48043	2.40
BRISCOE	TX	48045	2.40
BROOKS	TX	48047	3.65
BROWN	TX	48049	2.80
BURLESON	TX	48051	3.30
BURNET	TX	48053	3.30
CALDWELL	TX	48055	3.45
CALHOUN	TX	48057	3.65
CALLAHAN	TX	48059	2.80
CAMERON	TX	48061	3.65
CAMP	TX	48063	3.00
CARSON	TX	48065	2.40
CASS	TX	48067	3.00
CASTRO	TX	48069	2.40
CHAMBERS	TX	48071	3.60
CHEROKEE	TX	48073	3.15
CHILDRESS	TX	48075	2.40
CLAY	TX	48077	2.80
COCHRAN	TX	48079	2.40
COKE	TX	48081	2.60
COLEMAN	TX	48083	2.80
COLLIN	TX	48085	3.00
COLLINGSWORTH	TX	48087	2.40
COLORADO	TX	48089	3.60
COMAL	TX	48091	3.45
COMANCHE	TX	48093	2.80
CONCHO	TX	48095	2.80
COOKE	TX	48097	3.00
CORYELL	TX	48099	3.15
COTTLE	TX	48101	2.40
CRANE	TX	48103	2.40
CROCKETT	TX	48105	2.60
CROSBY	TX	48107	2.40
CULBERSON	TX	48109	2.40
DALLAM	TX	48111	2.40
DALLAS	TX	48113	3.00
DAWSON	TX	48115	2.40
DE WITT	TX	48123	3.60
DEAF SMITH	TX	48117	2.40
DELTA	TX	48119	3.00
DENTON	TX	48121	3.00
DICKENS	TX	48125	2.40
DIMMIT	TX	48127	3.45
DONLEY	TX	48129	2.40
DUVAL	TX	48131	3.65
EASTLAND	TX	48133	2.80
ECTOR	TX	48135	2.40
EDWARDS	TX	48137	2.80
EL PASO	TX	48141	2.25
ELLIS	TX	48139	3.00
ERATH	TX	48143	3.00
FALLS	TX	48145	3.15
FANNIN	TX	48147	3.00
FAYETTE	TX	48149	3.60

County/parish/city	State	FIPS code	Class I differential adjusted for location
FISHER	TX	48151	2.60
FLOYD	TX	48153	2.40
FOARD	TX	48155	2.60
FORT BEND	TX	48157	3.60
FRANKLIN	TX	48159	3.00
FREESTONE	TX	48161	3.15
FRIO	TX	48163	3.45
GAINES	TX	48165	2.40
GALVESTON	TX	48167	3.60
GARZA	TX	48169	2.40
GILLESPIE	TX	48171	3.30
GLASSCOCK	TX	48173	2.60
GOLIAD	TX	48175	3.65
GONZALES	TX	48177	3.45
GRAY	TX	48179	2.40
GRAYSON	TX	48181	3.00
GREGG	TX	48183	3.00
GRIMES	TX	48185	3.30
GUADALUPE	TX	48187	3.45
HALE	TX	48189	2.40
HALL	TX	48191	2.40
HAMILTON	TX	48193	3.15
HANSFORD	TX	48195	2.40
HARDEMAN	TX	48197	2.60
HARDIN	TX	48199	3.60
HARRIS	TX	48201	3.60
HARRISON	TX	48203	3.00
HARTLEY	TX	48205	2.40
HASKELL	TX	48207	2.60
HAYS	TX	48209	3.45
HEMPHILL	TX	48211	2.40
HENDERSON	TX	48213	3.00
HIDALGO	TX	48215	3.65
HILL	TX	48217	3.15
HOCKLEY	TX	48219	2.40
HOOD	TX	48221	3.00
HOPKINS	TX	48223	3.00
HOUSTON	TX	48225	3.15
HOWARD	TX	48227	2.40
HUDSPETH	TX	48229	2.25
HUNT	TX	48231	3.00
HUTCHINSON	TX	48233	2.40
IRION	TX	48235	2.60
JACK	TX	48237	2.80
JACKSON	TX	48239	3.60
JASPER	TX	48241	3.30
JEFF DAVIS	TX	48243	2.40
JEFFERSON	TX	48245	3.60
JIM HOGG	TX	48247	3.65
JIM WELLS	TX	48249	3.65
JOHNSON	TX	48251	3.00
JONES	TX	48253	2.60
KARNES	TX	48255	3.65
KAUFMAN	TX	48257	3.00
KENDALL	TX	48259	3.30
KENEDY	TX	48261	3.65
KENT	TX	48263	2.60
KERR	TX	48265	3.30
KIMBLE	TX	48267	2.80
KING	TX	48269	2.60
KINNEY	TX	48271	3.30
KLEBERG	TX	48273	3.65
KNOX	TX	48275	2.60
LA SALLE	TX	48283	3.45
LAMAR	TX	48277	3.00
LAMB	TX	48279	2.40
LAMPASAS	TX	48281	3.15
LAVACA	TX	48285	3.60
LEE	TX	48287	3.30
LEON	TX	48289	3.15
LIBERTY	TX	48291	3.60
LIMESTONE	TX	48293	3.15

County/parish/city	State	FIPS code	Class I differential adjusted for location
LIPSCOMB	TX	48295	2.40
LIVE OAK	TX	48297	3.65
LLANO	TX	48299	3.30
LOVING	TX	48301	2.40
LUBBOCK	TX	48303	2.40
LYNN	TX	48305	2.40
MADISON	TX	48313	3.30
MARION	TX	48315	3.00
MARTIN	TX	48317	2.40
MASON	TX	48319	2.80
MATAGORDA	TX	48321	3.60
MAVERICK	TX	48323	3.30
MCCULLOCH	TX	48307	2.80
MCLENNAN	TX	48309	3.15
MCMULLEN	TX	48311	3.45
MEDINA	TX	48325	3.30
MENARD	TX	48327	2.80
MIDLAND	TX	48329	2.40
MILAM	TX	48331	3.30
MILLS	TX	48333	2.80
MITCHELL	TX	48335	2.60
MONTAGUE	TX	48337	2.80
MONTGOMERY	TX	48339	3.60
MOORE	TX	48341	2.40
MORRIS	TX	48343	3.00
MOTLEY	TX	48345	2.40
NACOGDOCHES	TX	48347	3.15
NAVARRO	TX	48349	3.15
NEWTON	TX	48351	3.30
NOLAN	TX	48353	2.60
NUECES	TX	48355	3.65
OCHILTREE	TX	48357	2.40
OLDHAM	TX	48359	2.40
ORANGE	TX	48361	3.60
PALO PINTO	TX	48363	2.80
PANOLA	TX	48365	3.00
PARKER	TX	48367	3.00
PARMER	TX	48369	2.40
PECOS	TX	48371	2.40
POLK	TX	48373	3.30
POTTER	TX	48375	2.40
PRESIDIO	TX	48377	2.40
RAINS	TX	48379	3.00
RANDALL	TX	48381	2.40
REAGAN	TX	48383	2.60
REAL	TX	48385	3.30
RED RIVER	TX	48387	3.00
REEVES	TX	48389	2.40
REFUGIO	TX	48391	3.65
ROBERTS	TX	48393	2.40
ROBERTSON	TX	48395	3.30
ROCKWALL	TX	48397	3.00
RUNNELS	TX	48399	2.80
RUSK	TX	48401	3.00
SABINE	TX	48403	3.15
SAN AUGUSTINE	TX	48405	3.15
SAN JACINTO	TX	48407	3.30
SAN PATRICIO	TX	48409	3.65
SAN SABA	TX	48411	2.80
SCHLEICHER	TX	48413	2.80
SCURRY	TX	48415	2.60
SHACKELFORD	TX	48417	2.80
SHELBY	TX	48419	3.15
SHERMAN	TX	48421	2.40
SMITH	TX	48423	3.00
SOMERVELL	TX	48425	3.00
STARR	TX	48427	3.65
STEPHENS	TX	48429	2.80
STERLING	TX	48431	2.60
STONEWALL	TX	48433	2.60
SUTTON	TX	48435	2.80
SWISHER	TX	48437	2.40

County/parish/city	State	FIPS code	Class I differential adjusted for location
TARRANT	TX	48439	3.00
TAYLOR	TX	48441	2.60
TERRELL	TX	48443	2.60
TERRY	TX	48445	2.40
THROCKMORTON	TX	48447	2.80
TITUS	TX	48449	3.00
TOM GREEN	TX	48451	2.80
TRAVIS	TX	48453	3.30
TRINITY	TX	48455	3.30
TYLER	TX	48457	3.30
UPSHUR	TX	48459	3.00
UPTON	TX	48461	2.40
UVALDE	TX	48463	3.30
VAL VERDE	TX	48465	2.80
VAN ZANDT	TX	48467	3.00
VICTORIA	TX	48469	3.65
WALKER	TX	48471	3.30
WALLER	TX	48473	3.60
WARD	TX	48475	2.40
WASHINGTON	TX	48477	3.30
WEBB	TX	48479	3.45
WHARTON	TX	48481	3.60
WHEELER	TX	48483	2.40
WICHITA	TX	48485	2.80
WILBARGER	TX	48487	2.60
WILLACY	TX	48489	3.65
WILLIAMSON	TX	48491	3.30
WILSON	TX	48493	3.45
WINKLER	TX	48495	2.40
WISE	TX	48497	3.00
WOOD	TX	48499	3.00
YOAKUM	TX	48501	2.40
YOUNG	TX	48503	2.80
ZAPATA	TX	48505	3.65
ZAVALA	TX	48507	3.30
BEAVER	UT	49001	1.60
BOX ELDER	UT	49003	1.90
CACHE	UT	49005	1.90
CARBON	UT	49007	1.90
DAGGETT	UT	49009	1.90
DAVIS	UT	49011	1.90
DUCHESNE	UT	49013	1.90
EMERY	UT	49015	1.90
GARFIELD	UT	49017	1.60
GRAND	UT	49019	1.90
IRON	UT	49021	1.60
JUAB	UT	49023	1.90
KANE	UT	49025	1.60
MILLARD	UT	49027	1.90
MORGAN	UT	49029	1.90
PIUTE	UT	49031	1.60
RICH	UT	49033	1.90
SALT LAKE	UT	49035	1.90
SAN JUAN	UT	49037	1.60
SANPETE	UT	49039	1.90
SEVIER	UT	49041	1.90
SUMMIT	UT	49043	1.90
TOOELE	UT	49045	1.90
UINTAH	UT	49047	1.90
UTAH	UT	49049	1.90
WASATCH	UT	49051	1.90
WASHINGTON	UT	49053	1.60
WAYNE	UT	49055	1.60
WEBER	UT	49057	1.90
ACCOMACK	VA	51001	3.00
ALBEMARLE	VA	51003	2.80
ALEXANDRIA CITY	VA	51510	3.00
ALLEGHANY	VA	51005	2.80
AMELIA	VA	51007	3.10
AMHERST	VA	51009	2.80
APPOMATTOX	VA	51011	2.80
ARLINGTON	VA	51013	3.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
AUGUSTA	VA	51015	2.80
BATH	VA	51017	2.80
BEDFORD	VA	51019	2.80
BEDFORD CITY	VA	51515	2.80
BLAND	VA	51021	2.80
BOTETOURT	VA	51023	2.80
BRISTOL CITY	VA	51520	2.80
BRUNSWICK	VA	51025	3.10
BUCHANAN	VA	51027	2.80
BUCKINGHAM	VA	51029	2.80
BUENA VISTA CITY	VA	51530	2.80
CAMPBELL	VA	51031	2.80
CAROLINE	VA	51033	3.10
CARROLL	VA	51035	2.80
CHARLES CITY	VA	51036	3.10
CHARLOTTE	VA	51037	3.10
CHARLOTTESVILLE CITY	VA	51540	2.80
CHESAPEAKE CITY	VA	51550	3.20
CHESTERFIELD	VA	51041	3.10
CLARKE	VA	51043	2.80
CLIFTON FORGE CITY	VA	51560	2.80
COLONIAL HEIGHTS CITY	VA	51570	3.10
COVINGTON CITY	VA	51580	2.80
CRAIG	VA	51045	2.80
CULPEPER	VA	51047	2.80
CUMBERLAND	VA	51049	2.80
DANVILLE CITY	VA	51590	2.80
DICKENSON	VA	51051	2.80
DINWIDDIE	VA	51053	3.10
EMPORIA CITY	VA	51595	3.10
ESSEX	VA	51057	3.10
FAIRFAX	VA	51059	3.00
FAIRFAX CITY	VA	51600	3.00
FALLS CHURCH CITY	VA	51610	3.00
FAUQUIER	VA	51061	3.00
FLOYD	VA	51063	2.80
FLUVANNA	VA	51065	2.80
FRANKLIN	VA	51067	2.80
FRANKLIN CITY	VA	51620	3.10
FREDERICK	VA	51069	2.80
FREDERICKSBURG CITY	VA	51630	2.80
GALAX CITY	VA	51640	2.80
GILES	VA	51071	2.80
GLOUCESTER	VA	51073	3.20
GOOCHLAND	VA	51075	3.10
GRAYSON	VA	51077	2.80
GREENE	VA	51079	2.80
GREENSVILLE	VA	51081	3.10
HALIFAX	VA	51083	3.10
HAMPTON CITY	VA	51650	3.20
HANOVER	VA	51085	3.10
HARRISONBURG CITY	VA	51660	2.80
HENRICO	VA	51087	3.10
HENRY	VA	51089	2.80
HIGHLAND	VA	51091	2.80
HOPEWELL CITY	VA	51670	3.10
ISLE OF WIGHT	VA	51093	3.20
JAMES CITY	VA	51095	3.10
KING AND QUEEN	VA	51097	3.10
KING GEORGE	VA	51099	3.10
KING WILLIAM	VA	51101	3.10
LANCASTER	VA	51103	3.10
LEE	VA	51105	2.80
LEXINGTON CITY	VA	51678	2.80
LOUDOUN	VA	51107	3.00
LOUISA	VA	51109	2.80
LUNENBURG	VA	51111	3.10
LYNCHBURG CITY	VA	51680	2.80
MADISON	VA	51113	2.80
MANASSAS CITY	VA	51683	3.00

County/parish/city	State	FIPS code	Class I differential adjusted for location
MANASSAS PARK CITY	VA	51685	3.00
MARTINSVILLE CITY	VA	51690	2.80
MATHEWS	VA	51115	3.20
MECKLENBURG	VA	51117	3.10
MIDDLESEX	VA	51119	3.10
MONTGOMERY	VA	51121	2.80
NELSON	VA	51125	2.80
NEW KENT	VA	51127	3.10
NEWPORT NEWS CITY	VA	51700	3.20
NORFOLK CITY	VA	51710	3.20
NORTHAMPTON	VA	51131	3.00
NORTHUMBERLAND	VA	51133	3.10
NORTON CITY	VA	51720	2.80
NOTTOWAY	VA	51135	3.10
ORANGE	VA	51137	2.80
PAGE	VA	51139	2.80
PATRICK	VA	51141	2.80
PETERSBURG CITY	VA	51730	3.10
PITTSYLVANIA	VA	51143	2.80
POQUOSON CITY	VA	51735	3.20
PORTSMOUTH CITY	VA	51740	3.20
POWHATAN	VA	51145	3.10
PRINCE EDWARD	VA	51147	3.10
PRINCE GEORGE	VA	51149	3.10
PRINCE WILLIAM	VA	51153	3.00
PULASKI	VA	51155	2.80
RADFORD CITY	VA	51750	2.80
RAPPAHANNOCK	VA	51157	2.80
RICHMOND	VA	51159	3.10
RICHMOND CITY	VA	51760	3.10
ROANOKE	VA	51161	2.80
ROANOKE CITY	VA	51770	2.80
ROCKBRIDGE	VA	51163	2.80
ROCKINGHAM	VA	51165	2.80
RUSSELL	VA	51167	2.80
SALEM CITY	VA	51775	2.80
SCOTT	VA	51169	2.80
SHENANDOAH	VA	51171	2.80
SMYTH	VA	51173	2.80
SOUTHAMPTON	VA	51175	3.10
SPOTSYLVANIA	VA	51177	2.80
STAFFORD	VA	51179	3.00
STAUNTON CITY	VA	51790	2.80
SUFFOLK CITY	VA	51800	3.20
SURRY	VA	51181	3.10
SUSSEX	VA	51183	3.10
TAZEWELL	VA	51185	2.80
VIRGINIA BEACH CITY	VA	51810	3.20
WARREN	VA	51187	2.80
WASHINGTON	VA	51191	2.80
WAYNESBORO CITY	VA	51820	2.80
WESTMORELAND	VA	51193	3.10
WILLIAMSBURG CITY	VA	51830	3.10
WINCHESTER CITY	VA	51840	2.80
WISE	VA	51195	2.80
WYTHE	VA	51197	2.80
YORK	VA	51199	3.20
ADDISON	VT	50001	2.60
BENNINGTON	VT	50003	2.80
CALEDONIA	VT	50005	2.60
CHITTENDEN	VT	50007	2.60
ESSEX	VT	50009	2.60
FRANKLIN	VT	50011	2.40
GRAND ISLE	VT	50013	2.40
LAMOILLE	VT	50015	2.60
ORANGE	VT	50017	2.60
ORLEANS	VT	50019	2.40
RUTLAND	VT	50021	2.60
WASHINGTON	VT	50023	2.60
WINDHAM	VT	50025	2.80
WINDSOR	VT	50027	2.60
ADAMS	WA	53001	1.75

County/parish/city	State	FIPS code	Class I differential adjusted for location
ASOTIN	WA	53003	1.75
BENTON	WA	53005	1.75
CHELAN	WA	53007	1.75
CLALLAM	WA	53009	1.90
CLARK	WA	53011	1.90
COLUMBIA	WA	53013	1.75
COWLITZ	WA	53015	1.90
DOUGLAS	WA	53017	1.75
FERRY	WA	53019	1.90
FRANKLIN	WA	53021	1.75
GARFIELD	WA	53023	1.75
GRANT	WA	53025	1.75
GRAYS HARBOR	WA	53027	1.90
ISLAND	WA	53029	1.90
JEFFERSON	WA	53031	1.90
KING	WA	53033	1.90
KITSAP	WA	53035	1.90
KITTITAS	WA	53037	1.75
KLICKITAT	WA	53039	1.75
LEWIS	WA	53041	1.90
LINCOLN	WA	53043	1.90
MASON	WA	53045	1.90
OKANOGAN	WA	53047	1.75
PACIFIC	WA	53049	1.90
PEND OREILLE	WA	53051	1.90
PIERCE	WA	5303	1.90
SAN JUAN	WA	53055	1.90
SKAGIT	WA	53057	1.90
SKAMANIA	WA	53059	1.90
SNOHOMISH	WA	53061	1.90
SPOKANE	WA	53063	1.90
STEVENS	WA	53065	1.90
THURSTON	WA	53067	1.90
WAHKIAKUM	WA	53069	1.90
WALLA WALLA	WA	53071	1.75
WHATCOM	WA	53073	1.90
WHITMAN	WA	53075	1.90
YAKIMA	WA	53077	1.75
ADAMS	WI	55001	1.70
ASHLAND	WI	55003	1.70
BARRON	WI	55005	1.70
BAYFIELD	WI	55007	1.70
BROWN	WI	55009	1.75
BUFFALO	WI	55011	1.70
BURNETT	WI	55013	1.70
CALUMET	WI	55015	1.75
CHIPPEWA	WI	55017	1.70
CLARK	WI	55019	1.70
COLUMBIA	WI	55021	1.75
CRAWFORD	WI	55023	1.75
DANE	WI	55025	1.75
DODGE	WI	55027	1.75
DOOR	WI	55029	1.75
DOUGLAS	WI	55031	1.70
DUNN	WI	55033	1.70
EAU CLAIRE	WI	55035	1.70
FLORENCE	WI	55037	1.70
FOND DU LAC	WI	55039	1.75
FOREST	WI	55041	1.70
GRANT	WI	55043	1.75
GREEN	WI	55045	1.75
GREEN LAKE	WI	55047	1.70
IOWA	WI	55049	1.75
IRON	WI	55051	1.70
JACKSON	WI	55053	1.70
JEFFERSON	WI	55055	1.75
JUNEAU	WI	55057	1.70
KENOSHA	WI	55059	1.75
KEWAUNEE	WI	55061	1.75
LA CROSSE	WI	55063	1.70
LAFAYETTE	WI	55065	1.75
LANGLADE	WI	55067	1.70

County/parish/city	State	FIPS code	Class I differential adjusted for location
LINCOLN	WI	55069	1.70
MANITOWOC	WI	55071	1.75
MARATHON	WI	55073	1.70
MARINETTE	WI	55075	1.70
MARQUETTE	WI	55077	1.70
MENOMINEE	WI	55078	1.70
MILWAUKEE	WI	55079	1.75
MONROE	WI	55081	1.70
OCONTO	WI	55083	1.70
ONEIDA	WI	55085	1.70
OUTAGAMIE	WI	55087	1.75
OZAUKEE	WI	55089	1.75
PEPIN	WI	55091	1.70
PIERCE	WI	55093	1.70
POLK	WI	55095	1.70
PORTAGE	WI	55097	1.70
PRICE	WI	55099	1.70
RACINE	WI	55101	1.75
RICHLAND	WI	55103	1.75
ROCK	WI	55105	1.75
RUSK	WI	55107	1.70
SAUK	WI	55111	1.75
SAWYER	WI	55113	1.70
SHAWANO	WI	55115	1.70
SHEBOYGAN	WI	55117	1.75
ST. CROIX	WI	55109	1.70
TAYLOR	WI	55119	1.70
TREMPEALEAU	WI	55121	1.70
VERNON	WI	55123	1.75
VILAS	WI	55125	1.70
WALWORTH	WI	55127	1.75
WASHBURN	WI	55129	1.70
WASHINGTON	WI	55131	1.75
WAUKESHA	WI	55133	1.75
WAUPACA	WI	55135	1.75
WAUSHARA	WI	55137	1.70
WINNEBAGO	WI	55139	1.75
WOOD	WI	55141	1.70
BARBOUR	WV	54001	2.30
BERKELEY	WV	54003	2.60
BOONE	WV	54005	2.20
BRAXTON	WV	54007	2.20
BROOKE	WV	54009	2.10
CABELL	WV	54011	2.20
CALHOUN	WV	54013	2.20
CLAY	WV	54015	2.20
DODDRIDGE	WV	54017	2.10
FAYETTE	WV	54019	2.20
GILMER	WV	54021	2.20
GRANT	WV	54023	2.60
GREENBRIER	WV	54025	2.20
HAMPSHIRE	WV	54027	2.60
HANCOCK	WV	54029	2.10
HARDY	WV	54031	2.60
HARRISON	WV	54033	2.10
JACKSON	WV	54035	2.20
JEFFERSON	WV	54037	2.60
KANAWHA	WV	54039	2.20
LEWIS	WV	54041	2.10
LINCOLN	WV	54043	2.20
LOGAN	WV	54045	2.20
MARION	WV	54049	2.10
MARSHALL	WV	54051	2.10
MASON	WV	54053	2.20
MCDOWELL	WV	54047	2.80
MERCER	WV	54055	2.80
MINERAL	WV	54057	2.60
MINGO	WV	54059	2.20
MONONGALIA	WV	54061	2.10
MONROE	WV	54063	2.20
MORGAN	WV	54065	2.60
NICHOLAS	WV	54067	2.20

County/parish/city	State	FIPS code	Class I differential adjusted for location
OHIO	WV	54069	2.10
PENDLETON	WV	54071	2.60
PLEASANTS	WV	54073	2.20
POCAHONTAS	WV	54075	2.20
PRESTON	WV	54077	2.30
PUTNAM	WV	54079	2.20
RALEIGH	WV	54081	2.20
RANDOLPH	WV	54083	2.30
RITCHIE	WV	54085	2.20
ROANE	WV	54087	2.20
SUMMERS	WV	54089	2.20
TAYLOR	WV	54091	2.30
TUCKER	WV	54093	2.30
TYLER	WV	54095	2.10
UPSHUR	WV	54097	2.30
WAYNE	WV	54099	2.20
WEBSTER	WV	54101	2.20
WETZEL	WV	54103	2.10
WIRT	WV	54105	2.20
WOOD	WV	54107	2.20
WYOMING	WV	54109	2.20
ALBANY	WY	56001	1.90
BIG HORN	WY	56003	1.60
CAMPBELL	WY	56005	1.65
CARBON	WY	56007	1.90
CONVERSE	WY	56009	1.70
CROOK	WY	56011	1.65
FREMONT	WY	56013	1.60
GOSHEN	WY	56015	1.90
HOT SPRINGS	WY	56017	1.60
JOHNSON	WY	56019	1.65
LARAMIE	WY	56021	2.45
LINCOLN	WY	56023	1.60
NATRONA	WY	56025	1.70
NIOBRARA	WY	56027	1.70
PARK	WY	56029	1.60
PLATTE	WY	56031	1.90
SHERIDAN	WY	56033	1.60
SUBLETTE	WY	56035	1.60
SWEETWATER	WY	56037	1.90
TETON	WY	56039	1.60
UINTA	WY	56041	1.90
WASHAKIE	WY	56043	1.60
WESTON	WY	56045	1.70

Dated: December 8, 1999.

Enrique E. Figueroa,

Deputy Under Secretary, Marketing and Regulatory Programs.

[FR Doc. 99–32366 Filed 12–16–99; 8:45 am]

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federal register

Friday
December 17, 1999

Part IV

Department of Health and Human Services

Centers for Disease Control and Prevention

Instructions for Use of Vaccine Information Materials (Vaccine Information Statements); Revised Polio Vaccine Information Materials; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Instructions for Use of Vaccine Information Materials (Vaccine Information Statements); Revised Polio Vaccine Information Materials

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: Under the National Childhood Vaccine Injury Act (42 U.S.C. 300aa–26), the CDC must develop vaccine information materials that all health care providers, whether public or private, are required to distribute to patients/parents prior to administration of each dose of specific vaccines. On September 2, 1999, CDC published a notice in the **Federal Register** (64 FR 48238) seeking public comments on proposed revised vaccine information materials for polio vaccines. The polio materials are being revised so that they will conform with the CDC's revised recommendations for use of polio vaccines in the United States effective January 1, 2000, when the recommendation will be to use only inactivated poliovirus vaccine (IPV), except in very limited circumstances. The September 2 notice also sought public comments on proposed instructions for use of vaccine information materials. On September 29, 1999, CDC published an additional notice (64 FR 52596) seeking public comments on supplemental vaccine information materials for use when oral poliovirus vaccine (OPV) is proposed to be administered instead of inactivated poliovirus vaccine (IPV). The 60-day comment periods for the two notices ended on November 1, 1999 and November 29, 1999, respectively. Following review of the comments submitted and consultation as required under the law, CDC has finalized these vaccine information materials and instructions for use of vaccine information materials. The final materials and instructions are contained in this notice.

DATES: In order to conform with the revised CDC recommendations for use of polio vaccines effective January 1, 2000, the Instructions for Use of Vaccine Information Materials (Vaccine Information Statements) and revised polio vaccine information materials contained in this notice are effective January 1, 2000.

FOR FURTHER INFORMATION CONTACT: Walter A. Orenstein, M.D., Director, National Immunization Program, Centers for Disease Control and Prevention, Mailstop E–05, 1600 Clifton Road, NE, Atlanta, Georgia 30333, (404) 639–8200.

SUPPLEMENTARY INFORMATION: The National Childhood Vaccine Injury Act of 1986 (Pub. L. 99–660), as amended by section 708 of Public Law 103–183, added section 2126 to the Public Health Service Act. Section 2126, codified at 42 U.S.C. 300aa–26, requires the Secretary of Health and Human Services to develop and disseminate vaccine information materials for distribution by all health care providers, both public and private, to any patient (or to the parent or legal representative in the case of a child) receiving vaccines covered under the National Vaccine Injury Compensation Program.

Development and revision of the vaccine information materials have been delegated by the Secretary to the Centers for Disease Control and Prevention (CDC). Section 2126 requires that the materials be developed, or revised, after notice to the public, with a 60-day comment period, and in consultation with the Advisory Commission on Childhood Vaccines, appropriate health care provider and parent organizations, and the Food and Drug Administration. The law also requires that the information contained in the materials be based on available data and information, be presented in understandable terms, and include:

(1) A concise description of the benefits of the vaccine,

(2) A concise description of the risks associated with the vaccine,

(3) A statement of the availability of the National Vaccine Injury Compensation Program, and

(4) Such other relevant information as may be determined by the Secretary.

The vaccines initially covered under the National Vaccine Injury Compensation Program were diphtheria, tetanus, pertussis, measles, mumps, rubella, and poliomyelitis vaccines. Since April 15, 1992, any health care provider who intends to administer one of the covered vaccines is required to provide copies of the relevant vaccine information materials prior to administration of any of these vaccines. Effective June 1, 1999, health care providers were also required to provide copies of vaccine information materials for the following vaccines that have recently been added to the National Vaccine Injury Compensation Program: hepatitis B, *Haemophilus influenzae* type b (Hib), and varicella (chickenpox) vaccines.

Revised Recommendations for Use of Polio Vaccines

Progress continues toward the goal of world-wide eradication of poliomyelitis in the year 2000. As the risk of polio infection has diminished, recommendations for use of polio vaccines in the United States have changed significantly during the last few years to move away from exclusive use of oral poliovirus vaccine (OPV) toward exclusive use of inactivated poliovirus vaccine (IPV) and toward an ultimate goal of being able to cease polio vaccination.

In February 1997 the CDC, in accepting the advice of its Advisory Committee on Immunization Practices (ACIP), revised its recommendation from a schedule of all OPV to a recommended sequential schedule of two doses of IPV followed by two doses of OPV as the preferred polio vaccination schedule for routine childhood immunization. At that time, schedules using either all IPV or all OPV were also considered to be acceptable and preferred for some children in certain circumstances.

The CDC noted in a February 6, 1997, **Federal Register** notice (62 FR 5696) that the recommended schedules for polio immunization were expected to change further over time:

''The ACIP based their revised recommendations on a determination that the risk-benefit ratio associated with the exclusive use of OPV for routine immunization has changed because of rapid progress in global polio eradication efforts. In particular, the relative benefits of OPV to the United States population have diminished because of the elimination of wild-virus-associated poliomyelitis in the Western Hemisphere and the reduced threat of poliovirus importation into the United States. The risk for vaccine-associated poliomyelitis caused by OPV is now judged less acceptable because of the diminished risk for wild-virus-associated disease. Consequently, the ACIP recommended a transition policy that will increase use of IPV and decrease use of OPV during the next 3–5 years. Implementation of these recommendations should reduce the risk for vaccine-associated paralytic poliomyelitis and facilitate a transition to exclusive use of IPV following further progress in global polio eradication.''

Noting further progress toward global eradication of wild poliovirus and ongoing concern regarding the vaccine-associated paralytic poliomyelitis (VAPP) risks associated with administration of OPV vaccine prior to receipt of doses of IPV, the ACIP, at its

meeting on October 22, 1998, voted to further revise its recommendation for administration of the two polio vaccines to discourage use of OPV vaccine for the first two doses, except in limited circumstances. (Interim polio vaccine information materials reflecting this revised recommendation were published by the CDC in the **Federal Register** at 64 FR 9040, February 23, 1999.)

And then, at its meeting on June 16, 1999, the ACIP voted to recommend an all IPV schedule as of January 1, 2000, stating:

''An all IPV schedule is recommended for routine childhood polio immunization as of January 1, 2000. All children will need to receive four doses of IPV at 2, 4, 6–18 months and 4–6 years of age.

''OPV is acceptable only for the following special circumstances:

(1) Mass immunization campaigns to control outbreaks due to wild-type poliovirus;

(2) Unimmunized children where travel to polio-endemic areas is imminent (*i.e.* in less than four weeks) may receive OPV for the first dose;

(3) Children of parents who do not accept the recommended number of vaccine injections may receive OPV only for dose 3 or 4 or both. (OPV should be administered only after discussion of the risks of VAPP.)

''Limited availability of OPV is expected in the near future in the U.S.''

The CDC has adopted these recommendations. In addition, CDC accepts use of OPV when the vaccinee has a life-threatening allergy to any component of IPV.

Therefore, the vaccine information materials covering polio vaccines must be revised to conform with CDC's revised recommendations for use of polio vaccines in the United States effective January 1, 2000.

Development of Revised Polio Vaccine Information Materials and Instructions for Use of Vaccine Information Materials

The CDC has revised the vaccine information materials covering polio vaccines in accordance with the procedures mandated under 42 U.S.C. 300aa–26. On September 2, 1999, CDC published a notice in the **Federal Register** (64 FR 48238) seeking public comments on proposed revised vaccine information materials for use when administering polio vaccines. The September 2 notice also sought public comments on proposed instructions for use of vaccine information materials. On September 29, 1999, CDC published an additional notice (64 FR 52596) seeking public comments on supplemental vaccine information materials for use when oral poliovirus vaccine (OPV) is proposed to be administered instead of inactivated poliovirus vaccine (IPV). The 60-day comment periods for the two notices ended on November 1, 1999 and November 29, 1999, respectively. Few comments were received on the proposed revised polio vaccine information materials. No comments were received on the proposed instructions for use of vaccine information materials.

As required by the statute, CDC has also consulted with various groups, including the Advisory Commission on Childhood Vaccines, Food and Drug Administration, American Academy of Pediatrics, American Medical Association, American Pharmaceutical Association, Every Child by Two, Immunization Action Coalition, Infectious Disease Society of America, Informed Parents against VAPP, National Association of Pediatric Nurse Associates and Practitioners, National Coalition for Adult Immunization, National Coalition of Hispanic Health and Human Services Organizations (COSSMHO), National Vaccine Advisory Committee, and the National Vaccine Injury Compensation Program. Also, CDC provided copies of the draft materials to other organizations and sought their consultation; however, those organizations did not provide comments. Comments provided by the consultants, along with the comments submitted in response to the September 2 and 29 **Federal Register** notices, were fully considered in revising the polio vaccine information materials.

Following consultation and review of comments submitted, the revised polio vaccine information materials, including OPV supplemental materials, have been finalized and are contained in this notice. They are entitled ''Polio Vaccine: What You Need to Know'' and ''Oral Polio Vaccine: What You Need to Know.''

In addition, the ''Instructions for Use of Vaccine Information Materials (Vaccine Information Statements)'' have been finalized and are contained in this notice. The instructions are identical to those proposed in the September 2 **Federal Register** notice, except that the final instructions have been revised (1) to note the initial date use of each vaccine's materials was required, (2) to clarify that patients/parents must be given copies of the materials to keep, and (3) to clarify use of the polio and supplemental OPV vaccine information materials. The instructions specify the effective date for mandated use of each vaccine's information materials, note when the materials must be provided, delineate the edition dates of the current materials, specify recordkeeping requirements, and include other related information.

Instructions for Use of Vaccine Information Materials (Vaccine Information Statements) Required Use

As required under the National Childhood Vaccine Injury Act (42 U.S.C. 300aa–26), all health care providers in the United States who administer any vaccine containing diphtheria*, tetanus*, pertussis*, measles*, mumps*, rubella*, polio*, hepatitis B†, *Haemophilus influenzae* type b (Hib)†, or varicella (chickenpox)† vaccine shall, prior to administration of each dose of the vaccine, provide a copy to keep of the relevant current edition vaccine information materials that have been produced by the Centers for Disease Control and Prevention (CDC):

(a) To the parent or legal representative of any child to whom the provider intends to administer such vaccine, and

(b) To any adult to whom the provider intends to administer such vaccine.

The materials shall be supplemented with visual presentations or oral explanations, as appropriate.

''Legal representative'' is defined as a parent or other individual who is qualified under State law to consent to the immunization of a minor.

Additional Recommended Use of Materials

Health care providers may also want to give parents copies of all vaccine information materials prior to the first visit for immunization, such as at the first well baby visit.

Use of Revised Polio Vaccine Information Materials

Effective January 1, 2000, a health care provider prior to administering any polio vaccine (whether inactivated poliovirus vaccine (IPV) or oral poliovirus vaccine (OPV)) shall give the patient (or in the case of a child, the parent or legal representative) a copy of the vaccine information materials dated January 1, 2000, titled ''Polio Vaccine: What You Need to Know'' in place of the February 1, 1999 and February 6, 1997 versions of the polio materials. In addition, if the health care provider intends to administer OPV, such person shall also be given a copy of the OPV supplemental vaccine information materials dated January 1, 2000, titled

* Effective 4/15/92.

† Effective 6/1/99.

''Oral Polio Vaccine: What You Need to Know.''

Current Editions of Other Vaccine Information Materials

Diphtheria, Tetanus, Pertussis (DTP/DTaP/DT) Vaccine Information Materials, dated August 15, 1997.
Tetanus, Diphtheria (Td) Vaccine Information Materials, dated June 10, 1994.
Measles, Mumps, Rubella Vaccine Information Materials, dated December 16, 1998.
Hepatitis B Vaccine Information Materials, dated December 16, 1998.
Haemophilus influenzae type b (Hib) Vaccine Information Materials, dated December 16, 1998.
Varicella (chickenpox) Vaccine Information Materials, dated December 16, 1998.

Recordkeeping

Health care providers shall make a notation in each patient's permanent medical record at the time vaccine information materials are provided indicating (1) the edition date of the materials distributed and (2) the date these materials were provided.

This recordkeeping requirement supplements the requirement of 42 U.S.C. 300aa–25 that all health care providers administering these vaccines must record in the patient's permanent medical record (or in a permanent office log) the name, address and title of the individual who administers the vaccine, the date of administration and the vaccine manufacturer and lot number of the vaccine used.

Applicability of State Law

Health care providers should consult their legal counsel to determine additional State requirements pertaining to immunization. The Federal requirement to provide the vaccine information materials supplements any applicable State law.

Availability of Copies

Single camera-ready copies of the vaccine information materials are available from State health departments. Copies are also available on the Centers for Disease Control and Prevention's website at: http://www.cdc.gov/nip/publications/VIS/. Copies are available in English and in other languages.

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List of Contact Telephone Numbers for Copies of Vaccine Information Materials

Single camera-ready copies of the vaccine information materials, and copies of the instructions for their use, are available by calling the telephone number listed below for your location:

Alabama—(334) 206–5023
Alaska—(907) 269–8000
American Samoa—011–684–633–4606
Arizona—(602) 230–5855
Arkansas—(501) 661–2962
California—(510) 540–2065
Los Angeles—(213) 580–9800
Colorado—(303) 692–2669
Connecticut—(860) 509–7929
Delaware—(302) 739–4746
Florida—(850) 245–4342
Georgia—(404) 657–3158
Guam—011–671–735–7143
Hawaii—(808) 586–8330
Idaho—(208) 334–5931
Illinois—(217) 785–1455
Chicago—(312) 746–6050
Indian Health Service—(505) 248–4226
Indiana—(317) 233–7704
Iowa—(515) 281–4917
Kansas—(785) 296–5591
Kentucky—(502) 564–4478
Louisiana—(504) 483–1900
Maine—(207) 287–3746
Mariana Islands—011–670–234–8950, ext. 2001
Marshall Islands—011–692–625–3480
Maryland—(410) 767–6030
Massachusetts—(617) 983–6800
Michigan—(517) 335–8159
Detroit—(313) 876–4606
Micronesia—011–691–320–2619
Minnesota—(612) 676–5100
Mississippi—(601) 576–7751
Missouri—(573) 751–6133
Montana—(406) 444–0065
Nebraska—(402) 471–6423
Nevada—(775) 684–5900
New Hampshire—(603) 271–4482
New Jersey—(609) 588–7512
New Mexico—(505) 827–2369
New York State—(518) 473–4437
New York City—(212) 676–2293
North Carolina—(919) 733–7752
North Dakota—(701) 328–2378
Ohio—(614) 466–4643
Oklahoma—(405) 271–4073
Oregon—(503) 731–4020
Palau—011–160–680–1757
Pennsylvania—(717) 787–5681
Philadelphia—(215) 685–6749
Puerto Rico—(787) 274–5612
Rhode Island—(401) 222–4603
South Carolina—(803) 898–0460
South Dakota—(605) 773–3737
Tennessee—(615) 741–7343
Texas—(512) 458–7284
Houston—(713) 794–9267
San Antonio—(210) 207–8794
Utah—(801) 538–9450
Vermont—(802) 863–7638
Virgin Islands—(340) 776–8311, ext. 2151
Virginia—(804) 786–6246 or 6247
Washington, D.C.—(202) 576–7130
Washington—(360) 664–8688
West Virginia—(304) 558–2188
Wisconsin—(608) 266–2346
Wyoming—(307) 777–6001

Copies of the vaccine information materials and instructions for their use also can be downloaded from the CDC website at: http://www.cdc.gov/nip/publications/VIS/.

Polio Vaccine: What You Need To Know

1. What Is Polio?

Polio is a disease caused by a virus. It enters a child's (or adult's) body through the mouth. Sometimes it does not cause serious illness. But sometimes it causes paralysis (can't move arm or leg). It can kill people who get it, usually by paralyzing the muscles that help them breathe. Polio used to be very common in the United States. It paralyzed and killed thousands of people a year before we had a vaccine for it.

2. Why Get Vaccinated?

Inactivated Polio Vaccine (IPV) can prevent polio.

History: A 1916 polio epidemic in the United States killed 6,000 people and paralyzed 27,000 more. In the early 1950's there were more than 20,000 cases of polio each year. Polio vaccination was begun in 1955. By 1960, the number of cases had dropped to about 3,000, and by 1979 there were only about 10. The success of polio vaccination in the U.S. and other countries sparked a world-wide effort to eliminate polio.

Today: No wild polio has been reported in the United States for over 20 years. But the disease is still common in some parts of the world. It would only take one case of polio from another country to bring the disease back if we were not protected by vaccine. If the effort to eliminate the disease from the world is successful, some day we won't need polio vaccine.

Until then, we need to keep getting our children vaccinated.

Oral Polio Vaccine: No Longer Recommended

There are two kinds of polio vaccine: IPV, which is the shot recommended in the United States today, and a live, oral polio vaccine (OPV), which is drops that are swallowed.

Until recently OPV was recommended for most children in the United States. OPV helped us rid the country of polio, and it is still used in many parts of the world.

Both vaccines give immunity to polio, but OPV is better at keeping the disease from spreading to other people. However, for a few people (about one in 2.4 million), OPV actually causes polio. Since the risk of getting polio in the United States is now extremely low, experts believe that using oral polio

vaccine is no longer worth the slight risk, except in limited circumstances which your doctor can describe. The polio shot (IPV) does not cause polio.

If you or your child will be getting OPV, ask for a copy of the OPV supplemental Vaccine Information Statement.

3. Who Should Get Polio Vaccine and When?

IPV is a shot, given in the leg or arm, depending on age. Polio vaccine may be given at the same time as other vaccines.

Children

Most people should get polio vaccine when they are children. Children get 4 doses of IPV, at these ages:

✔ A dose at 2 months
✔ A dose at 4 months
✔ A dose at 6–18 months
✔ A booster dose at 4–6 years

Adults

Most adults do not need polio vaccine because they were already vaccinated as children. But three groups of adults are at higher risk and should consider polio vaccination: (1) People traveling to areas of the world where polio is common, (2) laboratory workers who might handle polio virus, and (3) health care workers treating patients who could have polio.

Adults in these three groups who have never been vaccinated against polio should get 3 doses of IPV:

✔ The first dose at any time,
✔ The second dose 1 to 2 months later,
✔ The third dose 6 to 12 months after the second.

Adults in these three groups who have had 1 or 2 doses of polio vaccine in the past should get the remaining 1 or 2 doses. It doesn't matter how long it has been since the earlier dose(s). Adults in these three groups who have had 3 or more doses of polio vaccine (either IPV or OPV) in the past may get a booster dose of IPV. Ask your health care provider for more information.

4. Some People Should Not Get IPV or Should Wait

These people should not get IPV:

• Anyone who has ever had a life-threatening allergic reaction to the drugs neomycin, streptomycin or polymyxin B should not get the polio shot.

• Anyone who has a severe allergic reaction to a polio shot should not get another one.

These people should wait:

• Anyone who is moderately or severely ill at the time the shot is scheduled should usually wait until they recover before getting polio vaccine. People with minor illnesses, such as a cold, may be vaccinated.

Ask your health care provider for more information.

5. What Are the Risks From IPV?

Some people who get IPV get a sore spot where the shot was given. The vaccine used today has never been known to cause any serious problems, and most people don't have any problems at all with it.

However, a vaccine, like any medicine, could cause serious problems, such as a severe allergic reaction. The risk of a polio shot causing serious harm, or death, is extremely small.

6. What if There Is a Serious Reaction?

What should I look for?

Look for any unusual condition, such as a serious allergic reaction, high fever, or unusual behavior.

If a serious allergic reaction occurred, it would happen within a few minutes to a few hours after the shot. Signs of a serious allergic reaction can include: Difficulty breathing, weakness, hoarseness or wheezing, a fast heart beat, hives, dizziness, paleness, or swelling of the throat.

What should I do?

• Call a doctor, or get the person to a doctor right away.

• Tell your doctor what happened, the date and time it happened, and when the vaccination was given.

• Ask your doctor, nurse, or health department to file a Vaccine Adverse Event Reporting System (VAERS) form, or call the VAERS toll-free number yourself at 1–800–822–7967. Reporting reactions helps experts learn about possible problems with vaccines.

7. The National Vaccine Injury Compensation Program

In the rare event that you or your child has a serious reaction to a vaccine, there is a federal program that can help pay for the care of those who have been harmed.

For details about the National Vaccine Injury Compensation Program, call 1–800–338–2382 or visit the program's website at http://www.hrsa.gov/bhpr/vicp.

8. How Can I Learn More?

• Ask your doctor or nurse. They can give you the vaccine package insert or suggest other sources of information.

• Call your local or state health department's immunization program.

• Contact the Centers for Disease Control and Prevention (CDC):

—Call 1–800–232–2522 (English)
—Call 1–800–232–0233 (Espanol)
—Visit the National Immunization Program's website at http://www.cdc.gov/nip

U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, National Immunization Program, Vaccine Information Statement, Polio (1/1/2000),

42 U.S.C. 300aa–26

Oral Polio Vaccine: What You Need To Know

1. What Is Polio?

Polio is a disease caused by a virus. It enters a child's (or adult's) body through the mouth. Sometimes it does not cause serious illness. But sometimes it causes paralysis (can't move arm or leg). It can kill people who get it, usually by paralyzing the muscles that help them breathe.

Polio used to be very common in the United States. It paralyzed and killed thousands of people a year before we had a vaccine for it.

2. Why Get Vaccinated?

Polio vaccine can prevent polio.

History: A 1916 polio epidemic in the United States killed 6,000 people and paralyzed 27,000 more. In the early 1950's there were more than 20,000 cases of polio each year. Polio vaccination was begun in 1955. By 1960 the number of cases had dropped to about 3,000, and by 1979 there were only about 10. The success of polio vaccination in the U.S. and other countries sparked a world-wide effort to eliminate polio.

Today: No wild polio has been reported in the United States for over 20 years. But the disease is still common in some parts of the world. It would only take one case of polio from another country to bring the disease back if we were not protected by vaccine. If the effort to eliminate the disease from the world is successful, some day we won't need polio vaccine.

Until then, we need to keep getting our children vaccinated.

3. Two Types of Polio Vaccine

There are two types of polio vaccine:

IPV (Inactivated Polio Vaccine): A shot.

IPV is the recommended polio vaccine for almost everyone in the United States.

OPV (Oral Polio Vaccine): Drops, by mouth.

Until recently, OPV was recommended for most children in the United States. But it is no longer recommended, except in limited circumstances. OPV helped us rid the country of polio, and it is still used in many parts of the world.

Both vaccines give immunity to polio, but OPV is better at keeping the disease

from spreading to other people. However, for a few people (about one in 2.4 million), OPV actually causes polio. Since the risk of getting polio in this country is now extremely low, experts believe that using oral vaccine is no longer worth the slight risk. The polio shot we now use (IPV) does not cause polio.

This Vaccine Information Statement supplement is about Oral Polio Vaccine (OPV). Your health care provider should also give you the Vaccine Information Statement for inactivated polio vaccine (IPV).

4. Who Should Get OPV and When?

OPV is no longer recommended for routine use in the United States. It should be used only in certain circumstances:

(1) Mass immunization campaigns to control polio outbreaks;

(2) Children who have never gotten any polio vaccine who plan to travel within 4 weeks to countries where polio is common. These children may get OPV for the first dose;

(3) Children whose parents do not accept the recommended number of injections. These children should get IPV for the first two doses of the polio vaccine series, but may get OPV for the 3rd or 4th dose, or both;

(4) People with a life-threatening allergy to the antibiotics neomycin, streptomycin, or polymyxin B, or people who have had a life-threatening allergic reaction to a dose of IPV. These people may get OPV instead.

If you or your child is in one of these 4 groups, ask your health care provider when the vaccine should be given. Also, ask about the risks of vaccine-associated polio before getting OPV.

OPV may be given at the same time as other vaccines.

5. Some People Should Not Get OPV or Should Wait

These people should not get OPV:

- Anyone who is taking long-term steroids or any other drug that affects the immune system.
- Anyone who has cancer or is getting chemotherapy.
- Anyone who has AIDS or HIV infection, or another disease that affects the immune system.
- If anyone in these three groups will be changing a child's diapers or be in close contact with a child getting polio vaccine, that child should not get OPV.
- A baby should not get OPV if someone who will be in close contact with the baby (for instance changing diapers) has never had any kind of polio vaccine.
- Anyone who has had a severe allergic reaction to a dose of OPV should not get another dose.

These people should wait:

- Anyone who is moderately or severely ill at the time the immunization is scheduled should usually wait until they recover before getting OPV. People with minor illnesses, such as a cold, may be immunized.

Ask your health care provider for more information.

6. What Are the Risks From Oral Polio Vaccine (OPV)?

OPV can, rarely, actually cause polio. This is why it is no longer recommended for most people. It caused several cases of polio each year (about 1 case for every 2.4 million doses of vaccine) during the years it was used. OPV can cause polio in people who get the vaccine or in people who are in close contact with them. Today, with polio under control in the U.S., experts believe IPV can protect children and adults just as well, without the risk.

A vaccine, like any medicine, could cause other serious problems, such as a severe allergic reaction. The risk of OPV causing serious harm, or death, is extremely small.

7. What if There Is a Serious Reaction?

What should I look for?

Look for any unusual condition, such as a serious allergic reaction, high fever, unusual behavior, or signs of weakness or paralysis.

If a serious allergic reaction occurred, it would happen within a few minutes to a few hours after the shot. Signs of a serious allergic reaction can include: Difficulty breathing, weakness, hoarseness or wheezing, a fast heart beat, hives, dizziness, paleness, or swelling of the throat.

If paralysis were to occur, it could happen from about a week to about a month after the vaccination. Symptoms might include:

—Severe muscle aches and spasms
—Weakness
—Loss of movement in an arm or leg

What Should I Do?

- Call a doctor, or get the person to a doctor right away.
- Tell your doctor what happened, the date and time it happened, and when the vaccination was given.
- Ask your doctor, nurse, or health department to file a Vaccine Adverse Event Reporting System (VAERS) form, or call the VAERS toll-free number yourself at 1–800–822–7967. Reporting reactions helps experts learn about possible problems with vaccines.

8. The National Vaccine Injury Compensation Program

In the rare event that you or your child has a serious reaction to a vaccine, there is a federal program that can help pay for the care of those who have been harmed.

For details about the National Vaccine Injury Compensation Program, call 1–800–338–2382 or visit the program's website at http://www.hrsa.gov/bhpr/vicp.

9. How Can I Learn More?

- Ask your doctor or nurse. They can give you the vaccine package insert or suggest other sources of information.
- Call your local or state health department's immunization program.
- Contact the Centers for Disease Control and Prevention (CDC):

—Call 1–800–232–2522 (English)
—Call 1–800–232–0233 (Espanol)
—Visit the National Immunization Program's website at http://www.cdc.gov/nip

U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, National Immunization Program, Vaccine Information Statement, Polio—OPV Supplement (1/1/2000),

42 U.S.C. 300aa–26.

Jeffrey P. Koplan,

Director, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99–32571 Filed 12–16–99; 8:45 am]

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Friday
December 17, 1999

Part V

Department of Agriculture

Food and Nutrition Service

7 CFR Parts 272 and 273

Food Stamp Program: Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996; Proposed Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 272 and 273

RIN 0584–AC39

Food Stamp Program: Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed Rule.

SUMMARY: This rulemaking proposes to amend Food Stamp Program regulations to implement 13 specific sections of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that add new eligibility requirements, increase existing penalties for failure to comply with Program rules, and establish a time limit for food stamp participation of three months in three years for able-bodied adults without children who are not working. The Department's proposals would: prohibit an increase in food stamp benefits when a household's income is reduced because of either a penalty imposed under a Federal, State, or local means-tested public assistance program for failure to perform a required action or for an act of fraud; allow State agencies to disqualify an individual from participation in the Program if the individual is disqualified from another means-tested program for failure to perform an action required by that program; allow State agencies to sanction Program households if they are sanctioned under TANF for failure to ensure their minor children attend school, or if the adults do not have (or are not working toward attaining) a secondary school diploma or its equivalent; make individuals convicted of drug-related felonies ineligible for food stamps; make fleeing felons and probation and parole violators ineligible for food stamps; require States to provide households' addresses, social security numbers, or photographs to law enforcement officers to assist them in locating fugitive felons or probation or parole violators; allow States to require food stamp recipients to cooperate with child support agencies as a condition of food stamp eligibility; allow states to disqualify individuals who are in arrears in court-ordered child support payments; double the penalties for violating Program requirements; permanently disqualify individuals convicted of trafficking in food stamp benefits of $500 or more; make individuals ineligible for 10 years if they misrepresent their identity or residence in order to receive multiple Program benefits; and limit the Program participation of most able-bodied adults without dependents to three months in a three-year period during times the individual is not working or participating in a work program.

DATES: Comments must be received on or before February 15, 2000 to be assured of consideration.

ADDRESSES: Comments should be submitted to Margaret Werts Batko, Assistant Branch Chief, Certification Policy Branch, Program Development Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302, (703) 305–2516. Comments may also be faxed to the attention of Ms. Batko at (703) 305–2486. The Internet address is: Margaret.Batko@FNS.USDA.GOV. All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia 22302, Room 720.

FOR FURTHER INFORMATION CONTACT: Questions regarding the proposed rulemaking should be addressed to Margaret Werts Batko at the above address or by telephone at (703) 305–2516.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been determined to be economically significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

Executive Order 12372

The Food Stamp Program (Program) is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR 3015, Subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "EFFECTIVE DATE" paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Shirley R. Watkins, Under Secretary, Food, Nutrition, and Consumer Services, has certified that this rule will not have a significant economic impact or affect a substantial number of small entities. State and local welfare agencies will be the most affected to the extent that they administer the Program.

Paperwork Reduction Act

The information collection burden associated with the proposed provisions in this rule concerning eligibility, certification, and continued eligibility of food stamp recipients (OMB No. 0584–0064) was published in the **Federal Register** for public comment on January 5, 1999, Volume 64, No. 2, Page 472. The information collection burden associated with the request for a waiver under the food stamp time limit is approved under OMB No. 0584–0479. The information collection burden that is associated with proposed provisions in this rule which affect the regulations at 7 CFR 273.16, the Demand Letter for Over Issuance, is approved under OMB 0584–0492.

In accordance with the Paperwork Reduction Act of 1995, the Food and Nutrition Service is submitting for public comment the change in the information collection burden that would result from the adoption of the proposals in the rule associated with the State Plan of Operations.

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and the information to be collected; and (c) ways to 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.

Send comments and requests for copies of this information collection to Margaret Werts Batko, Assistant Branch

Chief, Certification Policy Branch, Program Development Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302, (703) 305–2516. Comments may also be faxed to the attention of Ms. Batko, at (703) 305–2486. The Internet address is Margaret.Batko@FNS.USDA.GOV.

Comments and recommendations on the proposed information collection must be received by February 15, 2000.

Title: State Plan of Operations.

OMB Number: 0584–0083.

Expiration Date: December 1998—Emergency reinstatement has been requested.

Type of Request: Expired/Revision of currently approved collection.

Abstract: The regulations at 7 CFR 272.2 require that State agencies plan and budget program operations and establish objectives for each year. State agencies submit these plans to the regional offices for review and approval. This rulemaking is proposing to amend Part 7 CFR 272.2(d) of the Food Stamp Program Regulations to require State agencies who opt to implement certain provisions of the PRWORA to include these options in the State Plan of Operation. The optional provisions that must be included in the State Plan of Operation are: school attendance, secondary school diploma, comparable disqualifications, custodial and non-custodial parents, cooperation with child support enforcement agencies, disqualification for child support arrears. The regulations at 7 CFR 272.2(f) require that State agencies only have to provide FNS with changes to these plans as they occur. Since these options are newly provided for by PRWORA, State agencies who choose these options must include it in their State Plan of Operations this year, and any subsequent year only if there are changes. Four States have opted to sanction households if the adult fails to ensure children attend school; 13 States have opted to implement comparable disqualifications; 7 States have opted to disqualify individuals who fail to cooperate with child support agencies; 3 States have opted to disqualify individuals if they are in arrears on child support; 7 States have opted to not increase benefits if the household does not comply with requirements of other federally means tested benefits. No State has opted to disqualify adults who have not attained a secondary school diploma.

Number of Additional Respondents: 34.

Estimated Number of Responses per Respondent: A one time burden of one response per State agency.

Estimate of Burden: The additional public reporting burden for this proposed collection of information is estimated to average an additional .25 hours per response.

Estimated Total Annual Burden on Respondents: An additional one time burden of 8.5 hours.

Unfunded Mandate Reform Act of 1995 (UMRA) Title II of UMRA establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, FCS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FCS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This notice contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of $100 or more in any one year. This rule is, therefore, not subject to the requirements of Sections 202 and 205 of the UMRA.

Civil Rights Impact Analysis

FNS has reviewed this proposed rule in accordance with the Department Regulation 4300–4, ''Civil Rights Impact Analysis'' to identify and address any major civil rights impacts the proposed rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of food stamp households and individual participants, FNS has determined that there is no way to soften their effect on any of the protected classes. FNS has no discretion in implementing many of these changes. The changes required to be implemented by law have been implemented.

All data available to FNS indicate that protected individuals have the same opportunity to participate in the Food Stamp Program as non-protected individuals. FNS specifically prohibits the State and local government agencies that administer the program from engaging in actions that discriminate based on race, color, national origin, gender, age, disability, marital or family status. Regulations at 7 CFR 272.6 specifically state that ''State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs. Discrimination in any aspect of program administration is prohibited by these regulations, the Food Stamp Act, the Age Discrimination Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 93–112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15.'' Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6

Regulatory Impact Analysis

Need for Action

This action is needed to implement 13 sections of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, and would: (1) prohibit an increase in food stamp benefits when a household's income is reduced because of a penalty imposed under a Federal, State, or local means-tested public assistance program for failure to perform a required action; (2) prohibit an increase in food stamp benefits when a household's income is reduced because of a penalty imposed under a Federal, State, or local means-tested public assistance program for an act of fraud; (3) allow states to disqualify an individual from Program participation if the individual is disqualified from another means-tested program for failure to perform an action required by that program; (4) allow State agencies to sanction households if minor children are not attending school, or if the adults do not have (or are not working toward attaining) a secondary school diploma or its equivalent; (5) make individuals convicted of drug-related felonies ineligible to receive food stamps; (6) make fleeing felons and probation and parole violators ineligible to receive food stamps; (7) require States to provide households' addresses, social security numbers, or photographs to law enforcement officers to assist them in locating fugitive felons or probation or parole violators; (8) allow States to require food stamp recipients to cooperate with child support agencies as a condition of food stamp eligibility;

(9) allow States to disqualify individuals who are in arrears in court-ordered child support payments; (10) double existing penalties for violating Program requirements; (11) permanently disqualify individuals convicted of trafficking in food stamp benefits of $500 or more; (12) make individuals ineligible for 10 years if they misrepresent their identity or residence in order to receive multiple food stamp benefits; and (13) limit the Program participation of most able-bodied adults without dependents to three months in a three-year period during times the individual is not working or participating in a work program.

Benefits

State agencies will benefit from this rule to the extent that it allows States to implement provisions that will encourage personal responsibility and promote self-sufficiency.

Costs

The changes in food stamp requirements made by the provisions addressed in this rule would reduce Program costs for FY 1999–2003 by approximately $2.090 billion. For FY 1999–2003, the estimated yearly savings are (in millions) $615, $515, $395, $290, $275, respectively. The majority of the savings are realized from Section 824, time limited benefits for able-bodied adults without dependents. Smaller savings are realized from the following provisions: Section 819, comparable disqualifications; Section 822, cooperation with child support agencies; Section 823, disqualifications for child support arrears; and Section 829 and 911, no increase in benefits. The savings from the remaining provisions in the rule are negligible, and therefore, will not be discussed in this analysis.

Section 824—Time Limits for Able-Bodied Adults without Dependents—This provision limits the receipt of food stamps for certain able-bodied adults without dependents (ABAWDs) to 3-months in a 36 month period unless the individual is either working or participating in an approved work or work training program for at least 20 hours per week. Individuals are exempt from the time limit if they are under 18 or over 50, medically certified as physically or mentally unfit for employment, a parent or other household member with responsibility for a dependent child, or exempt from work registration under 6(d)(2) of the Act, or pregnant. Individuals can regain eligibility if they work 80 hours in a 30 day period, and they maintain eligibility as long as they are satisfying the work requirement. If individuals later lose their job, they can receive an additional 3 months of food stamps while not working. The additional 3 months must be consecutive, and begins on the date the individual notifies the State that he/she is no longer working. The law allows waivers of the time limit for groups of individuals living in areas with an unemployment rate of more than 10 percent or where there are not a ''sufficient number of jobs to provide employment for the individuals.''

This provision affects participants to the extent they are able-bodied adults without dependents and to the extent they are not fulfilling the work requirement, exempt or covered by a waiver. We estimate that 412,000 individuals will reach the time limit in FY 1999 due to this provision. We estimate that in FY 2000–2003 the number of individuals reaching the time limit will be (in thousands) 331, 239, 160, and 140 respectively. We estimate that the FY 1999–2003 cost savings from this provision will be (in millions) $585, $485, $360, $250, $225. We estimate that the five-year cost savings for FY 1999 through FY 2003 will be $1.905 billion. These estimates do not take into account any changes in the treatment of ABAWDs resulting from the subsequent Balanced Budget Act of 1997 or Agricultural Research, Extension, and Education Reform Act of 1998.

The caseload estimates were generated by identifying those participants in the 1996 food stamp quality control data who are ABAWDs, expressing the able-bodied population as a percentage of the total Food Stamp caseload, and separating out to the extent possible those participants who were exempt from the work requirements. Further adjustments were made to account for the estimated size of the able-bodied population living in areas that had been granted 10 percent unemployment and insufficient jobs waivers (in 1999 approximately 35 percent of the ABAWD caseload have been estimated to live in waived areas and are exempt from the work requirement), and the number of able-bodied who might retain eligibility either through work or an approved work or training program. About 315,000 people in 1999 have been estimated to be ABAWDs who live in a waived area and will not run into the time limit. Cost estimates were then derived by multiplying the appropriate caseload estimates by the average benefit for a single able-bodied Food Stamp recipient over the course of one year.

Subsequent to the passage of this law, the Balanced Budget Act of 1997 and the Agricultural Research Extension, and Education Reform Act of 1998 (Agricultural Research Act) modified the ABAWD provisions of PRWORA. The Balanced Budget Act increased funding to the Food Stamp Employment and Training Program to allow states to create qualifying work opportunities to help ABAWDs retain their Food Stamp eligibility, and permitted states to exempt up to 15 percent of their unwaived able-bodied caseload from the time limits. The Agricultural Research Act further modified the level of funding for Employment and Training Programs for ABAWDs. Taken together both of these laws will likely mitigate the effects of the ABAWD provisions of PRWORA. The effects of these more recent laws will be addressed in future rulemaking.

Section 822—Cooperation With Child Support Agencies—This provision allows States to require cooperation with child support agencies as a condition of food stamp eligibility. The provision is optional and can be waived for the custodial parent for good cause but not for the non-custodial parent. This provision affects participants to the extent States choose to implement this provision and to the extent they are a custodial or non-custodial parent with child support responsibilities and do not cooperate with child support agencies. We estimate the number of recipients affected by this provision in FY 1999–2003 will be (in thousands) 76, 92, 105, 119, 132 respectively. We estimate the cost savings from this provision in FY 1999–2003 will be (in millions) $15, $15, $15, $20, $25, respectively. We estimate the total cost savings for the 5-year period of FY 1999–2003 will be $90 million.

Custodial Parents

We estimate that in FY 1999 approximately 4,000 custodial parents will be disqualified due to sanctions for noncompliance and 68,000 custodial parents will have their benefits slightly reduced due to compliance and increased child support income as a result of this provision. We estimate the FY 1999 cost savings for the custodial parents to be $10 million and the five-year cost savings for FY 1999 through FY 2003 to be $60 million.

Because food stamp households receiving public assistance are already mandated to cooperate with child support agencies, the impact of this provision is expected to be realized among food stamp-only custodial-parent households. Based on the February 1995 FNS report, Participation in the Child Support Enforcement Program Among Non-AFDC Food Stamp Households,

food stamp-only custodial households with child support needs that are not cooperating with the child support agencies account for roughly 2.8 percent of all participating food stamp households. According to the report, the response of these custodial parents to this provision was assumed to fall into three categories: (1) those that comply and receive higher child support payments; (2) those that do not comply and face sanctions, and; (3) those that opt to leave food stamps rather than comply.

First, in the 1995 report, custodial parents choosing to comply with the provision were found to account for approximately 8.5 percent of food stamp benefits and were expected to experience a decline in food stamp benefits of 2.0 percent as a result of higher child support payments. Savings from this group was calculated as the proportion of total food stamp benefits contributed to this group (8.5 percent) times the expected decline of 2.0 percent (0.085 times 0.02 = .00170 or 0.17 percent).

Second, to estimate the cost for households which are sanctioned for noncompliance, the report indicated that food stamp-only custodial households accounted for 7.0 percent of all food stamp households, and that approximately 2.1 percent of such households would choose to be sanctioned rather than comply with the provision. The total number of participating households was calculated by dividing a participation projection (21,638,000 persons) by the average household size from 1996 food stamp quality control data (2.5 persons). The monthly benefit reduction for those sanctioned and leaving food stamps rather than comply was estimated to be the difference between the maximum allotment for a family of four and the maximum allotment for a family of three (difference = $87). The savings for this group was calculated as the product of total households, the proportion which are food stamp-only custodial households (7.0 percent), the proportion choosing to be sanctioned rather than comply with the provision (2.1 percent), and the annual value of the sanction (e.g., in FY 1999, 8,655 households times 7 percent times 2.1 percent times $87 times 12 months).

Third, the 1995 report indicated that of food stamp-only custodial households, 3.8 percent were expected to leave the Food Stamp Program rather than comply with the provision. The estimate of savings from the group of custodial parents choosing to leave food stamps rather than comply was calculated as the product of the number of total food stamp households, the proportion which are food stamp-only custodial households (7.0 percent), the proportion choosing to leave food stamps rather than comply (3.8 percent), and the annual value of the household benefit reduction (e.g., in FY 1999, 8,655 households times 7 percent times 3.8 percent times $87 times 12 months).

The three group impacts were summed and the estimate was adjusted pursuant to assumptions regarding the proportion of food stamp recipients in States choosing to adopt this optional provision—10 percent in FY 1997 and growing to 20 percent by FY 2003. State option data were based on the May 1998 FNS report, State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50–State Survey. Seven States reported having adopted this optional provision as of the end of calendar year 1997: Idaho, Kansas, Maine, Michigan, Mississippi, Ohio and Wisconsin. According to 1996 food stamp quality control data, these seven States account for approximately 10 percent of applicable food stamp households.

The estimate of the number of custodial parents disqualified for food stamp benefits from this provision (4,000 people) was calculated as the total unrounded savings ($4.5 million) attributable to the second and third groups of custodial parents—those continuing to not cooperate with child support agencies—divided by the annual value of their sanction ($87 times 12 months).

The estimate of the number of custodial parents receiving reduced benefits as a result of complying with this provision and receiving increased child support income (68,000 persons) was calculated as the difference between the total number of custodial parents affected by the provision (72,000 persons) and those being disqualified for noncompliance (4,000 people). The total number of custodial parents affected was estimated as the total target population of the provision—2.8 percent of all households according to the 1995 report—times the projected number of participants from the FY 1999 budget baseline, times the State option phase-in assumptions.

Non-Custodial Parents

We estimate that approximately 4,000 non-custodial parents will be disqualified by this provision in FY 1999. We estimate the FY 1999 cost savings for non-custodial parents to be $5 million and the five-year cost savings for FY 1999 through FY 2003 to be $30 million.

Estimates of the savings attributable to the non-custodial parents in this provision are based on information from a 1995 report, Non-custodial Fathers: Can They Afford to Pay More Child Support, by Elaine Sorenson at the Urban Institute. Data on non-custodial parents is extremely limited and this was the best available information. The number of non-custodial parents not cooperating with child support was estimated to be more than 78,000 in 1990. This estimate was based on the reported 5.9 million fathers in 1990 who were not paying support, adjusted by 75 percent to account for those at low-income levels, times the proportion estimated to represent non-custodial fathers receiving food stamps who had no child support order—a proxy for non-cooperation (1.77 percent which is derived from the 1995 Urban Institute report) [5.9 million times 0.75 times 0.0177 = 78,323]. The estimate of the number of non-custodial parents not cooperating with their child support agency was inflated by 1.5 percent annually to account for growth in the child support system. This inflation factor is consistent with information from the Department of Health and Human Services on the child support system. The savings were estimated as the product of the number of non-custodial parents not cooperating and an estimated average food stamp benefit per person ($76.41 per month times 88,891 persons times 12 months).

The savings estimate for non-custodial parents was adjusted for the proportion of households in States choosing to adopt this optional provision and assumptions regarding the percent of non-cooperating non-custodial parents States are able to identify and sanction. The State option assumptions were based on the May 1998 FNS report, State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50–State Survey. Three States reported having adopted this provision at the end of calendar year 1997: Maine, Mississippi, and Wisconsin. According to 1996 quality control data, these three States account for roughly 5 percent of all applicable households. Therefore the savings estimate in FY 1997 assumes only these States implement this child support provision, thereby effecting 5 percent of all households that could be subject to this provision, and further assumes a gradual expansion of the States selecting this option so that 10 percent of all households are subject to this provision by FY 2003. The estimate was adjusted further based on the assumption that, operating at maximum effectiveness,

States would only be able to correctly identify and sanction 75 percent of applicable offenders.

The estimate of the number of non-custodial parents disqualified for food stamp benefits from this provision was calculated as the total unrounded savings from non-custodial parents ($3.668 million) divided by an estimated average annual food stamp benefit ($916.92 = $76.41 times 12 months).

Summing together the estimates for both custodial and non-custodial parents, we estimate that 8,000 people will be disqualified as a result of complying and receiving additional income from child support in FY 1999. 68,000 custodial parents will have benefits reduced due to higher amounts of child support income as a result of this provision. We estimate the FY 1999 cost savings to be $15 million and the five-year cost savings for FY 1999 through FY 2003 to be $90 million.

Section 823—Disqualification for Child Support Arrears: This provision allows States to disqualify individuals for any month during which they are delinquent in any court-ordered child support payment. This provision is optional. This provision affects participants to the extent States choose to implement this provision and to the extent they have court-ordered child support responsibilities and they are delinquent in their payments. We estimate that approximately 3,000 persons will be disqualified as a result of this provision in FY 1999. We estimate the FY 1999 cost savings to be $5 million and the five-year cost savings for FY 1999 through FY 2003 to be $25 million.

The estimate of savings for this provision was based on the 1995 report, Non-Custodial Fathers: Can They Afford to Pay More Child Support, by Elaine Sorenson at the Urban Institute. There were an estimated 825,000 custodial mothers participating in the child support system (in IV–D programs) with child support orders not receiving support in 1990. It was assumed that for every custodial mother with an order and without support, there was a non-custodial father in arrears. Estimating that almost 7 percent (the national average of 1 in 14 Americans receiving food stamps) of them were receiving food stamp benefits, it was calculated that in 1990 there were more than 56,000 non-custodial fathers receiving food stamps who were in arrears for court-ordered child support. This number was inflated by 1.5 percent per year to reflect growth in the child support system, consistent with information from the Department of Health and Human Services. The estimate of savings for this provision was based on an estimated average monthly benefit per person ($76.41). The total savings was calculated as the product of the number of non-custodial fathers in arrears for child support times the annual benefits they would lose due to disqualification (64,883 people times $76.41 per month times 12 months).

This product was adjusted for assumptions regarding the proportion of food stamp households in States choosing to implement this provision and the State's ability to identify and sanction the appropriate individuals. The State option assumptions were based on the May 1998 FNS report, State Food Stamp Choices Under Welfare Reform: Findings of 1997 50–State Survey, indicating that three States reported operating this provision at the end of 1997: Ohio, Oklahoma and Wisconsin. According to 1996 food stamp quality control data, these three States account for approximately 5 percent of all applicable households. The savings estimate was adjusted to reflect that 5 percent of the States would implement this provision in FY 1997, growing to 10 percent by FY 2003. The estimate was adjusted further based on the assumption that, operating at maximum effectiveness, States would only be able to correctly identify and sanction 75 percent of applicable offenders. In FY 1999, for example, the savings was calculated by taking the product of the 5 percent state phase-in and the assumption of 75 percent cooperation and multiplying it by the total savings. The estimate of the number of individuals disqualified for food stamp benefits from this provision was calculated as the total unrounded savings ($2,667,000) divided by an estimated average annual food stamp benefit ($916.92).

Section 829 and 911—No Increase for Penalties in Other Programs—Section 829 provides that if a household's benefits are reduced under a Federal, State, or local means-tested public assistance program for failure to perform a required action, the household may not receive an increased food stamp allotment as a result of the decrease in income due to the reduced public assistance payment. This applies to both intentional and unintentional failures to take a required action. In addition to not increasing allotments, States may reduce the Food Stamp allotment by up to 25 percent. Section 911 prohibits an increase in food stamp benefits as the result of a decrease in Federal, State, or local means-tested assistance benefits because of fraud. Participants will be affected by these provisions to the extent their benefits are reduced for failure to perform a required action or for fraud. The effect of the provisions also depends on the cooperation of other programs in notifying the food stamp agency. We estimate approximately 6,000 participants will be affected by these provisions in FY 1999. We estimate that in FY 1999–2003 the number of recipients affected by this provision will be (in thousands) 6,6,6,7,7 respectively. We estimate the cost savings for FY 1999–2003 to be (in millions) $5, $5, $10, $10, $10. We estimate the five-year cost savings for FY 1999 through FY 2003 to be $25 million.

Food stamp savings from these provisions results from two sources: (1) a mandatory prohibition on increasing food stamp benefits when individuals receive lower benefits in other means-tested programs for failure to comply with a required action, and (2) an optional provision to decrease food stamp benefits by no more than 25 percent.

The estimate for savings from the mandatory prohibition on increasing benefits was based on the Department of Health and Human Services' Administration for Children and Families data regarding the average number of people sanctioned monthly from the JOBS program in May 1994. This serves as a proxy for the number of individuals that receive reduced benefits from a means-tested program for failure to perform a required action or for fraud, and is the best available data. (Data on fraud in other programs is unavailable.) There were almost 13,000 monthly first sanctions, 1,876 monthly second sanctions and 375 monthly third sanctions. First sanctions were assumed to result in instant compliance and therefore last zero months in duration. This assumption is based on 1994 information from the Department of Health and Human Service, Administration on Children and Families (ACF). ACF does not have any more recent information. Second sanctions were assumed to have an average duration of three months and third sanctions were assumed to have an average duration of six months. The savings from the mandatory prohibition on increasing food stamp benefits was calculated as the sum of the products of the number of individuals sanctioned, the average AFDC benefit lost times the FSP benefit reduction rate of 30 percent, and the duration of the sanction. The average AFDC benefit reduction was taken from the average AFDC benefit per person reported in the 1996 Green Book and inflated over time. [(1,876 monthly second sanctions times 12 months times

the average AFDC benefit lost which equals $143 times 30 percent FSP benefit reduction times 3 months) plus (375 monthly third sanctions times 12 months times the average AFDC benefit lost which equals $143 times 30 percent FSP benefit reduction times 6 months)]

The estimate for savings from the State option to decrease food stamp benefits by no more than 25 percent was based on an estimated average monthly food stamp benefit per person and the JOBS sanction data. The savings was calculated as the product of the number of individuals sanctioned, 25 percent of the average food stamp benefit per person and the duration of the sanction. This estimate was adjusted to account for the proportion of food stamp households in States expected to exercise this optional provision—10 percent in 1997 and growing to 20 percent by 2003. This was based on information provided in the May 1998 FNS report, State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50-State Survey. Seven States reported having adopted this optional provision at the end of 1997: Connecticut, Iowa, Kentucky, Michigan, Mississippi, Montana and Tennessee. According to 1996 food stamp quality control data, these seven States account for approximately 10 percent of all food stamp cash assistance households.

The savings estimates for the mandatory and optional portions of the provisions were summed. The estimate of the number of individuals receiving a reduction in food stamp benefits due to these provisions was calculated as the total unrounded savings divided by an estimated average annual food stamp benefit. [(1,876 monthly second sanctions times 12 months times the average AFDC benefit lost which equals $143 times 30 percent FSP benefit reduction times 3 months) plus (375 monthly third sanctions times 12 months times the average AFDC benefit lost which equals $143 times 30 percent FSP benefit reduction times 6 months) plus the sum of (1,876 times 12 months times the average FSP benefit per AFDC household which equals $259.96 times .25 reduction times 3 months) and (375 times the average FSP benefit per AFDC household which equals $259.96 times .25 reduction times 6 months)]

Background

On August 26, 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, (PRWORA), was enacted. PRWORA amended the Food Stamp Act of 1977 7 U.S.C. 2011, *et seq.* (The Act), by adding new Food Stamp Program (the Program) eligibility requirements, increasing existing penalties for failure to comply with Program rules, and establishing a time limit for Program participation of three months in three years for able-bodied adults without children who are not working. Thirteen sections of the PRWORA are addressed in this rulemaking. State agencies were required to implement most of these provisions upon enactment for applicant households and at recertification of participant households. Some of these provisions were required to be implemented at dates of enactment, and those instances are discussed below. The requirements of each provision are discussed below.

The Department is proposing to codify many of the new provisions in 7 CFR 273.11, ''Action on Households with Special Circumstances''. The proposed new or increased penalties will amend 7 CFR 273.16. Because of the complexity of the new food stamp time limit for able-bodied adults, the Department is proposing to add a new regulatory section to codify these requirements, 7 CFR 273.24. The discussion below follows this organizational structure.

7 CFR 273.11—Action on Households with Special Circumstances

Ban on Increased Benefits for Failure to Take Required Action or Fraud—7 CFR 273.11(k)

Current regulations at 7 CFR 273.11(k) provide that a State agency shall not increase food stamp benefits when benefits received under another means-tested Federal, State or local welfare or public assistance program have been decreased due to an intentional failure to comply with a requirement of the program that imposed the benefit decrease. This provision does not apply in the case of individuals or households subject to a food stamp work sanction imposed under 7 CFR 273.7(g)(2). If the other program will not cooperate in providing information sufficient to enforce 7 CFR 273.11(k), the State agency is not held responsible for noncompliance as long as the State agency has made a good faith effort to obtain the information.

Section 829 of PRWORA amended Section 8(d) of the Act, 7 U.S.C. 2017(d), to provide that if the benefits of a household are reduced under a Federal, State, or local law relating to a means-tested public assistance program for the failure of a person to perform an action required under the law or program the household may not receive an increased allotment as the result of that decrease, and the State agency may reduce the household's food stamp allotment by not more than 25 percent. This provision applies whether or not the act leading to the decrease in benefits was intentional. The prohibition on increasing food stamp benefits is applicable for the duration of the reduction imposed by the other program. If the reduction is the result of a failure to perform an action required under part A of title IV of the Social Security Act, 42 U.S.C. 601, *et seq.* (Temporary Assistance for Needy Families (TANF)), the State agency may use the rules and procedures that apply under part A of title IV to reduce the food stamp allotment.

The Department proposes to amend 7 CFR 273.11(k)(1) to provide that a ''means-tested public assistance program'' for purposes of the restriction imposed by Section 829 of PRWORA shall include any public or assisted housing under Title I of the United States Housing Act of 1937, any State program funded under part A of Title IV of the Social Security Act, and any program for the aged, blind, or disabled under Titles I, X, XIV, or XVI of the Social Security Act, and State and local general assistance as defined in 7 CFR 271.2. Title XIX was not included because Medicaid benefits are not counted as income for food stamp purposes. The Department also proposes that ''reduced'' will mean decreased, suspended, or terminated.

The Department would like to point out that the requirement of the assistance program does not have to be comparable to a food stamp program requirement.

The Department plans to retain the current requirement at 7 CFR 273.11(k) which provides that this restriction must be applied to all applicable cases. In addition, the Department proposes to retain the current provision that if a State agency is not successful in obtaining the necessary cooperation from another Federal, State or local means-tested welfare or public assistance program to enable it to comply with the requirements of this provision, the State agency shall not be held responsible for noncompliance as long as the State agency has made a good faith effort to obtain the information. However, the Department expects the State agency to act on information that it has available, such as information on TANF participants. The Department proposes that the State agency obtain information about sanctions and changes in those sanctions directly from the assistance programs and not rely on the households to provide the information. This may be done through computerized listings or other means. The Department

does not propose changing the reporting requirements for households.

The Department proposes that the restriction imposed by Section 829 only apply if assistance benefits are reduced for failure of a member of a household to perform an action required under a Federal, State, or local law relating to a means-tested public assistance program if the person was receiving such assistance at the time the reduction was imposed. In other words, the prohibition imposed by Section 829 would not apply to a failure to take an action at the time of initial application for an assistance program. If the person was not already participating, benefits could not be ''reduced.'' With the following exceptions, this provision would apply to reductions imposed during the period benefits were originally authorized by the other program and to reductions imposed at the time of application for continued benefits if there is no break in participation. The Department does not consider reaching a time limit for time-limited benefits or having a child that is not eligible because of a family cap as failures to perform an action required by an assistance program. The person or persons simply no longer meet the eligibility criteria for assistance. Further, the Department does not intend this provision to apply to purely procedural requirements such as failure to submit a monthly report or failure to reapply for assistance.

The Department is proposing that the household member does not have to be certified for food stamps at the time of the failure to perform a required action for this provision to apply. If a reduction in the assistance benefits is in force at the time of the food stamp application, food stamp benefits would be computed in a manner that would prevent a higher food stamp allotment as a result of the failure to take the required action.

The Department proposes to give States flexibility in determining how to prevent an increase in food stamp benefits. For example, the State may compute the exact amount of assistance the household would have received each month but for the penalty. Or, the State may determine the amount of the decrease at the time it was first imposed and attribute that amount as additional assistance without regard to other changes in household circumstances for the duration of the penalty. For example, a household's original grant is reduced by $50. No matter what the grant is in subsequent months, the State will increase it by $50 to find out what the grant should have been. As an alternative, the State agency may increase the actual assistance received on an individual case basis by the same percentage as the original reduction. For example, if the original grant of $100 is reduced by 25 percent to $75, no matter what the grant is in subsequent months, the State agency will increase it by 25 percent to find out what the grant should have been. Finally, instead of computing each reduction on an individual case-by-case basis, the State agency may choose to increase the assistance grant of all households that fail to perform a required action by the same flat percent, not to exceed 25 percent. For example, for all households that fail to perform a required action, no matter what their actual individual percentage decrease is, the State agency may choose to increase everyone's actual assistance grant by 25 percent.

Section 8(d)(1)(A) of the Act, as amended by Section 829 of PRWORA, provides that the household may not receive an increase in food stamp benefits and Section (8)(d)(1)(B) provides that State agencies may reduce the food stamp allotments by not more than 25 percent. The Department interprets these sections to mean that the State agency must prevent an increase in food stamp benefits and, in addition, it may reduce the food stamp allotment by up to 25 percent. If the State agency opts, under the flexibility discussed in the preceding paragraph, to use a flat percentage to prevent an increase in food stamp benefits for all households that contain a member who failed to take a required action, the Department believes that that percentage should also not be more than 25 percent.

If a percentage is computed for an individual case, the percentage must be applied to the assistance payment before any amount is recouped to repay a prior assistance overissuance. Likewise, if a percentage is used as a standard measure of reduction, it must be applied to the food stamp allotment before any amount is recouped to repay a prior food stamp overissuance.

Section 829 of the PRWORA also amended Section 8(d)(2) of the Act to provide that if benefits are reduced for a failure of an individual to perform an action required under a program under Title IV–A of the Social Security Act (TANF), the State agency may use the TANF rules and procedures to reduce the food stamp allotments. Under the TANF program, households are sometimes sanctioned for 30 percent of the grant. The Department interprets the reference to use of TANF rules and procedures to apply only to procedural aspects such as budgeting procedures and combined notices and hearings. The Department does not interpret it as allowing a percentage reduction greater than 25 percent even though the TANF reduction may be more than 25 percent.

A number of States have expressed concern about indefinite and permanent penalties. An indefinite penalty may occur, for example, when a person is determined to be ineligible for a particular program for 2 months or until he or she complies with a certain requirement. In some cases the person may not reapply for the other assistance program or may not be given an opportunity to cure the violation because they may become ineligible for some other reason, such as having children reach the age of 18. Also, some assistance programs only keep records for a limited time and may be unable to provide the food stamp office with the information necessary to enable it to prohibit an increase in food stamp benefits. The Department believes that a stricter penalty should not be imposed for a failure to perform a required action in another program than the penalty imposed for the first time a person commits an intentional food stamp program violation. In most cases the penalty for the first food stamp violation is a 1-year disqualification. Therefore, if the other assistance program assigns a disqualification period of longer than one year or an indefinite or permanent disqualification period, the Department proposes that that the maximum length of the food stamp disqualification under Section 8(d) of the Act be no more than one year. Further, the Department proposes that the State agency be allowed to shorten the disqualification period to less than one year if the State becomes aware that the person would be ineligible for assistance for some other reason.

If an individual fails to perform a required action in a State or local assistance program, and the individual moves within the State, the Department proposes that the disqualification goes with that person, but that it be terminated if the person is ineligible for the assistance program for some other reason or if the individual moves out of State. If an individual fails to perform a required action in a Federal program, and the individual moves, either interstate or intrastate, the Department is proposing that the State verify the status and continue the disqualification if appropriate.

The introductory paragraph of 7 CFR 273.11(k) currently provides in part that the prohibition on increasing food stamp benefits does not apply in the case of individuals or households subject to the food stamp work sanction imposed pursuant to 7 CFR 273.7(g)(2).

Some State agencies have advised that this provision is confusing and difficult to administer, especially when another program's penalty is for a longer period of time. For example, a person could have a 2-month food stamp disqualification and a 6-month TANF disqualification for the same violation. The question is should the person be disqualified for food stamp purposes for 2 months and at the same time have an amount attributed as income as the result of the TANF reduction or should the person be disqualified for 2 months and then have an amount attributed as income for the remaining 4 months in order to prevent an increase in benefits as the result of the TANF decrease. The law provides for both a disqualification for food stamp purposes and prohibits an increase in food stamp benefits for the duration of the reduction in the other assistance program. Therefore, the Department is proposing that the person be disqualified for food stamp purposes and the State agency prohibit an increase in food stamps as the result of the reduction in assistance for the duration of the reduction in assistance even if there is some overlap. In the example presented, if the amount of the TANF reduction was $20, the person could be disqualified from receiving food stamps for June and July and $20 could be added to the household's TANF income for June through November. The Department believes that States should be able to take both actions against the household simultaneously since both programs are affected by the violation. This proposal will also simplify the program and allow the State to use TANF procedures. Accordingly, the Department is proposing to remove the sentence from the regulations that provides that 7 CFR 273.11(k) shall not apply in the case of individuals or households subject to a food stamp work sanction.

As amended by Section 829 of PRWORA, Section 8(d) of the Act provides that food stamp benefits cannot be increased as a result of a decrease in the another assistance program ''for the duration of the reduction.'' The Department interprets this to mean that the prohibition on increasing benefits must be for the same months as the decrease in assistance to the extent possible, even if there is a break in participation. If the penalty cannot be imposed during the first month or months of the penalty in the other program because of notice of adverse action time frames, the prohibition on increasing food stamp benefits shall apply to the remainder of the assistance sanction period. If a sanction is imposed, and the other program subsequently lifts the sanction (for example, the person takes the required action), the food stamp prohibition on increasing benefits must be lifted when the food stamp office becomes aware of this.

The Department would like to emphasize that during the disqualification the State agency must act on changes that would affect the household's benefits which are not related to the assistance violation. For example, if the household's earned income decreases and the TANF grant is increased because of this, the food stamp office must take the decrease in earned income and the increase in the assistance payment into account for food stamp purposes.

In accordance with the above discussion, the Department is proposing to revise 7 CFR 273.11(k) in its entirety.

The current regulations at 7 CFR 273.9(b)(5)(i) exclude from income moneys withheld from an assistance payment, earned income or other income source, or moneys received from any source which are voluntarily or involuntarily returned, to repay a prior overpayment received from that income source, provided that the overpayment was not from income that was excludable. The Department is proposing to revise this paragraph so that the total amount of welfare or public assistance, rather than the total amount minus the repayment amount, is counted as income for food stamps purposes when the overissuance was caused by the household. To count the net amount of assistance would result in a household getting more food stamps in the month of repayment. For example, if the amount of the authorized assistance grant was $400, but the household will only receive $350 because $50 is going to be recouped to repay a prior overpayment caused by the household, food stamp benefits would be based on $400. To base food stamp benefits on $350 would result in an increase in food stamps for that month as the result of a failure of a member of the household to take a required action.

Prohibition on Increasing Benefits as the Result of Fraud

Section 911 of PRWORA provides that if an individual's benefits under a Federal, State, or local law relating to a means-tested welfare or a public assistance program are reduced because of an act of fraud by the individual under the law or program, the individual may not, for the duration of the reduction, receive increased food stamp benefits as a result of a decrease in income attributable to such reduction. We believes that cases of fraud will involve a failure to take a required action in another program, e.g. failure to provide complete and accurate information, and, therefore, it is not necessary to distinguish between fraud and other program violations.

The provision prohibiting an increase due to fraud is similar to the provision prohibiting an increase due to a failure to perform a required action except that in the case of fraud the statute does not reference the use of TANF procedures nor an additional percentage penalty. The Department is proposing to allow the use of TANF procedures for TANF fraud cases including the optional additional percentage reduction to simplify the procedures and because cases of fraud usually involve the failure of a household member to take a required action. Accordingly, the Department proposes to incorporate the prohibition on increasing food stamp benefits as the result of a fraud into the revision to 7 CFR 273.11(k).

Comparable Disqualifications—7 CFR 273.11(l)

Section 819(a) of the PRWORA amended Section 6 of the Act, 7 U.S.C. 2015, to establish requirements for State agencies that want to impose the same disqualifications under the Food Stamp Program that are imposed under other public assistance programs. The Department's proposals for implementing this provision are discussed below.

Section 6 (i) of the Act now provides that if a disqualification is imposed on a member of a food stamp household for a failure of the member to perform an action required under a Federal, State, or local law relating to a means-tested public assistance program, the State agency may impose the same disqualification on the member of the household under the Food Stamp Program. Under section 6(i), the requirement of the other program does not have to be comparable to a Food Stamp Program requirement. The Department interprets this provision to mean that the assistance program has to be authorized by Federal, State or local law, but that the specific requirement does not have to be specified in the law. For purposes of this provision, the Department proposes that a ''means-tested public assistance program'' shall mean any public or assisted housing under Title I of the United States Housing Act of 1937; any State temporary assistance for needy families funded under part A of Title IV of the Social Security Act; and any program for the aged, blind, or disabled under

Titles I, X, XIV, or XVI of the Social Security Act; Medicaid under Title XX of the Social Security Act; and State and local general assistance as defined in 7 CFR 271.2.

Since the law makes the comparable disqualification provision a State option, the Department proposes to allow State agencies the discretion to apply this provision to some, but not all, means-tested public assistance programs. For example, the State agency may opt to apply TANF disqualifications but not general assistance disqualifications. Further, the Department proposes to allow State agencies to choose which disqualifications within a specific program it wants to impose for food stamp purposes. For example, the State agency may choose to disqualify a person for food stamps who has failed to submit to a drug test for TANF purposes but it does not have to disqualify a member of the household for all TANF failures. State agencies will be required to develop their own tracking system(s) for purposes of this provision. The Department does not plan to change the reporting requirements for households.

For purposes of this provision, the Department proposes that this provision only apply if the person was receiving assistance at the time the disqualification was imposed by the other program. In other words, this provision would not apply to a failure to take an action at the time of initial application for an assistance program. If the person was not already participating, the person could not be ''disqualified.'' With the following exceptions, this provision would apply to disqualifications imposed during the period benefits were originally authorized by the other program and to disqualifications imposed at the time of application for continued benefits if there is no break in participation. The Department does not consider reaching a time limit for time-limited benefits or having a child that is not eligible because of a family cap as failures to perform an action required by an assistance program. The person or persons simply no longer meet the eligibility criteria for assistance. Further, the Department does not intend this provision to apply to purely procedural requirements such as a failure to submit a monthly report or failure to reapply for assistance.

One State agency has interpreted Section 835 of PRWORA as allowing a comparable disqualification for food stamps when the person is disqualified at the time of initial application for the assistance program. Section 835 amended Section 11(i)(2) of the Act, 7 U.S.C. 2020 (k)(2), to provide that ''except in the case of disqualification as a penalty for failure to comply with a public assistance program rule or regulation,'' no household shall have its food stamp application denied nor its food stamp benefits terminated solely on the basis that its application to participate has been denied or its benefits have been terminated under any program for which the household filed a joint application without a separate determination by the State agency that the household fails to satisfy the food stamp eligibility requirements. The Department interprets this change as only applying to joint applications for recertification. The Department's position is that a person must first be participating in the assistance program before he or she can be ''disqualified.'' Some examples of disqualifications that could affect food stamp eligibility are disqualifications imposed on Title IV–A participants for failing to have a child immunized or failing to cooperate.

The Department is proposing that current assistance disqualifications be applied to food stamp applicants as well as recipients who are already receiving food stamp benefits. For example, if a disqualification was imposed by another assistance program while the person was participating in that program and it is still in effect when the person initially applies for food stamps, the disqualification may be imposed at the time of the initial food stamp application.

Section 6(i)(2) or the Act, 7 U.S.C. 2015(i)(2), as amended by Section 819 of PRWORA, provides that if a disqualification is imposed on a ''member'' of a household for failure to perform a required action, the State agency may impose the same disqualification on the ''member'' of the household under the Food Stamp Program. In some assistance programs, if an individual fails to take a required action the whole assistance unit may be disqualified. Some State agencies are interpreting Section 6(i)(2), which allows use of TANF rules and procedures for TANF cases to allow the whole assistance unit to be disqualified for food stamp purposes when the whole assistance unit is disqualified for TANF purposes. The Department interprets the reference to TANF rules and procedures as authorizing the same notice and hearing requirements and disqualifying the person for the same months that the person is disqualified under the TANF program in a retrospective eligibility system. For example, if TANF counts all of the person's income while disqualified, then all of the person's income could be counted for food stamp purposes. The Department expects these procedures to vary from State to State. The Department does not believe that the intent was to disqualify the whole household even in TANF situations. Therefore, the Department is proposing that for food stamp purposes only the individual can be disqualified, rather than the whole household.

A number of States have expressed concern about indefinite and permanent disqualification periods. In some cases the person may become ineligible for some other reason, may not reapply for the other assistance program, or may move from the State where the penalty was imposed to another State that does not have the same requirement so the person is unable to comply and have the disqualification lifted. Also, some assistance programs only keep records for a certain time period and they may be unable to provide the food stamp office with the information necessary to disqualify the person. The Department believes that a stricter penalty should not be imposed for a failure to perform a required action in another program than the penalty imposed for the first time a person commits an intentional food stamp program violation. In most cases the penalty for the first food stamp violation is a 1-year disqualification. Therefore, if the other assistance program assigns a disqualification period of longer than one year or an indefinite or permanent disqualification period, the Department proposes that that the maximum length of the food stamp disqualification in these circumstances be no more than one year. Further, the Department proposes that the State agency be allowed to shorten the food stamp disqualification period if the person becomes ineligible to participate in the other program for some other reason during that one-year time period.

Although Section 6(i)(2) of the Act does not specify if the food stamp disqualification period has to be concurrent with the disqualification period imposed by the other assistance program, the Department proposes that the food stamp disqualification period be limited to the same period of time to the extent possible. It may not be possible to impose the full disqualification period because of the requirements for a food stamp advance notice of adverse action in accordance with 7 CFR 273.13. If the State agency does not have time to apply the full disqualification concurrently because of notice of adverse action requirements, the Department is proposing that the

State agency only apply the portion that may be imposed concurrently.

When a household member is disqualified from food stamp eligibility under Section 6(a)(2), the Department is proposing all of the member's resources be counted as they will continue to be available to the household. However, since this is an optional provision, we are proposing that State agencies be allowed the option of counting all or a prorated share of the income and deductible expenses of the disqualified individual. State agencies would not have the option of excluding the person's resources or all of their income because this could be to the household's advantage and could conflict with the previously discussed prohibition on increasing food stamp benefits as a result of a decrease in assistance benefits due to failure to take a required action.

Section 6(i)(3) of the Act, as amended by Section 819 of PRWORA, provides that if a member of a household has been disqualified under the comparable treatment for disqualification provision, the member of the household so disqualified may, after the disqualification period has expired, apply for food stamp benefits and shall be treated as a new applicant, except that a prior disqualification under Section 6(d) of the Act regarding work requirement disqualifications shall be considered in determining eligibility. This places the burden of initiating an action once the disqualification period is over on the household. The Department interprets the language regarding prior work disqualifications to mean that if a person had a food stamp work violation in a prior year and has a current food stamp work violation for which an overlapping comparable disqualification is being served, the next food stamp work violation, if any, will be considered the third violation. If there are two or more pending disqualifications, the Department proposes that the State agency impose them concurrently but keep track of the number of food stamp work violations for purposes of determining if a subsequent food stamp violation is the second or third violation. For example, if an individual is disqualified in June for a food stamp work violation and in June and July for a TANF violation, after being disqualified for June and July the person will not have to serve an additional disqualification period and the food stamp work disqualification will have been considered served. If the whole household is disqualified for June for a food stamp violation and one member is disqualified for June and July for a comparable disqualification, the household would be disqualified for June and the individual would be disqualified for July.

The Department is proposing to add a new provision to 7 CFR 273.1(b)(2)(x) to encompass those individuals disqualified from the Food Stamp Program based on a disqualification in another assistance program and to add a new section 7 CFR 273.11(l) to explain the requirements as discussed above.

Section 819 of PRWORA provides that State agencies electing to impose comparable disqualifications, must specify in their State Plan of Operations the guidelines the State agency will be using in carrying out this provision. The State Plan discussion should include the programs and disqualifications the State has selected, how information will be obtained, time restrictions set for indefinite and permanent disqualification, TANF procedures that will be used, and how the income of the person will be counted. Accordingly, the Department is proposing to add a new section 7 CFR 272.2(d)(1)(xiii) to require that the comparable disqualification procedures be included in the State Plan of Operation for those States electing to implement such Food Stamp Program disqualifications.

School Attendance—7 CFR 273.11(m) and (n)

Section 103 of PRWORA amended Part A of Title IV of the Social Security Act, 42 U.S.C. 601, *et seq.*, to provide for block grants to States for TANF. The title of section 404 is ''Use of Grants.'' Section 404(i) provides that a State to which a grant is made under section 403 shall not be prohibited from sanctioning a family that includes an adult who has received assistance under the Food Stamp Program, if such adult fails to ensure that the minor dependent children of such adult attend school as required by the law of the State in which the minor children reside. Section 404(j) provides that a State to which a grant is made under section 403 shall not be prohibited from sanctioning a family that includes an adult who is older than age 20 and younger than age 51 and who has received assistance under the Food Stamp Program, if such adult does not have, or is not working toward attaining, a secondary school diploma or its recognized equivalent unless such adult has been determined in the judgment of medical, psychiatric, or other appropriate professionals to lack the requisite capacity to successfully complete a course of study that would lead to a secondary school diploma or its recognized equivalent.

We have had several questions as to whether or not these provisions provide for separate food stamp sanctions in addition to TANF sanctions. The Department has interpreted these provisions to pertain to TANF sanctions only. States may not apply a separate food stamp sanction to households based on Sections 404(i) and (j). The Department has come to this conclusion based on the fact that these provisions are in Title IV of the Social Security Act and are limited to States that receive a TANF block grant. By inserting Sections 404(i) and 404(j) into the TANF statute, Congress implied that only TANF benefits would be affected. In addition, the paragraph only references adults receiving food stamps; it does not reference food stamp sanctions. Finally, Congress made no cross-references to this provision in the Food Stamp Act.

If a food stamp household's TANF benefits are reduced under these provisions, however, States must apply Section 8(d) of the Act, as amended by 829 of PRWORA. Section 8(d) of the Act prevents an increase in food stamp benefits if a member of a household fails to comply with another Federal, State, or local means-tested benefit program. In addition, States may apply Section 6 of the Act, as amended by section 819 of PRWORA. Section 6 of the Act provides that if a disqualification is imposed on a member of a food stamp household for a failure of the member to perform an action required under a Federal, State, or local law relating to a means-tested public assistance program the State agency may impose the same disqualification on the member of the household under the Food Stamp Program.

Because we have had questions concerning these provisions, we are including a reference to them in 7 CFR 273.11, Action on Households with Special Circumstances. We clarify that these are TANF only sanctions. However, we also clarify that, in cases where TANF benefits are reduced or a member is disqualified under these provisions, States must prevent an increase in food stamp benefits and, in addition, they may reduce food stamp benefits by up to 25 percent and impose a comparable disqualification on the member for food stamp purposes.

Overlapping Penalties

In addition to prohibiting an increase in food stamp benefits as the result of fraud or failure to take a required action in an assistance program, the State agency may opt to impose a comparable disqualification period. The Department is proposing to include this provision in the new paragraph 7 CFR 273.11(l). In some cases a failure to take a required action may also involve a failure to

ensure that a minor child attend school or failure to work toward attaining a secondary school diploma. In such latter cases, the Department is proposing that the State agency choose under which provision to handle the cases. These options are included in the proposed new paragraphs 7 CFR 273.11(m) and (n).

Denial of Benefits for Drug-Related Felony Convictions—7 CFR 273.11(o)

Section 115(a) of PRWORA, 42 U.S.C. 862a, provides that an individual convicted of a felony under either Federal State law which has as an element the possession, use, or distribution of a controlled substance (as defined in Section 102(6) of the Controlled Substances Act; 21 U.S.C. 802(c)) shall not be eligible for benefits under the Food Stamp Program. Section 115(b)(2) further provides that, although such an individual shall not be considered a member of a household for the purpose of determining benefits, the individual's income and resources shall be considered available to the household.

Section 115(d) of PRWORA gives States the option, through specific legislation enacted (by the State legislature) after the date of enactment of PRWORA, to exempt any or all individuals residing in the State from the application of subsection (a), *i.e.* ineligibility based on conviction for a drug-related felony. A State, through legislation, may also limit the period of ineligibility of individuals convicted of drug-related felonies.

Section 115(c) of PRWORA mandates that State's electing to enforce Section 115(a) must indicate in writing during the certification process whether the applicant, or a member of the applicant's household, has been convicted of drug-related felonies.

Pursuant to Section 116 of PRWORA, Section 115 became generally effective July 1, 1997, unless the State opts out of its provisions as described above. However, Section 116 further provides that in States that submit plans under TANF, Section 115 is effective when the plan is submitted to the Department of Health and Human Services (DHHS). Section 115 specifically provides that in no event can an individual be disqualified under this provision for a conviction for a crime occurring before August 22, 1996, the date of PRWORA's enactment.

To implement the provisions of Section 115 of the PRWORA, the Department is proposing to amend 7 CFR 273.11 by adding a new paragraph (o), which would specifically provide that an individual convicted (under Federal or State law) of a felony which has as an element the possession, use, or distribution of a controlled substance (as defined in Section 102(6) of the Controlled Substances Act) shall not be considered a household member for Food Stamp Program purposes. The new paragraph will further provide that the exclusion would not apply if the State had elected to opt out of enforcing Section 115 through legislation, or would be in effect for a limited time if the State had elected to limit the length of the period of disqualification. Consistent with the statutory language, the Department is also proposing to amend 7 CFR 273.11(c)(1) to provide that the income and resources of individuals ineligible to participate in the program as the result of convictions for drug-related felonies shall be considered available to the household for purposes of determining eligibility and benefit levels. The Department is also proposing a technical amendment to 7 CFR 273.1(b), which will specify that individuals convicted of drug-related felonies shall not be considered household members.

We have no discretion to mitigate this provision. However, those States that would like to pursue option of opting out or limiting the disqualification period can contact States that have already done so for information. The following 19 States have either opted out or limited the disqualification time period: Louisiana, Oklahoma, Illinois, Michigan, Minnesota, Ohio, Wisconsin, New Hampshire, New York, Vermont, New Jersey, North Carolina, Colorado, Iowa, Utah, Hawaii, Nevada, Oregon and Washington.

Disqualification of Fleeing Felons

Section 821 of PRWORA amended Section 6 of the Act, 7 U.S.C. 2015, by adding a new paragraph (k) which disqualifies individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of a New Jersey, a high misdemeanor) from participating in the Food Stamp Program. Section 6(k) of the Act as amended by Section 821 of PRWORA, also disqualifies individuals who are violating a condition of probation or parole under a Federal or State law.

To implement these disqualification provisions, the Department is proposing to amend 7 CFR 273.1(b)(2), which defines the criteria for inclusion in eligible food stamp households, by adding a new paragraph (xi) specifically providing that individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of a New Jersey, a high misdemeanor), or who are violating a condition of probation or parole under a Federal or State law, are not to be considered members of households otherwise eligible to participate in the Program. The Department is also proposing to add a similar provision through a new paragraph (p) at 7 CFR 273.11.

The Department is proposing to mandate that State agencies verify the status of applicants to determine if they are subject to the provisions of 6(k) of the Act. In doing so the Department is also proposing to provide State agencies with broad discretion regarding the method of verifying an applicant's status since there are significant differences between the administrative structures of State agencies which may affect the nature of relationships between welfare agencies and the State or local law enforcement agencies which would provide verification of the applicants' status. One possible method of verification would be to establish a system under which State or local law enforcement agencies would periodically provide lists of individuals subject to disqualification under this section for matching by welfare agencies to determine if any applicants are subject to disqualification. The lists would most likely be in the form of computer tapes. Depending on the State agency's administrative structure, the matching could be conducted at either the State or local level. Another alternative would be to include a notice in the application indicating that the agency may match data with law enforcement agencies for the purposes of verification. The Department wishes to emphasize that this is one possible method of verification and that it is not our intent to exclude other systems or methods which may be established by State agencies. The Department is suggesting that, prior to providing comments in response to this proposed rulemaking, State agencies consult with State and local law enforcement agencies to determine the most effective method of verifying the status of applicants to determine whether they are subject to the provisions of Section 6(k) of the Act. To implement this provision the Department is proposing to add a new paragraph 273.2(f)(1)(ix).

Although it is the clear intent of both the statute and this proposed rule that Food Stamp Program participants who are subject to disqualification under Section 6(k) of the Act be terminated from the program as quickly as possible, State agencies may continue to allow such individuals to participate if so

requested by local, State or Federal law enforcement authorities and if such continued participation would expedite or assist in the apprehension of individuals fleeing to avoid prosecution or custody.

Cooperation With Law Enforcement Authorities

Section 837 of PRWORA amended Section 11(e)(8) of the Act, 7 U.S.C. 2020(e)(8), to require a State agency to furnish, upon request, the address, social security number, and, if available, photograph to any Federal, State, or local law enforcement officer of any household member. The officer must furnish the State agency with the name of the member and notify the State agency that the member is fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of a New Jersey, a high misdemeanor). This provision also applies if the member is violating a condition of probation or parole imposed under a Federal or State law, or has information necessary for the officer to conduct an official duty related to the above-described individuals. The statute further specifies that the request must be made in the proper exercise of an official duty.

The Department is proposing to add a new paragraph (vii) to 7 CFR 272.1(c)(1) to specifically require State agencies to disclose to Federal, State or local law enforcement officers the address, social security number, and, if available, photograph of any household member if the officer furnishes the State agency with the name of the member and notifies the State agency that the member is fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of a New Jersey, a high misdemeanor), or is violating a condition of probation or parole imposed under a Federal or State law. The new paragraph also requires disclosure if the information regarding the household member is necessary for the officer to conduct an official duty related to the above-described individuals. The Department would like to clarify that the policy of 7 CFR 272.1(C), and will continue to be, that if an eligibility worker (EW) believes that a Food Stamp Program applicant or member of a participating household may be fleeing to avoid prosecution or custody for a felony the EW shall notify the appropriate law enforcement agency.

The Department would like to clarify that this provision in no way requires State agencies to collect photo IDs as a condition of eligibility. Though the regulations at 7 CFR 273.2(f) require State agencies to verify identity, they are very clear that any document which reasonably establishes the applicant's identity must be accepted. The State agency may not impose a requirement for a specific type of document such as a photo ID.

The Department would like to clarify that section 837 of PRWORA does not supersede the confidentiality provisions of section 11(e)(8) of the Act. State agencies may, however, verify the status of applicants or household members to determine if they are subject to disqualification under Section 6(k) of the Act.

Cooperation With Child Support Agencies—7 CFR 273.11(q) and (r)

Section 822 of PRWORA amended Section 6 of the Act, 7 U.S.C. 2015, by adding a new paragraph (l). This section gives a State agency the option to require cooperation with a Child Support Enforcement Program established under title IV, part D of the Social Security Act, 42 U.S.C. 651, *et seq.*, as a condition of eligibility. Separate provisions address custodial and noncustodial parents. For custodial parents, the requirement can be waived for good cause, but there is no good cause exception for noncustodial (including putative) parents. The provisions for custodial and noncustodial parents are discussed separately below.

Custodial Parent—7 CFR 273.11(q)

Section 6(e) of the Act, as amended by Section 822 of PRWORA, allows State agencies to disqualify a natural or adoptive parent or other individual (collectively referred to as ''the individual'') who is living with and exercising parental control over a child under the age of 18 if the custodial parent does not cooperate with the State agency in establishing paternity and collecting child support without good cause. The provision requires the Department, in consultation with the Department of Health and Human Services (DHHS), to develop standards for what will constitute ''good cause'' for failure of a custodial parent to cooperate. There are two separate issues to address: what constitutes cooperation, and what constitutes good cause. The Department has discussed the issues of good cause and cooperation with the DHHS staff responsible for TANF and the staff responsible for Child Support Enforcement. In defining cooperation of the custodial parent, the Department has based its proposal on wording already used by DHHS. Therefore, under proposed food stamp regulations the individual will be required to cooperate with the State agency in identifying and locating the absent parent of the child(ren); establishing the paternity of a child born out of wedlock; obtaining support payments for the child or the individual and the child; and obtaining any other payments or property due the child or the individual and the child. We also list actions that are relevant to or necessary for, achieving cooperation: appearing at an office of the State or local agency or the child support agency to provide verbal or written information; appearing as a witness at judicial or other hearings or proceedings; supplying information in establishing paternity; and paying to the child support agency any support payments received from the absent father.

The Department is also proposing to adopt DHHS' provisions concerning good cause exceptions. We list the circumstances under which cooperation may be against the best interests of the child and would, therefore, not be required. Establishing paternity, securing support, or identifying and providing information could result in physical or emotional harm to the child or the parent or caretaker relative which could be determined good cause for not cooperating.

The concepts of cooperation with child support enforcement agencies, and good cause for failure to cooperate, are new to the Food Stamp Program, but DHHS has used them for some time and States are familiar with them. The Department believes that relying on DHHS' expertise in these areas is initially the most practical and administratively efficient alternative. The Department is proposing to add a new paragraph 7 CFR 273.11(q) to codify this provision.

The Department is proposing that the State agency make both the cooperation and good cause determinations. If the State agency determines that the custodial parent has not cooperated without good cause, then that individual (and not the entire household) would be ineligible to participate in the Food Stamp Program. The statutory language did not authorize the disqualification of the entire household, and so the Department is proposing that the disqualification be limited to the offending custodial parent. The Department is proposing that the disqualification period is over as soon as it is determined that the individual is cooperating with the child support agency. The State agency must have procedures in place to re-qualify an individual once cooperation has been

established. We realize that many States already have such procedures in place. Therefore, at this time, we would like to solicit comments on those systems already in use.

The law did not specify how the income and resources of the disqualified person should be treated for the remaining household members. Since this is an optional provision, the Department is proposing that the State agency count all of the individual's resources, but to give State agencies the option to count all or a pro rata share of his income. The Department is proposing to amend 7 CFR 273.11(c) and 273.1(b)(2)(xii) to reflect this policy.

Section 6(l) of the Act prohibits the payment of a fee or other cost for services provided under a Part D, Title IV, Child Support Enforcement Program, and so the Department is proposing to prohibit the charging of such fees or costs.

The Department is proposing that if a State agency wants to use the option of disqualifying an individual who refuses to cooperate without good cause, the option must be included in its State Plan of Operation. Accordingly, the Department is proposing to add a new section 7 CFR 272.2(d)(1)(xiv) to reflect the above-discussed requirements.

Noncustodial Parent—7 CFR 273.11(r)

Section 822 of PRWORA also amended Section 6 of the Act by adding subsection (m) to give State agencies the option to disqualify the noncustodial parent who refuses to cooperate in establishing the paternity of a child and provide support for the child. This provision requires the Department, in consultation with DHHS, to develop standards for what will constitute cooperation on the part of the noncustodial parent. As mentioned previously, the Department has met with DHHS staff in developing this proposed rule, and we are proposing to adopt DHHS' definition of cooperation as the most practical approach, given DHHS' experience with the issue.

The Department is proposing that refusal to cooperate occurs if the noncustodial parent refuses to appear for an interview; refuses to furnish requested documentation; refuses DNA testing; or fails to make payments to the Child Support Enforcement agency. As with the custodial parent, if the State agency determines after contacting the Child Support Enforcement agency that the noncustodial parent has refused to cooperate, then that individual (and not the entire household) would be ineligible to participate in the Food Stamp Program. The statutory language did not authorize the disqualification of the entire household, and so the Department is proposing that the disqualification be limited to the individual. Consistent with the Department's proposed treatment for disqualified custodial parents, it would be the option of the State Agency to determine whether part or all of the income and the resources of the individual refusing to cooperate would be considered available to the rest of the noncustodial parent's household under this proposal. In addition, the Department is proposing that the disqualification period is over as soon as it is determined that the individual is cooperating with the child support agency. The State agency must have procedures in place to re-qualify an individual once cooperation has been established. We realize that many States already have such procedures in place. Therefore, at this time, we would like to solicit comments on those systems already in use.

Section 6(m) of the Act does not permit a fee or other cost to be charged the household for services of the Child Support Enforcement agency, and the Department's proposal includes this prohibition. To implement this provision, the Department is proposing to add a new paragraph 7 CFR 273.11(r).

Section 6 of the Act, as amended by Section 22 of PRWORA also requires the State agency to provide safeguards to restrict the use of information collected by the State agency to purposes for which the information is collected. The Department believes that this is an area in which the State agency should have flexibility to establish the specific safeguards. The Department is therefore proposing only to require that safeguards be in place.

The Department is proposing that if a State agency wants to use the option of disqualifying the noncustodial parent who refuses to cooperate, this option must be included in its State Plan of Operation. The Department is also proposing to add a new section 7 CFR 272.2(d)(1)(xiv) to require that the States that elect to implement this provision include these safeguards in their Plan of Operation.

Disqualification for Child Support Arrears—7 CFR 273.11(s)

Section 823 of the PRWORA amended section 6 of the Act by adding subsection (n) to give State agencies the option to disqualify a member of any household during any month that the individual is delinquent in any payment due under a court order for the support of the individual's child. The provision also specifies that if a court is allowing the individual to delay payment or the individual is complying with a payment plan approved by a court or the Child Support Enforcement agency, the individual will not be disqualified.

As with the disqualification for failure to cooperate with child support enforcement officials, the Department is proposing that the disqualification for child support arrears apply to the offending individual and not to the entire household. The statutory language does not authorize the disqualification of the entire household. However, similar to the handling of the child support cooperation provision concerning the custodial and noncustodial parents, the Department is proposing that it will be the option of the State agency to determine whether part or all of the income and resources of a disqualified individual be considered available to the rest of that person's household. The Department is proposing to add a new section 7 CFR 273.11(s) to implement the disqualification, and is proposing to amend 7 CFR 273.11(c)(2) and (3), and 273.1(b) to incorporate its proposed treatment of the disqualified individual's income and resources.

Section 6(n) of the Act specifies that the individual will be disqualified during any month that the individual is delinquent in any payment due. Because an individual could always pay his or her child support toward the end of the month, it will be impossible to know when an individual is delinquent in time to disqualify him or her for that month. Therefore, under the Department's proposal the State agency must establish a claim against the household, in accordance with the regulations at 7 CFR 273.18, for any month for which it later discovers that the individual was delinquent and should have been disqualified.

The Department is proposing that if a State agency wants to use the option of disqualification for child support arrears, this option must be included in its Plan of Operation. Accordingly, the Department is proposing to include this section in the new 7 CFR 272.2(d)(1)(xiv) to reflect the addition.

7 CFR 273.16—Disqualification for Intentional Program Violation

The current regulations at 7 CFR 273.16 outline the procedures involved with Intentional Program Violations (IPVs) and IPV-related disqualifications. This proposed rule extensively revises this section of the regulations. The increased and additional disqualification penalties brought about by sections 813, 814 and 820 of PRWORA that need to be reflected in 7 CFR 273.16 are included in this rule. In

addition, this proposed rule contains a change necessitated by a court action on the imposition of disqualification periods. Clarification is also being proposed for a number of issues, including the definition of an IPV. Lastly, as part of an effort to streamline the regulatory requirements and to increase State agency flexibility in the area, the Department is proposing to remove prescriptive language and some requirements in many discretionary areas concerning IPVs and the IPV disqualification process.

General Administrative Responsibility—7 CFR 273.16(a)

The current regulations at 7 CFR 273.16(a) specify a State agency's responsibility for investigating and disqualifying individuals who commit IPVs. As part of the regulatory reorganization and streamlining effort, the Department is proposing in this rule to eliminate much of the prescriptive language under this section. Under this proposal at § 273.16(a), each State agency would be responsible for: (1) effectively and efficiently investigating suspected IPVs; (2) establishing a system for determining whether an individual has committed an IPV; and (3) when appropriate, disqualifying the individual from participation in the Program.

Definition of an IPV—7 CFR 273.16(c)

The current regulations at 7 CFR 273.16(c) provide a definition for an IPV. The Department is proposing to make three changes to this paragraph. The first change would eliminate the reference that this definition applies only to an administrative disqualification hearing (ADH). The Department believes that this definition should also apply to the other bases for IPV determination, which are a signed ADH waiver, a court finding, and a signed disqualification consent agreement. The second change would update the definition by eliminating the reference to *ATPs* (authorization to participate documents). In its place, the Department is proposing to use the term ''authorization card'' (which is defined in section 3(b) of the Act (7 U.S.C. 2012(b)(3))) and ''reusable documents used as part of an automated benefit delivery system'' (access device). This definition was updated to specifically provide for the acquisition and use of electronic benefit transfer (EBT) cards. For the third change, the proposed rule would specifically include trafficking in this definition. This is being provided for clarification purposes only and does not constitute a change in policy. The Department has historically viewed (and continues to view) any type of trafficking as an IPV offense. Finally, as part of the regulatory reorganization, this paragraph would be incorporated into § 273.16(b) in the proposed rule.

PRWORA Section 813—Doubled Penalties for Violating FSP Rules

As reflected in the current regulations at 7 CFR 273.16(b), a graduated system for IPV disqualification penalties exists. Under this system, an individual found to have committed an IPV not related to the trading of coupons for firearms, ammunition, explosives or controlled substances would receive a disqualification for: (a) 6 months for the first offense; (b) 12 months for the second offense; and (c) a permanent disqualification for the third offense. In addition, an individual convicted of a controlled substance-related IPV would receive a 12 month disqualification for the first offense and a permanent disqualification for the second offense.

Section 813 of PRWORA amended section 6(b)(1) of the Act (7 U.S.C. § 2105(b)(1)) to increase the penalties twofold for the non-permanent offenses. Specifically, unless the offense falls under a specific category requiring a more stringent penalty, Section 6(b)(1) now requires that an individual be disqualified for one year for a first finding, and for two years for a second finding of IPV. The penalty for a third finding of IPV, permanent disqualification, would remain the same. For convictions involving the trading of controlled substances for coupons, Section 813 of PRWORA requires that an individual be disqualified for two years for the first offense. Accordingly, the Department is proposing to reflect these legislative changes in § 273.16(c) of this rule.

PRWORA Section 814—Disqualification of Individuals Convicted of Trafficking $500 or More

Section 814 of PRWORA amended Section 6(b)(1)(iii)of the Act to introduce more stringent disqualification penalties for those individuals who traffic food coupons. Specifically, under the new legislation, individuals would be permanently disqualified from FSP participation if they are convicted of a trafficking offense of $500 or more. Individuals trafficking under $500 would continue to be subject to the same penalties as other IPVs. Accordingly, the Department is proposing to reflect this legislative change in § 273.16(c) of this rule.

The statutory language provides for this penalty to take effect where there is an actual conviction. Hence, the increased trafficking penalty would be applied when there is such a finding by a court of appropriate jurisdiction. In addition, the Department considered whether this increased trafficking penalty applies to violations settled by deferred adjudication. While the Department recognizes that the statutory language speaks of a conviction, and not of a finding or a settlement, the Department believes that this increased penalty for trafficking may be applied in cases of deferred adjudication. Trafficking for an amount greater than $500 is undeniably a serious offense. As such, if the case warrants the formal involvement or inclusion of a Federal, state or local court process, then the State agency should apply the increased penalty. Therefore, it is the Department's intent in this proposed rule to allow the inclusion of this increased penalty in signed deferred adjudications in exactly the same manner that the existing penalties are currently included in such agreements. Accordingly, this proposal is reflected in § 273.16(c) in this rule.

As opposed to deferred adjudication, since there is no formal involvement or inclusion of a Federal, state or local court process in the ADH system, the Department is proposing that the increased penalty not apply to IPVs determined as a result of an ADH or a signed waiver to the right to an ADH.

When PRWORA was originally published, some State agencies inquired as to whether Section 6(b)(1)(iii)'s $500 benchmark refers to a single trafficking transaction or to the cumulative amount trafficked. The Department maintains a long-standing policy that a series of related infractions may embody a single IPV. Therefore, if the cumulative amount of the related infractions making up the IPV is greater than $500, then the individual would be subject to the increased trafficking penalty.

PRWORA Section 820—Ten Year Disqualification for Duplicate Participation

Under certain circumstances, PRWORA lengthened the penalty associated with fraudulent receipt of multiple benefits. This provision is in section 820 of PRWORA, which amended section 6 of the Act (7 U.S.C. § 2015) by adding a new paragraph ''(j)''. Paragraph (j) provides that ''[a]n individual shall be ineligible to participate in the food stamp program as a member of any household for a 10-year period if the individual is found by a State agency to have made, or is convicted in a Federal or State court of having made, a fraudulent statement or representation with respect to the identity or place of residence of the

individual in order to receive multiple benefits simultaneously under the food stamp program.''

The increase in the penalty for fraudulent representation of identity or residence to obtain multiple duplicate benefits reflected in the quoted statutory language is clearly intended to be an additional deterrence against this kind of fraud. However, the 10-year period of disqualification associated with this provision does not apply to all cases of duplicate participation (that is, where an individual receives food stamps as a member of more than one household). There are three criteria to consider in determining whether this disqualification provision applies. First, the individual must have been found by a State agency or court of committing a certain unlawful act. Second, the unlawful act is ''having made, a fraudulent statement or representation with respect to the identity or place of residence of the individual.'' Finally, the purpose of committing this misrepresentation must have been to receive multiple benefits under the FSP. Section 820 does not apply unless all three of these criteria are present.

The Department considered whether it is necessary for the individual to be successful in obtaining multiple benefits in order for this provision to apply. The title of section 820 of PRWORA is ''Disqualification for Receipt of Multiple Food Stamp Benefits'', however, the language of the text is directed at the penalty for the intentional act of misrepresenting information in order to receive multiple benefits. The Department has found nothing in the text or legislative history to suggest that Congress intended the penalty to be more or less severe depending upon whether the individual was successful in obtaining the multiple benefits. Currently, when a household is identified as having one or more members who are already receiving benefits as a member of another household or in another locality, State agencies are required to investigate the cause of the duplicate participation and when appropriate, pursue the matter through the claims collection and/or IPV referral process (7 CFR 272.4(f)(3)).

A State agency is required to take the IPV referral route when it believes it can prove an individual's intent to abuse the FSP by providing false or misleading information to receive benefits for which the individual is not entitled. Some State agencies pursue an IPV regardless of whether the individual was successful in being certified to receive the additional benefits. The Department believes that this approach is consistent with an aggressive anti-fraud program and strongly encourages those State agencies which pursue attempted (as well as successful) fraud to continue to operate under their current policy. The Department therefore proposes to make clear that the coverage of Section 6(j) provision also applies to individuals who attempt to receive multiple benefits by misrepresenting their identity or residence.

Appropriate Penalty Determination

Prior to the enactment of PRWORA and the implementation of its predecessor (the Mickey Leland Childhood Hunger Relief Act (Pub. L. 103–66) (Leland Act)), only one set of disqualification penalties existed for IPVs. This set of disqualification penalties, as discussed earlier in this preamble, applied to all IPVs and began with a relatively short disqualification period for the first finding of IPV and culminated with a permanent disqualification for the third IPV finding. The Leland Act and PRWORA changed this by introducing varying disqualification penalties for certain types of IPV-related offenses.

Pursuant to this rule making, disqualification periods based on the particular offense and finding would be:

IPV-RELATED DISQUALIFICATION PENALTIES

Disqualification type	First finding	Second finding	Third finding
''Any'' IPV	12 months	24 months	Permanent
Controlled substances related	24 months	Permanent	See below [1]
Firearms, ammunition, and explosives related	Permanent	See below [1]	See below [1]
Duplicate participation related	10 years	10 years [2]	Permanent (same as ''any'' IPV) [2]
Trafficking $500 or greater related	Permanent	See below [1]	See below [1]

[1] Since the prior offense (i.e., first or second) results in a permanent disqualification, the same penalty (permanent disqualification) would be applied if, for some inexplicable reason, the individual was not already permanently disqualified when the subsequent finding occurred.

[2] PRWORA does not specify a graduated increase in penalty length for subsequent findings. The appropriate disqualification period lengths for these subsequent occurrences are discussed in detail below.

The Department believes that clarification is needed to determine which penalty takes precedence when an IPV also is included in one of the four special disqualification categories listed above. For example, an individual who has already committed two IPVs may be found to have committed a third IPV and the third offense is for duplicate participation. In this situation, the State agency would need to determine whether the appropriate disqualification would be for 10 years (for duplicate participation) or permanently (as is the penalty for all third IPVs). The Department believes that it is appropriate to permanently disqualify the individual. The progressive penalty structure and policies are key components of program integrity. Progressive penalties deter repeat offenders by providing a framework for clear and consistent consequences for their actions. Although certain offenses are dealt with more severely than others, the FSA provides for a maximum of three offenses. The penalty for a third offense, permanent disqualification, is the ultimate redress for repeat violators. The Department believes that it would be contrary to the Act to apply a shorter penalty or to allow a repeat offender a fourth opportunity to intentionally violate the Program simply because of the nature of the offense. Further, the 10-year penalty for duplicate participation and the 2-year penalty for the first finding involving controlled substances are intended to deter these more serious types of offenses. Thus, the Department intends that the 10-year and 2-year penalties be imposed whenever they apply, except when an earlier disqualification penalty was either as serious, more serious or the current violation is the individual's third. A permanent or higher disqualification would always take precedence over a lesser penalty. These decisions are reflected in § 273.16(c) in this proposed rule.

Applicability of PRWORA Disqualification Penalties

As previously discussed, sections 813, 814 and 820 of PRWORA amended Section 6 of the Act to either introduce a new or increase an existing disqualification penalty for committing an IPV. Questions have arisen as to whether these new penalties should be applied to all ADHs, court hearings, etc., held subsequent to enactment of the law (regardless of when the actual offense occurred) or only to those cases in which the actual offense occurred subsequent to State agency implementation of the new legislation.

PRWORA set the date of enactment, August 22, 1996, as the effective date for these provisions of the law. As a result, State agencies needed to use their own discretion as to whether the new or increased penalties should apply to offenses that occurred prior to State agency implementation of the new legislation. It is therefore impractical for the Department to introduce standards on an issue for which action has already been taken.

Imposition of Disqualification Penalties—7 CFR 273.16(a), (e), (f), (g) and (h)

The current regulations concerning the imposition of disqualification periods specify that, if the individual is not certified to participate in the FSP at the time the disqualification period is to begin, the period shall take effect immediately after the individual applies for and is determined eligible for benefits. A court finding (*Garcia* v. *Concannon and Espy,* 67 F. 3d 256 (1995)) in the Ninth Circuit has found that this interpretation is not consistent with Section 6(b)(1) of the Act (7 U.S.C. 2015(b)(1)). The Court found that an individual should be disqualified from the FSP immediately even though he/she may not be eligible to participate. The Department does not concur with this finding. However, to ensure nationwide consistency in this policy, the Department is proposing in this rule to require State agencies to impose a disqualification period for all IPV-related disqualifications as soon as administratively possible, regardless of eligibility. Under this proposal, a State agency would be required to begin the disqualification no later than the second month which follows the date the individual receives written notice of the disqualification.

Notification to Applicant Households—7 CFR 273.16(d)

The current regulations at 7 CFR 273.16(d) specify that the household shall be notified in writing of the disqualification penalties when it applies for benefits. The Department is proposing, in § 273.16(c)(10) of this rule, to retain this requirement. However, much of the prescriptive language would be removed.

Bases for Disqualification—7 CFR 273.16(e) through (h)

Current regulations at 7 CFR 273.16 allow any one of the following four means as a basis for disqualification: (1) An ADH finding; (2) a signed waiver to the right of an ADH; (3) a finding by a court; and (4) a signed disqualification consent agreement for cases of deferred adjudication. The Department is proposing to retain these four bases with some streamlining revisions which are discussed elsewhere in this preamble. In addition, as part of the regulatory reorganization, these bases, currently found in 7 CFR 273.16(e), (f), (g) and (h), would be consolidated into one paragraph at § 273.16(d).

Administrative Disqualification Hearings—7 CFR 273.16(e)

The current regulations at 7 CFR 273.16(e)(1) discuss consolidating an ADH with a fair hearing. The consolidation of the two hearings would remain an option in § 273.16(d)(1) in the proposed rule. In addition, the Department, in an effort to increase State agency flexibility, is proposing to remove prescriptive language from the current paragraph.

The current regulations at 7 CFR 273.16(e)(2) discuss specific procedures for conducting the ADH. The Department is proposing in this rule to allow those State agencies which conduct ADHs to establish their own procedures. However, a time frame for reaching and notifying an individual of a hearing decision would still be maintained. The current time frame is within 90 days after the individual is notified that the hearing has been scheduled. Under this proposal, the time frame would be within 180 days after the discovery of the suspected violation or within 60 days of the date of the hearing, whichever is sooner.

The current regulations at 7 CFR 273.16(e)(3) discuss the advance notice of the ADH. The Department is proposing to remove redundant and overly prescriptive language. The remaining language would be found in § 273.16(d)(1) in this proposed rule.

The current regulations at 7 CFR 273.16(e)(4), which discuss the scheduling of the hearing and what constitutes timely good cause for not attending the hearing, would be removed under the proposed rule. This would provide a State agency with more flexibility and the ability to determine its own good cause criteria, if any. In addition, all but the first sentence of paragraph 7 CFR 273.16(e)(5) would be eliminated. The paragraph containing the remaining language stating that a pending ADH or a pending ADH decision would not affect an individual or household's right to participate in the FSP would be contained in § 273.16(d) of the proposed rule.

The current regulations at 7 CFR 273.16(e)(6) state that the determination of an IPV shall be based on clear and convincing evidence. The Department is not proposing to make any change to this evidentiary standard. However, this paragraph would be moved to § 273.16(b) in the proposed rule.

The Department is proposing in this rule to eliminate 7 CFR 273.16(e)(7). This paragraph requires the hearing authority decision to specify the reasons, identify the supporting evidence, identify the pertinent regulation, and respond to reasoned arguments. The Department believes that these requirements need not be specified as they are required by due process.

The current regulations at 7 CFR 273.16(e)(8) discuss the imposition of disqualification penalties and specify the individual's limited appeal rights of an ADH decision. The imposition of the disqualification periods is addressed in depth elsewhere in this preamble. The Department is proposing in this rule to reorganize the paragraph containing the individual's appeal rights of an ADH decision (7 CFR 273.16(e)(8)(ii)) into § 273.16(d)(1).

The current regulations at 7 CFR 273.16(e)(9) discuss notification of the ADH decision and related matters. The Department is proposing only to include language from this paragraph stating that the household is to receive written notification of the ADH decision and the impending disqualification.

The current regulations at 7 CFR 273.16(e)(10) discuss local level ADHs. This proposal at § 273.16(d)(1) would still allow local-level hearings. The Department is proposing to delete prescriptive language from this section. In addition, the Department would like to clarify that either the affected individual or local agency may appeal a local-level decision to a State-level hearing. This is reflected in § 273.16(d)(1)(vii) of this proposed rule.

Waived ADH—7 CFR 273.16(f)

The current introductory text at 7 CFR 273.16(f) provides the State agencies with the option of establishing procedures for allowing an accused

individual to waive his/her right to an ADH. The Department is not proposing any significant policy revisions in this area. However, under this proposal, the introductory text would be designated as its own paragraph at § 273.16(d)(2).

Current regulations at 7 CFR 273.16(f)(1) discuss procedures for advance notification. The proposed rule, in § 273.16(d)(2), would require that each State agency develop its own waiver form and provide the individual written notification. In addition, the waiver/written notification must clearly inform the affected individual that, once the form is signed, he/she would be disqualified from the Program.

The current regulations at 7 CFR 273.16(f)(2) discuss the imposition of disqualification penalties and the individual's limited appeal rights after he/she signs the waiver. The imposition of the disqualification periods is addressed in depth elsewhere in this preamble. The Department is proposing in this rule to reorganize the paragraph containing the individual's limited appeal rights of an ADH decision (7 CFR 273.16(f)(2)(ii) into § 273.16(d)(2)).

The current regulations at 7 CFR 273.16(f)(3) discuss notification of disqualification and related matters. The Department is proposing only to include a statement that the individual is to receive written notification of the impending disqualification. This revision would be incorporated into § 273.16(c)(11) in this proposed rule.

The current regulations at 7 CFR 273.16(f)(4) discuss waivers of a local level hearing. As part of the streamlining effort, the Department is proposing to remove this paragraph to increase State agency flexibility. However, a State agency would still be able to have a local-level waiver process under the proposed rule.

Court Referrals—7 CFR 273.16(g)

The current regulations at 7 CFR 273.16(g) discuss referring suspected IPV cases for prosecution by a court of appropriate jurisdiction. The Department, as part of its effort to increase State agency flexibility, is proposing to remove prescriptive language from this paragraph. The proposed rule, in § 273.16(d)(3), would provide for court referrals as a mechanism for determining an IPV. The only requirement, in addition to a State agency establishing its own procedures, would be the actions the State agency must take when the court fails to impose a disqualification period. This requirement, proposed in § 273.16(c)(7), would be the same as current FNS policy.

Deferred Adjudication—7 CFR 273.16(h)

The introductory text at 7 CFR 273.16(h) in the current regulations provides a State agency with the option to establish procedures for allowing an accused individual to sign a disqualification consent agreement for cases of deferred adjudication. The Department is not proposing any significant policy revisions in this area. However, the introductory text, as part of the regulatory reorganization effort, would be condensed and designated as its own paragraph under § 273.16(d)(4) in this rule.

The current regulations at 7 CFR 273.16(h)(1) discuss a number of requirements pertaining to deferred adjudication, such as notification and the disqualification consent agreement. The Department is proposing in this rule to remove prescriptive language from the regulations. The proposed rule, at § 273.16(d)(4), would require the State agency to develop its own disqualification agreement form and provide the individual written notification of the consequences surrounding deferred adjudication.

The current regulations at 7 CFR 273.16(h)(2) discuss the imposition of disqualification penalties. This is addressed in detail elsewhere in this preamble and would be consolidated into § 273.16(c)(11) in the proposed rule.

The current regulations at 7 CFR 273.16(h)(3) discuss notifying the individual of the impending disqualification and related matters including notifying the household and initiating collection action. The Department is proposing only to include a statement that the household is to receive written notification of the impending disqualification. This revision would be incorporated into § 273.16(d)(1) in this proposed rule.

Conducting Both Court Referrals and ADHs

The current regulations at 7 CFR 273.16(a)(1) prohibit a State agency from initiating an ADH against an individual, ''. . . whose case is currently being referred for prosecution or subsequent to any action taken against the accused individual by the prosecutor or court of appropriate jurisdiction. . . .'' However, the current regulations at 7 CFR 273.16(e)(3)(iii)(H) appear to contradict this paragraph by stating that an advance notice of an ADH shall contain language indicating that ''. . . the hearing does not preclude the State or Federal Government from prosecuting the household member for intentional Program violation in a civil or criminal court action.'' In an effort to eliminate this inconsistency while allowing greater State agency flexibility and increasing the likelihood that violators would receive the appropriate disqualification, the Department is proposing to change the policy at 7 CFR 273.16(a)(1).

The proposal, found in § 273.16(d)(5) of this rule, would specify that a State agency may: (1) simultaneously begin and/or conduct an ADH and court action and may proceed with a court action whether or not a violation has been determined by the ADH; and (2) conduct and make a determination based on an ADH for any case for which the court has not already returned a verdict. The Department feels that allowing the transpiration of both activities would not constitute double jeopardy since one action is administrative while the other action is judicial.

Reporting Requirements—7 CFR 273.16(i)

State agencies are required by 7 CFR 273.16(i) to report information about disqualified individuals to FNS. Outside of changes necessitated by the *Garcia* v. *Concannon and Espy* decision and the Departmental streamlining effort, policy interpretations and changes in this area will be addressed and proposed under a separate rulemaking.

Reversed Disqualifications—7 CFR 273.16(j)

Current regulations at 7 CFR 273.16(j) discuss actions to be taken by the State agency on reversed disqualifications. The Department is not proposing any change in this area other than to redesignate the paragraph as § 273.16(f).

7 CFR 273.25—Time Limit for Able-Bodied Adults Without Dependents

Section 824 of P RWORA amended Section 6 of the Act by adding a new section (o) that limits the receipt of food stamps for certain able-bodied adults to three months in a three-year period unless the individual is working or participating in a work program 20 hours per week, or is participating in a workfare program. Individuals can regain eligibility, and may receive an additional three months of food stamps while not working in certain circumstances. Amended Section 6(o) creates some exceptions, and receiving food stamps while exempt does not count towards an individual's time limit. In recognition that it may be difficult for individuals to find work in depressed labor markets, the statute authorizes waivers for individuals in areas in which the unemployment rate

is above ten percent, or where there is a lack of sufficient jobs.

The time limit is complex and raises many issues. In order to simplify the analysis, the preamble and regulatory language are organized as follows: general rule, exceptions, regaining and maintaining eligibility, eligibility for the second three countable months, and waivers. In developing this proposed rule, the Department has attempted to balance the competing goals of ensuring consistent national application of these requirements, and providing State agencies with appropriate implementation flexibility, to implement this provision. The Department is especially interested in comments on this balance, as well as on the practical implications of the proposed rule's provisions. Because there are many requirements that apply only to the time limit, the Department is proposing to codify this provision in a new regulatory section—7 CFR 273.25.

General Rule

Under the time limit of Section 6(o), individuals are not eligible to participate in the Food Stamp Program as a member of any household if the individual received food stamps for more than three countable months during any three-year period. Individuals may regain eligibility or may be eligible for up to three additional countable months under certain circumstances. ''Countable months'' are months during which an individual receives food stamps and is not either exempt, covered by a waiver, working 20 hours per week, participating in and complying with a work program 20 hours per week (as determined by the State agency), or participating in and complying with a workfare program. As discussed below in the context of measuring and tracking the months, the Department is proposing that only full benefit months be considered ''countable months.'' The provision also specifies that nothing in Section 824 makes an individual eligible for food stamps if he or she is not otherwise eligible for benefits. Therefore, in the discussion below, a statement that someone is ''eligible'' simply means that the person is eligible under the time limit. The person must still be otherwise eligible for the Food Stamp Program in order to receive benefits.

This general rule raises four fundamental issues: what will satisfy the work requirement, how will the time (three months and three years) be tracked, what will count as receiving food stamps, and what are the other administrative requirements (e.g., verification and reporting) that are triggered by this provision? These issues are discussed below. The exceptions are discussed separately.

Satisfying the Work Requirement

Section 6(o) limits the receipt of food stamps for certain able-bodied adults who are not either: working 20 hours per week (averaged monthly), participating in and complying with a work program 20 hours per week (as determined by the State agency), or participating in and complying with a workfare program. These options (working or participating in a work program 20 hours per week or participating in workfare) will be referred to as the ''work requirement.'' As long as an individual is satisfying the work requirement (or is exempt or covered by a waiver), the individual's participation is not counted, and the individual can participate as long as he or she is otherwise eligible. Issues involving the ways that an individual can satisfy the work requirement are discussed separately below.

The first issue that arises in this context is what is meant by ''20 hours a week averaged monthly?'' The plain meaning of ''averaged monthly'' means averaged over the month. The month of February has 28 days, or four weeks. In this case, 20 hours a week averaged monthly would be 80 hours ($20 \times 4 = 80$). However, the month of March has 31 days, or approximately 4 and a half weeks. If we were to take into consideration the additional 3 days, twenty hours a week averaged monthly would equal more than 80 hours. The Department believes that it would be administratively difficult for the State agency to calculate a different number of hours for each month according to how many days there are in the pertinent month. Also, the Department believes that it should not require an individual to work more than 80 hours to maintain eligibility while to regain eligibility an individual only has to work 80 hours in a 30 day period. Therefore, the Department is proposing that ''20 hours a week averaged monthly'' mean 80 hours a month.

An individual can satisfy the work requirement by ''working'' 20 hours or more per week, averaged monthly. One issue that arises in this context is whether the ''work'' has to be paid work (or paid at any particular level). Neither the statutory language nor the legislative history requires that individuals receive money in exchange for work in order to satisfy this requirement. An individual who is being paid in kind (for example, someone managing an apartment complex in exchange for free rent), is clearly ''working,'' and should be considered as such. But the question about whether unpaid work will qualify as ''working'' is less clear. The Department recognizes that it may be difficult for individuals with few job skills or no significant job history to obtain paid employment. In some cases, volunteer work may be the only way for these individuals to obtain needed job skills and a job history to make them more employable. Allowing volunteer work to count as work raises some concerns about verification and the potential for abuse. In order to balance these competing concerns, the Department is proposing a definition of ''work'' that specifically includes unpaid work under standards established by the State agency. It is the Department's intent that volunteer work will be allowed to satisfy the work requirement, and that State agencies shall verify it the same way they verify paid work. Work in exchange for goods or services (''in kind'' work) is not to be considered ''unpaid'' work for these purposes.

Another issue that arises in this context is how much work will satisfy the work requirement, and how to handle situations in which someone normally meeting the work requirement falls somewhat short. The statutory language requires someone to work ''20 hours per week, averaged monthly.'' However, the Department recognizes that there may be cases in which an individual usually works 20 hours per week, but because of an emergency or other ''good cause,'' the individual falls short of the required number of hours. In part-time employment, workers are often not able to make up for lost hours. Someone who misses a day of work (or even a few hours) because of a family illness or other emergency could lose food stamp benefits for the month if he or she could not make up the hours. (As discussed later, someone who misses work because of his or her own illness may be exempt under the ''medically certified as physically or mentally unfit for employment'' exception.)

The Department believes that such a narrow interpretation of the requirement that an individual work 20 hours per week ignores the realities of working life and goes beyond the intent of the provision to require able-bodied adults to work in order to receive food stamp benefits. In addition, participants who are satisfying the work requirement by participating in a work program are already covered by a good cause provision in 7 CFR 273.7(m). A policy that includes some practical flexibility for individuals who are participating in a work program, but not for those who

are working could discourage individuals from electing to satisfy the requirement by working. Therefore, the Department is proposing that someone who has missed work for good cause (as determined by the State agency) will be considered to be satisfying the work requirement as long as the absence from work is temporary, and the individual retains his or her job. Beyond these basic limits, the Department believes that State agencies are in a better position to identify situations where the good cause provision would be appropriate. The Department intends for this good cause provision to be used sparingly, and only in circumstances under which the individual would normally be granted leave or time off, or when the absence would not jeopardize the individual's employment status. The Department believes that this proposal reasonably balances the reality of working life with Congress' intent to make food stamp recipients who can work, work.

The second way an individual can satisfy the work requirement is by participating in and complying with a work program for 20 hours per week, as determined by the State agency. (The definition of ''work program'' makes reference to the Job Training Partnership Act (JTPA) (29 U.S.C. 1501, et seq). However, the Section 199A(c) of the Workforce Investment Act (WIA) of 1998 (Pub. L. 105–220) provides that all references in any other provision of law to a provision of the Job Training Partnership Act shall be deemed to refer to the Workforce Investment Act of 1998. Therefore in this preamble and in the regulation text any reference to JTPA has been replaced by WIA). ''Work program'' is defined by the statute to mean a program under the Workforce Investment Act of 1998 (29 U.S.C. 1501, et seq.)); a program under section 236 of the Trade Act of 1974 (19 U.S.C. 2296); or an employment and training program, other than a job search or job search training program, operated or supervised by a State or political subdivision of the State that meets standards approved by the Governor of the State. As specified in the statutory language, the State agency may determine whether and when an individual has participated in and complied with a work program for 20 hours per week. Existing regulations at 7 CFR 273.7 address issues that arise in this context (e.g., whether the individual has ''good cause'' for failing to meet the requirements of the work program), and the Department does not propose to change any of those regulations in this rulemaking. Only three issues are raised that are unique to this time limit: whether a program must be approved by FNS in order to qualify as a ''work program,'' whether an individual can combine work and participation in a work program to meet the 20 hour per week requirement, and whether the employment and training program can contain job search as a subsidiary component.

The statutory language does not require that a qualifying work program be an FNS Employment and Training (E&T) program under 7 CFR 273.7(f). Section 6(o) only requires that a qualifying work program not be a job search or job search training program, and that it meet standards approved by the Governor of the State. While the Department believes that it would be appropriate for FNS to review programs that States are proposing to operate as work programs, it also believes it would be administratively burdensome to do so, especially since FNS already reviews and approves FNS E&T programs through the state plan process. Therefore, the Department is not proposing that these plans be reviewed and approved by FNS, but is cautioning State agencies to scrutinize these programs carefully so that they are not later determined through the quality control process not to meet the requirements of the statute.

The second issue raised in this context is whether the work program can contain job search as a subsidiary component. The Department realizes that there are work programs that may include some job search activity and it does not want the minor activity (such as job search) to invalidate the bulk of the component (such as education). Therefore, the Department is proposing that a qualifying work program may contain job search as a subsidiary component but that the program must emphasize the component that satisfies the work requirement and that the job search activity be less than half of the requirement.

With respect to the question of whether work and work program hours can be combined to meet the 20 hour per week requirement, the Department believes allowing an individual to combine these hours would be consistent with the intent of the provision. The Department has therefore proposed to allow a combination of work and participation in a work program to satisfy the 20 hour per week requirement.

Measuring and Tracking Time

Within the context of the general rule that an individual can participate for three (countable) months during a three year period, there are two time elements that must be tracked: the three months of participation, and the three-year period. (In order to regain eligibility, the statute introduces a third measure of time—''a 30-day period''—which will be discussed later.) The Department believes that State agencies should have maximum flexibility to measure and track these time periods, and so is proposing only a few requirements in this area.

With respect to the basic three months of participation, the statute provides specifically that the months do not have to be consecutive months. An individual could use one ''countable'' month, go off of the Food Stamp Program for a few months (those months are not counted because the individual is not receiving food stamps), and then use another countable month. This example holds true even if the individual was not participating because of a sanction. For example, if an individual uses one countable month, and then gets a job that he or she quits without good cause, he or she is ineligible under the voluntary quit provision of 7 CFR 273.7(n) for six months. Six months later, after the sanction has expired, the individual can use another countable month if he or she is otherwise eligible. An individual could also use one countable month, work 20 hours per week for a few months (those months are not counted because the individual is satisfying the work requirement), and then use another countable month. The fact that the first three countable months do not have to be consecutive is significant because the statutory language requires that the second three countable months be consecutive. (Eligibility for the second three countable months is discussed below.)

The only other substantial issue to address in the context of measuring the basic three months of participation is whether to count partial months. To count a partial month of benefits as a ''month'' would penalize individuals who applied toward the end of the month. It could also result in someone getting substantially less than three full benefit months if the individual comes on and off the Food Stamp Program as he or she gets work and then loses it. Counting only full benefit months will also be much easier for States to administer. Therefore, as mentioned earlier, the Department is proposing that partial months, i.e., months in which benefits were prorated, not be considered ''countable months.'' These proposals involve measuring the basic three countable months; State agencies

can track these months as they deem appropriate.

The second time period that must be measured (and possibly tracked) is the three-year period. Section 6(o) of the Act provides that individuals generally are limited to receiving food stamps for three countable months in a three-year period. Issues that arise in this context are whether the period will be ''rolling'' or ''fixed,'' when the period starts, and what the three-year period cannot include. The Department believes that a clarification will help explain the issues and options discussed below. Conceptually, the three-year period is a background against which an individual's countable months are measured. Therefore, unlike the ''countable months,'' which start and stop as appropriate, the three-year period is a continuous period. Within the few parameters discussed below, the Department proposes to give State agencies maximum flexibility to track the three-year period as they deem appropriate, given their choices as to how to measure the period, their computer systems' tracking abilities, etc.

The language of Section 6(o) provides that an individual is ineligible if, ''during the preceding 36-month period,'' (emphasis added), the individual participates for more than three countable months. There are two basic ways a State agency could measure or track the three-year period: as a ''fixed'' or a ''rolling'' period. A fixed period has a definite start and stop date; it starts on a given date, runs continuously for three years, stops exactly three years later, and then a new fixed three-year period starts. Under a fixed period approach, when a new three-year period starts, a participant's slate is ''wiped clean,'' and he or she can be eligible for another three countable months. A rolling period does not have definite start or stop dates; using a rolling period, the eligibility worker always ''looks back'' three years from the date of application (but not beyond the notification date or November 22, 1996, as discussed below) and keeps looking back three years each ensuing month. Under the rolling period approach, a participant must wait three years between a total of three countable months.

The following example illustrates the different approaches. The State agency notified recipients of this provision on November 22, 1996 that it is using a fixed three-year period beginning November 22, 1996 and ending November 21, 1999. Mary, a food stamp recipient, gave birth to a baby in November, 1996. Mary's three-year clock started on November 22, but because she had a baby she was exempt from the time limit. On April 30, 1999, Mary's baby (now almost three years old) moves in with the baby's father, causing Mary to lose her exemption from this provision. Mary reports this change to her eligibility worker, and because she is no longer exempt, not covered by a waiver, and not satisfying the work requirement, she uses up her first three countable months in May, June, and July, 1999. In August, 1999, Mary gets a job and works 80 hours, regaining her eligibility as explained below. When Mary loses her job at the end of August and returns to her food stamp office on September 1, she gets her second three countable months (also explained below) for September, October, and November, 1999. On December 1, 1999, Mary has still not found a job. Under a fixed approach, Mary's three-year period ran from November 22, 1996 to November 21, 1999. On November 22, 1999, Mary started a new three-year period. If she is otherwise eligible, Mary can receive three countable months of food stamps for December (1999), January, and February, 2000.

Under a rolling approach, on December 1, 1999, Mary's eligibility worker will look back three years to December 1, 1996 to see if Mary has used all of her allowable countable months. Mary's worker will find all of Mary's allowable countable months from May through November, 1999, so Mary will not be eligible until she becomes exempt, covered by a waiver, or until three years have elapsed between a total of three countable months. Assuming she is not exempt, covered by a waiver, or satisfying the work requirement, Mary will begin to be eligible in June, 2002, as the May, 1999 countable month drops off of the rolling period.

How can Mary be eligible in June 2002 when in fact Mary's eligibility worker will look back and see that Mary still has used five countable months (May dropped off the calendar, but Mary still received food stamps in June and July, and September, October and November 1999)? The law says, ''no individual shall be eligible * * * if, during the preceding 36-month period, the individual received food stamp benefits for not less than 3 months (consecutive or otherwise)'' during which he did not fulfill the work requirement, was exempt or covered by a waiver. The law also provides individuals the opportunity to receive an additional 3 months of food stamps if he regains eligibility by working 80 hours in a 30 day period. Therefore, the law actually provides an individual the opportunity to receive a total of 6 months of food stamps in a three-year period if the two periods are interrupted by a period of work. Given this ambiguity, the Department believes it is appropriate to allow the State agency to issue benefits to an individual who has used up his/her countable months, three years after receiving his/her first countable months benefits. Therefore, under the rolling period, as the first 3 (consecutive or otherwise) month period falls off the calendar, the individual can become eligible for another 3 (consecutive or otherwise) month period. In the example above, Mary will become eligible for her first three (consecutive or otherwise) months again in June 2002 as May 1999 falls off the calendar. She will only become eligible for her second three (consecutive) months in October 2002 as September 1999 falls off the calendar.

Under either the fixed or rolling approach, the outcome is the same; individuals who are not either exempt, covered by a waiver, or satisfying the work requirement will not receive food stamps for more than three months (six, under circumstances discussed below) in three years. Neither the statutory language nor the legislative history specifically address how to measure or track the three-year period. If the statutory language had referred to the preceding ''36 months,'' rather than the ''36-month period'' as it did, there would be no ambiguity, and State agencies could only measure the period as a ''rolling'' period. Allowing the use of a ''fixed'' period will not increase Program costs, it would be consistent with the provision's intent, and would be easier for many State agencies to administer. Given these factors and the ambiguity in the statutory language and legislative history, the Department believes it is appropriate to allow State agencies to choose either approach, and is proposing to do so. However, under the proposal, the State agency must apply its procedures consistently, and make sure that participants who are similarly situated are treated the same.

Under a fixed approach, there are a few areas where the State agency will have additional flexibility. The State agency can elect to administer separate three-year periods for individuals, or it can use the same three-year period for everyone. If the State uses individual-based periods, for non-exempt individuals, the periods would start on the date of application (but, as discussed below, not before the earlier of November 22, 1996, or the date the state notified recipients of this provision). For someone who is exempt from the provision, the State agency can

either start the three-year period at the date of application (so that the period runs during the period of exemption) or on the date the individual's exemption is removed. The State could also choose to use the same three-year period for everyone. As in the example above, the State had the same three year clock for everyone, regardless of when they applied or lost their exemption, which ran from November 22, 1996 through November 21, 1999. On November 22, 1999, everyone's slate is wiped clean and a new three year clock begins. Under either approach, non-exempt individuals who are not satisfying the work requirement will only get food stamps for three months in three years. The Department believes that the added flexibility of determining how to track a fixed three-year period will be useful to State agencies, who can develop tracking policies to suit their computer systems, other welfare reform initiatives, etc.

There is one important limitation on the three-year period which applies under both a fixed and a rolling approach. The statute mandates that the three-year period shall not include any time before the date the State notifies recipients of the application of this provision (the ''notification date''), or November 22, 1996 (the date that was three months after the date of enactment of the PRWORA), whichever is earlier. Therefore, if the State agency chooses a fixed three-year period, the start date cannot be before November 22, 1996, or the notification date, whichever was earlier. If the State agency elects to use a rolling three-year period, it cannot look back beyond either November 22, 1996, or the notification date, whichever was earlier. The proposed rule includes this limitation.

What Counts as ''Receiving'' Food Stamps?

Section 6(o) of the Act, subsequent to amendment by Section 824 of PRWORA makes individuals ineligible for food stamps if during the preceding 36-month period, the individual ''received food stamp benefits'' for more than three months during which time the individual was not either exempt, covered under a waiver, or satisfying the Food Stamp Program work requirement. An individual's participation in a particular month does not count toward the time limit unless he or she actually received some food stamps during that month. The statute does not require that the individual actually use his or her benefits in order for a month to be counted; it just requires that he or she receive them. The only significant issue that the Department must address in this context is how to handle a situation in which an individual was certified in error. As discussed below, the Department is proposing that when an individual is certified in error, the stamps be considered to have been ''received'' unless the erroneous benefits have been repaid.

In a situation in which an individual was mistakenly certified (e.g., a work sanction was incorrectly applied), the clear language of the statute would require that the month be counted because the individual received food stamps. Once a claim is established and the overissued benefits are repaid in full, counting the erroneously issued benefits as having been received would be inappropriate. A policy that ignores the actual receipt of food stamps based on the possibility that they might be repaid would be inconsistent with the intent of the provision and the statutory language. A policy that did not count erroneously issued benefits as having been ''received'' would be inconsistent with efforts to discourage clients from misrepresenting their circumstances. However, the Department recognizes the administrative complexity involved, and is therefore proposing that the State agencies may opt to treat benefits erroneously received as having been ''received'' unless or until they are repaid in full.

Administrative Requirements

The statutory language and legislative history are silent as to verification and reporting requirements, and how the income and resources of someone made ineligible by this provision should be handled for the rest of the household.

The statutory language of Section 6(o) is very specific as to the number of hours required to be worked in order to satisfy the work requirement (''20 hours per week, averaged monthly''). Because eligibility can hinge on the actual number of hours worked, the Department believes that it is necessary to verify an individual's work hours when that individual is meeting the requirement of this provision by working. None of the current mandatory verification items at 7 CFR 273.2(f)(1) would capture all work situations. Income must be verified, so paid work hours would probably be captured as part of the verification of income. But the Department is proposing to allow unpaid or ''in-kind'' work to satisfy the work requirement, and those items would not be captured in the verification of a household's income. Because the accurate assessment of an individual's work hours is crucial (both at initial certification and recertification) to the eligibility determination, the Department is proposing to make verification of work hours mandatory at certification and recertification for certain individuals who are subject to the time limit. The State agency should have information as to an individual's work hours if the individual is satisfying the work requirement by participating in a state-operated work or workfare program. Therefore, additional verification of work hours will not be necessary in those circumstances. However, the State agency may not have information about an individual's work hours if the individual is participating in a work or workfare program that is not operated by the State agency. The Department is therefore proposing that the verification requirement apply to individuals subject to the food stamp time limit who are satisfying the work requirement by working, or by combining work and work program participation, or by participating in a work or workfare program that is not operated or supervised by the State agency.

One other verification issue is raised when an individual indicates that he/she has participated in the food stamp program in another State. Though no national database exists now that would capture the number of ''countable months'' each participant has used, the Department is in the process of exploring the feasibility of designing one. In the meantime, the Department believes that it is not overly burdensome to require State agencies to check other States for the number of ''countable months'' an individual has used when the individual indicates that he/she has participated in those other states. Such a policy is consistent with Food Stamp procedures that require State agencies to verify anything that appears ''questionable.'' The Department does not believe, however, that it would make sense to require the new State to perform an independent analysis to determine how many countable months the individual has used. Therefore, the Department is proposing to allow a State agency to rely on another State agency's assertion as to how many countable months an individual has used. Verification of the number of countable months an individual has used in another State is not necessary at recertification, so the Department is proposing to make it mandatory only at initial certification (and when there is an indication that the individual participated in another state). To codify these policies, the Department is proposing to amend regulations at 7 CFR 273.2(f)(1) and 273.2(f)(8) to add

the new mandatory verification requirements.

As discussed above, the number of hours an individual works is crucial to the eligibility determination for most individuals subject to the time limit and satisfying the work requirement. None of the current requirements for reporting changes that occur during a certification period would necessarily capture changes in an individual's work hours. Because the Department is proposing to allow unpaid or ''in-kind'' work to satisfy the work requirement, reporting changes in income will not necessarily capture changes in the number of work hours. As part of its flexible approach to change reporting, the Department published a proposed rule on December 17, 1996 (61 FR 66233), which would provide State agencies with options for requiring changes to be reported. One of the options would require a change report when the number of hours worked changed more than 5 hours a week, and the change is expected to continue for more than a month. Even this requirement will not capture a small change in the number of hours worked, which could affect eligibility. The Department believes that because hours worked are so critical to the eligibility determination for individuals subject to the time limit, it must require that changes in work hours be reported. Therefore, the Department is proposing to require that individuals subject to the time limit must report changes in work hours that bring the individual below 20 hours per week, averaged monthly. The Department is proposing to amend 7 CFR 273.12(a)(1) accordingly.

Another reporting issue is whether or not a household must report when an able-bodied adult without dependents obtains or loses employment, thus becoming eligible or ineligible. For example, if an individual is ineligible because he/she has used up his/her countable months, and then gets a job and works 80 hours in a 30 day period, he/she becomes eligible. The regulations at 273.12(a) require that a household report changes in the source or amount of gross monthly income and changes in household composition such as the addition or loss of a household member. Policy memo 86–7 further addresses this issue and states that households are required to report changes during the certification period which affect the nonhousehold status of members, for example, when a full-time student quits college or increases part-time employment from 15 hours to 20 hours a week, or a household member marries a live-in attendant or begins to purchase and prepare food with a nonhousehold member. A household must report these changes because they may affect the household's eligibility or allotment. Therefore, as the regulations and current policy already address this issue, the Department is not proposing additional household composition reporting requirements specific to able-bodied adult without dependents.

Another issue that arises in this context is how to handle an unreported job. Section 6(o)(2)(A) of the Act provides that an individual's participation counts toward the time limit during times when the individual ''did not work 20 hours or more per week.* * *'' If an individual was working 20 hours per week but did not report the job, the individual may have received benefits erroneously (or a higher allotment that he or she should have received), but the individual was working 20 hours per week, and so the participation should not count toward the time limit. Existing policy would require that when an unreported job is discovered, the State agency must count the unreported income, recalculate the household's eligibility and benefit level, and establish claims as appropriate. But the State agency must also consider the individual to have been ''working,'' and so not count those months of participation if the work requirement was being satisfied with an unreported job. The Department has incorporated this policy into its proposal.

The final administrative issue is the treatment of an ineligible individual's income and resources. In other contexts, the Department handles the nonhousehold member's income and resources in one of three ways. The income and resources of the nonhousehold member are either counted in full as available to the household, excluded from those of the household except to the extent that they are actually contributed to, or jointly owned by, eligible household members, or a pro rata share of the individual's income and all of the individual's resources are counted as available to the household. The Department recognizes that most of these individuals will not have much income or resources. However, if the ineligible able-bodied adult without dependents is purchasing and preparing food with the remaining members of the household, what little income he/she has should be counted at least in part as available to the household and the resources be counted in full. To count all of the income as available to the household would be more punitive than necessary. Therefore, the Department is proposing that the income and resources of someone made ineligible under this provision be handled according to § 273.11(c)(2); The resources of the ineligible able-bodied adult without dependents shall count in their entirety and a pro rata share of the income shall be counted as income to the remaining members. The remaining provisions of 273.11(c)(2) concerning deductible expenses and eligibility and benefit levels will also apply. In order to codify this policy, the Department is proposing a technical amendment to 273.1(b); section 273.11(c)(2) does not need to be amended.

Exemptions

Section 6(o) of the Act exempts from the otherwise generally applicable statutory time limit individuals who are: (1) under 18 or over 50 years of age; (2) medically certified as physically or mentally unfit for employment; (3) a parent or other household member with responsibility for a dependent child; (4) exempt from work registration requirements under section 6(d)(2) of the Act; or (5) pregnant. Periods of participation in the Food Stamp Program while an individual is exempt are not counted toward the individual's three-month limit. Therefore, exempt individuals may participate in the Food Stamp Program for as long as they are otherwise eligible. Eligibility workers should set certification periods as appropriate for the exemption. Two of the exemptions (age and pregnancy) need minor clarification; two of the exemptions raise substantial issues (the ''unfit for employment'' and the ''household member with responsibility for a child'' exemptions). As elsewhere in this proposed rule, the Department is seeking a balance between consistency and State agency flexibility in the context of these exemptions.

Section 6(o)(3)(A) of the Act exempts individuals who are ''under 18 or over 50 years of age.'' The Department would like to clarify that someone is ''over 50 years of age'' on his or her 50th birthday. On that day, the individual starts his or her 51st year, and so is ''over 50 years of age.'' Similarly, an individual loses the exemption on his or her 18th birthday. The provision also exempts pregnant women, and the Department would like to clarify that any trimester of pregnancy exempts a woman from this provision. However, to clarify and be consistent with the proposal to not count partial months, the Department is proposing that a month is not a countable month for able-bodied adult without dependents purposes if the individual is exempt for part of the month. For example, if an individual turns 18 on September 5, he retains his exemption for September, and his first countable month is

October. Or if an individual turns 50 in September, he will be exempt for the entire month of September. The provision incorporates by reference the work registration exemptions from subsection 6(d)(2) of the Act. Regulations at 7 CFR 273.7(b) already implement those exemptions, so they will not be addressed further in this rulemaking.

The Department would like to clarify that only those provisions of 7 CFR 273.7(b) that implement the section 6(d)(2) exemptions are incorporated by reference as exemptions to this provision.

Medically Certified as Physically or Mentally Unfit for Employment

Section 6(o)(3)(B) of the Act exempts individuals who are ''medically certified as physically or mentally unfit for employment.'' Nothing in the legislative history of this provision provides guidance in defining either ''medically certified,'' or ''unfit for employment.'' In crafting this exemption, Congress did not use the term ''disabled,'' which is defined in Section 3 of the Act, 7 U.S.C. 2012. Someone who is disabled as defined in the Act may be ''unfit for employment,'' but the language of this exemption is more broad. The concept of physical or mental ''fitness'' for employment, as distinguished from physical or mental ''disability,'' is found in the context of the work requirements that predate PRWORA. Section 6(d)(1)(A) of the Act defines the work requirements for ''physically and mentally fit'' individuals (emphasis added). Regulations that implement this provision (at 7 CFR 273.7(b)(1)(ii)) exempt individuals who are ''unfit for employment.'' It would not make sense for Congress to have intended two different meanings of ''unfit for employment'' in the context of exemptions from food stamp work requirements. It appears that the only difference between the ''unfit for employment'' exemption in section 6(d)(1)(A) of the Act (as implemented in 7 CFR 273.7(b)(1)(ii)) and the one in Section 6(o)(3)(B) of the Act is whether the condition is ''medically certified.''

Regulations at 7 CFR 273.7(b)(1)(ii) do not define ''unfit for employment,'' but set out verification requirements if the ''unfitness'' is not evident. Someone whose condition (and that the condition made him or her unfit for employment) was ''evident'' would not have to provide any verification in order to be entitled to the exemption. Under this rule, verification ''may consist of receipt of temporary or permanent disability benefits issued by governmental or private sources, or of a statement from a physician or licensed or certified psychologist.'' The receipt of disability benefits is indirect proof that there has been a medical certification of a condition making the recipient unfit for employment. A statement from a physician or licensed or certified psychologist is certainly a ''medical certification.'' The Department believes that the verification requirement in this context is essentially a ''medical certification'' requirement. With no legislative history to indicate otherwise, the Department believes that it would not make sense to try to establish a new, separate definition of ''medically certified.'' The real distinction appears to be that under the work registration exemption, participants only have to furnish a medical certification if the condition (or its debilitating nature) is not evident. Section 6(o)(3)(B) of the Act requires medical certification in all cases. The verification requirement in 7 CFR 273.7(b)(1)(ii) is a reasonable definition of what ''medically certified'' might mean. In addition, it would not make sense for an individual to be considered ''unfit for employment'' under 7 CFR 273.7(b)(1)(ii) after providing the requisite verification, but not be considered ''unfit for employment'' in this context, even after providing the same verification. For these reasons, the Department is proposing to incorporate the exemption in 7 CFR 273.7(b)(1)(ii), as the ''unfit for employment'' exemption, except that the verification (medical certification) will be mandatory.

Parent or Other Household Member With Responsibility for a Dependent Child

Section 6(o)(3)(C) of the Act exempts an individual who is ''a parent or other member of a household with responsibility for a dependent child.'' This exemption raises two issues: what is the age of the child that entitles certain household members to the exception; and assuming a qualifying ''child,'' which household members can qualify for the exemption.

The Department is proposing that in this context ''child'' mean any individual under age 18. The Department has considered proposing a lower age, but could find no basis in the Act or the regulations for any qualifying age other than six. Section 6(d)(2) of the Act exempts parents or other household members responsible for the care of a child under age six from the work requirements that predate the PRWORA. However, as mentioned above, Section 6(o)(3)(D) of the Act exempts from its provisions anyone who is exempt under Section 6(d)(2) of the Act. Clearly Congress would not have created a separate exception in Section 6(o)(3)(C) for parents or other household members with ''responsibility for a dependent child'' if it intended that the ''child'' be under age six. Without any legislative history on the issue, or any other statutory or regulatory basis, the Department believes that selecting an age other than that of majority would be arbitrary. The Department also believes that this is one area in which consistency is important, and so is proposing to consider anyone under age 18 a ''child'' for these purposes.

The statutory language exempts any parent of a child household member. Therefore, if a food stamp household consists of two parents and a child, the child is exempt as being under 18, and both parents are exempt under the ''parent'' exemption. As in other contexts, the Department is proposing to include adoptive and stepparents in the definition of ''parent.''

The provision also exempts an individual who is not a parent, but who is a member of the household ''with responsibility for'' a child. The Department recognizes that there will be many situations in which non-parent adults have responsibilities for child household members. A grandparent may provide most of the financial support for the child, an unrelated household member may be the child's primary caretaker, etc. The statutory language did not limit the number of household members that could be exempted under this provision. The Department believes it would be administratively burdensome to require the State agency to evaluate the exemption on a case-by-case basis to determine whether an individual has ''responsibility'' for a dependent child. Accordingly, the Department is proposing that whenever there is a child under 18 in the household, no adult in the household would be subject to the work requirements.

Regaining and Maintaining Eligibility

Section 6(o)(5) of the Act allows an individual who has ''used up'' his or her countable months to regain eligibility if, during a thirty-day period, the individual works 80 or more hours, participates in and complies with a work program for 80 or more hours (as determined by the State agency), or participates in and complies with a workfare program. Someone who has regained eligibility under this provision may remain eligible as long as he or she continues to satisfy the work requirement (or is exempt or covered by a waiver). The terms ''work program''

and ''workfare'' have the same meaning as in the discussion of the general rule. The discussion as to what will qualify as ''work'' (volunteer or ''in kind'' work) is also applicable in this context, and the Department's proposal reflects that. The provision allowing individuals to regain eligibility raises three new issues: what is the ''30-day period,'' whether the 80 hours of work or participation in a work program has to be completed before the individual can receive benefits, and whether the individual can regain eligibility more than once in a three-year period. The Department would also like to clarify that someone who becomes ineligible under the time limit, but later becomes exempt or covered by a waiver, does not have to regain eligibility under this provision (i.e., he or she does not have to work 80 hours in a thirty-day period, etc.). He or she is exempt from the provision, and can begin or continue to receive benefits as long as the exemption or waiver lasts and the individual is otherwise eligible.

The statutory language requires that the 80 hours of work, etc. be completed ''during a 30-day period.'' The provision does not specify that the work must be done during a calendar month, but it does imply that the thirty-day period be uninterrupted. To allow otherwise would distort the plain meaning of the language. The Department is therefore proposing to define ''30-day period'' as ''30 consecutive days.'' A second issue in the context of the thirty-day period is whether the thirty days has to immediately precede the date of reapplication. There is no requirement in the statutory language that the thirty-day period immediately precede the reapplication. Elsewhere in the provision, Congress specified reference to the ''preceding'' time period, and it certainly could have in this context if it had intended that the 80 hours of work (or work program, etc.) be completed immediately prior to the reapplication. The Department is therefore proposing that someone can regain eligibility by working 80 hours, etc. during any 30 consecutive days.

When an individual applies for benefits and completes the ''cure'' for regaining eligibility during the application period by either working or participating in a work program, the Department is proposing to allow States the option of either providing benefits back to the date of application or prorating benefits from the date the cure is complete. For example, for an individual who uses up his or her three countable months, reapplies on December 1, but does not complete his or her 80 hours of work until the 15th of December, the State agency may either provide benefits back to December 1st , or prorate them from December 15th. However, the Department would like to stress that this proposed policy is for individuals regaining eligibility by working or participating and complying in a work program. An individual who regains eligibility by participating in and complying with workfare, and whose workfare obligation is based on an estimated monthly allotment prorated to the date of application, then the allotment issued must be prorated back to this date. Section 20 of the Act, 7 U.S.C. 2029, is clear that food stamps are compensation for work performed in a workfare program. For example, if an individual has used up his first three months, then applies for food stamps, and is assigned to a workfare slot prior to determination of eligibility, and he then completes his workfare obligation within 30 days, his benefits shall be calculated to the date of application. The Department believes that this interpretation is the only one consistent with the Act regarding workfare. One additional clarification is proposed in the regulatory language. The statutory language of Section 6(o)(5) does not require individuals participating in workfare to work 80 hours in a 30-day period because under a workfare program, an individual's work obligation is linked with the amount of the individual's food stamp benefit. The language requires that an individual ''participate in and comply with'' a workfare program during a 30-day period, not that an individual participate in a workfare program for 30 days, which would essentially require a 30-day waiting period. The Department is proposing to clarify that when an individual is regaining eligibility through a workfare program, the individual must be considered to have completed the cure when the individual has completed the required number of hours of work.

The last issue in this context is whether an individual can regain eligibility and then maintain eligibility under this provision more than once during the three-year period. Neither the statutory language nor the legislative history address this issue. (The statutory language does prohibit someone from using his or her second three ''countable months'' more than once, as discussed below.). As mentioned above, Section 6(o)(5) of the Act allows an individual who has ''used up'' his or her countable months to regain eligibility if, during a thirty-day period, the individual works 80 or more hours, participates in and complies with a work program for 80 or more hours (as determined by the State agency), or participates in and complies with a workfare program. Someone who has regained eligibility under this provision may remain eligible as long as he or she continues to satisfy the work requirement (or is exempt or covered by a waiver). This provision is a time limit for individuals who are not working, and individuals can only regain eligibility by working (or participating in a work program or workfare) and then maintain eligibility by continuing to work. Allowing individuals to be able to regain and maintain eligibility whenever and as often as they meet the 80 hour/30-day work requirement would encourage individuals to continue to look for work even after having used up their countable months. The Department is therefore not proposing to limit the number of times an individual can regain and maintain eligibility under this provision.

Eligibility for the Additional Three ''Countable Months''

Section 6(o)(5)(C) allows an individual who has regained eligibility (by working 80 hours in a 30-day period, etc.) and then lost the job (or workfare slot, etc.) to be eligible for an additional period of three countable months. The additional three months must be consecutive, and they start on the date the individual notifies the State agency that he or she is no longer meeting the work requirement. An illustration will help explain this general concept. Joe uses up his three countable months, and becomes ineligible for food stamps. Two months later, he gets a job and works 80 hours in a thirty-day period, regaining eligibility. For six months, Joe works at least 20 hours per week. He is satisfying the work requirement, so he is maintaining his food stamp eligibility. Joe is laid off in the seventh month of Joe's job, and notifies his eligibility worker immediately. Starting the day he notifies his worker, Joe is eligible for an additional three consecutive ''countable'' months of food stamps. That is, even though he already used up his (first) three countable months, he is eligible for up to three consecutive months without having to either fulfill the work requirement (20 hours per week, etc.), be exempt (physically or mentally unfit for employment, etc.), or be covered by a waiver. There are two significant issues that arise only in the context of this additional three countable months: the additional countable months are consecutive, and they start the date the client notifies the

State that he or she is no longer meeting the work requirement.

Section 6(o)(5)(C) of the Act specifies that, although the first three countable months can be consecutive or otherwise, the second three countable months are consecutive. The plain meaning of this language is that the second three countable months cannot be used in a piecemeal fashion, they must be used consecutively. For example, Sue has just lost her job, and becomes eligible for the second three countable months on January 1, so (if she is otherwise eligible) her second three countable months are January, February, and March. If she gets a job in March, she essentially ''forfeits'' her last countable month (a month when she can receive food stamps without working, etc.) because she cannot ''save'' the month for use some time later when she is no longer working.

The statute not only requires that the additional three countable months be consecutive, but it requires that they start ''the date the individual first notifies the State agency'' that the individual is no longer fulfilling the work requirement. That means that even if the individual cannot take advantage of the second three countable months (e.g., he or she is under a work sanction or temporarily resource ineligible), the additional three month ''window'' opens the date the individual notifies the State that he or she is no longer working (and because it has to be three consecutive months, it closes exactly three months later). To illustrate, if John notifies the State agency on January 1 that he has quit his job (without good cause), he is potentially eligible under this provision for a period of three consecutive months starting January 1. However, Section 6(o)(6) of the Act states that nothing in its provisions makes an individual eligible for food stamps if he or she is not otherwise eligible for benefits. Therefore, the provisions in Section 6(o) that make an individual eligible do not override other provisions of the Food Stamp Act and implementing regulations that make an individual ineligible. In the illustration, John is subject to a 90-day voluntary quit sanction under 7 CFR 273.7(n). His sanction would expire on April 1, but his second three-month window of eligibility was only open from January 1 (the day he notified the State agency that he was no longer working) through the end of March (three consecutive months later). John has forfeited the opportunity to use his additional three countable months (at least this time).

There are two more issues arising from the provision mandating when the additional three months of eligibility start. Section 6(o)(5)(C) mandates that the additional three countable months start the date the individual ''first notifies the State agency'' that he or she is no longer meeting the work requirement. Therefore, even if the individual does not report the job loss right away, the additional three month ''window'' opens when the individual notifies the State agency.

Although this policy might not provide incentive to report the job loss immediately, the Department cannot ignore the plain language of the statute. Therefore, the Department's proposal mirrors the statutory requirement that eligibility for the additional three countable months starts the day the client first notifies the State agency that he or she is no longer meeting the work requirement.

There is one circumstance when the Department believes that a departure from this general rule is necessary. If an individual is meeting the work requirement by participating in a work program or workfare, and at some point no longer meets the requirements of the work or workfare program (such that he or she could be eligible for the additional three months), in most cases the State agency becomes aware of this information and is required by work rules to take an action on the individual's case. In most cases the State agency is either supervising the workfare or work program and is aware that the individual is no longer meeting the work requirements or is notified by the agency that is. Once the State agency becomes aware that the individual is no longer meeting the work requirements, the eligibility worker will send the individual a notice explaining that he or she no longer meets the work requirements (of 7 CFR 273.7), and advise him of his options. The Department believes that in these cases, when the State agency becomes aware that the individual is no longer meeting the work requirement because the State agency was operating or supervising the work or workfare program, or was notified by the agency that was, it would be meaningless to require the individual to contact his or her eligibility worker in order to trigger the eligibility for the additional three months. The individual may not even be aware that he or she is no longer meeting the work requirement. When the State agency is the entity with information as to whether the work requirement is being met, the additional three month period should start on the date of the notice. Accordingly, the Department is proposing that when an individual is meeting the work requirement by participating in a work or workfare program, the additional three-month period will start the date the State agency notifies the individual that he or she is no longer meeting the work requirements.

The statute also makes it clear that individuals may only ''receive benefits'' for a second three countable months once in a three-year period. Therefore, although individuals may regain eligibility (by working 80 hours in a 30-day period, etc.) many times, they can only take advantage of the second three countable months once. Individuals can therefore get food stamps for no more than six countable months in a three-year period, but in order to become eligible for the second three countable months, the individual has to have worked at least 80 hours in a thirty-day period. Significantly, the statute uses the following language: ''an individual shall not *receive any benefits* pursuant to * * * [the additional three month provision] for more than a single 3-month period in any 36-month period.'' (emphasis added.) Therefore, using the example above, although John has essentially forfeited the second three countable months (because of the voluntary quit sanction), he may become eligible again for the additional three consecutive countable months because he never received benefits for that period. As before, any three consecutive month window would open the day John first notifies the State agency that he has lost his job, and would close three months later. In the example, after John's voluntary quit sanction expires (and he has forfeited the opportunity to use the three consecutive countable months), he finds a new job on May 1. He works 80 hours in a thirty-day period, regaining his eligibility. On August 1, John is laid off from the new job, and notifies his eligibility worker.

John is now eligible for three consecutive countable months starting August 1. After John has received any benefits during this second three-month window, he will have to either meet the work requirement, become exempt, or be covered by a waiver in order to participate.

Waivers

Section 6(o)(4) of the Act allows the Department, at the request of a State agency, to waive the time limit for any group of individuals if the Secretary determines that the area in which the individuals reside has an unemployment rate of over ten percent, or ''does not have a sufficient number of jobs to provide employment for the individuals.'' The Department issued guidance for States seeking waivers on

December 3, 1996. The guidance contained basic procedures for applying for waivers, identified data sources which could be used to substantiate requests, and described some approaches that could support a ''lack of sufficient jobs'' waiver. This proposed rule does not substantially change the policies expressed in the December 3, 1996 guidance. Because of the nature of the waiver approval process and the many factors involved in the analysis of whether a waiver is appropriate, the Department cannot specify which waiver requests it will approve and which it will not. This proposed rule is intended merely to provide a framework for waiver requests.

The waiver authority raises several issues: data required to justify a waiver, the duration of waivers, defining an area, and factors to indicate a lack of sufficient jobs. Other than the limits discussed here, FNS is not proposing any specific procedures for applying for waivers. FNS will expedite the approval process, and intends that it be as simple as possible. Consistent with these goals, FNS is proposing that in areas for which the State has certified that data from the Bureau of Labor Statistics (BLS) show an unemployment rate above 10 percent, the State may begin to operate the waiver at the time the waiver request is submitted. FNS has proposed to retain the ability to require any modifications that might be required in order to meet the requirement of the statute. For example, if the most recent data (that might not have been available to the State at the time of the request) shows that some areas no longer have unemployment rates above 10 percent, FNS must be able to reexamine the basis for waivers in those areas. The terms of any such modification of the waiver would be negotiated with the State agency. Allowing States to begin to operate such waivers would provide immediate relief to areas long suffering with high unemployment rates. All other waivers will need prior approval before they take effect.

Kinds of Data Needed

With respect to the kinds of data required to support a waiver, established Federal policy requires Federal executive branch agencies to use the most recent National, State or local labor force and unemployment data from the Bureau of Labor Statistics (BLS) for all program purposes. This policy is contained in Statistical Policy Directive No. 11, issued by the Office of Federal Statistical Policy Standards, Office of Management and Budget. This policy ensures the standardization of collection methods and the accuracy of data used to administer Federal programs. In accordance with this policy, the Department is proposing that States seeking waivers for areas with unemployment rates higher than 10 percent be required to rely on standard BLS data or methods. To the extent that a ''lack of sufficient jobs'' waiver is also based on labor force and unemployment data, the Department is proposing that the labor force and unemployment data also be based on BLS data or methods.

Duration of Data and Duration of Waivers

Another issue related to the data required to support a waiver is how recent the data and analysis must be, and whether the data must cover a certain period before a waiver will be granted. Closely related is the issue of the duration of the waivers. Unemployment rates fluctuate from month to month, with fluctuations likely to be larger for estimates based on smaller areas. Data must be recent because a waiver must be based on the job market as it then exists. Stale data could mask areas in which the labor market has recently declined, or overestimate the unemployment rate in an area that is experiencing job growth. If requested, FNS will automatically grant a waiver in any area in which the average unemployment rate in the preceding 12 months is greater than 10 percent. However, the Department will not require a 12-month average to approve a waiver for two reasons: a 12-month average may mask portions of the year when the unemployment rate rises above or falls below 10 percent. In addition, requiring a 12-month average before a waiver could be approved would necessitate a sustained period of high unemployment before an area became eligible for a waiver. However, although allowing States to obtain a year-long waiver based on fewer months of data might be more responsive to early labor market signals, it could be an over response to a seasonal problem or a short term aberration. Therefore, the Department is proposing that in general, the duration of a waiver should bear some relationship to the documentation provided in support of the waiver request. FNS will consider approving waivers for up to one year based on documentation covering a shorter period, but the State must show that the basis for the waiver is not a seasonal or short term aberration. In general, the Department will not approve waivers for more than one year. In addition, States in areas with predictable seasonal variations in unemployment may use historical trends to anticipate the need for waivers for certain periods. For example, if the pattern of seasonal unemployment is such that an area's unemployment rate typically increases by two percentage points in January, February, and March, and the area's unemployment rate is currently 9 percent, a State may request a waiver for this area based on its current rate and historical trends. The period covered by the waiver would then coincide with the period of projected high unemployment.

Defining an ''Area''

With respect to the question of what ''areas'' can receive waivers, the Department is allowing States broad discretion in defining areas that best reflect the labor market prospects of Program participants and State administrative needs. In general, the Department encourages States to consider requesting waivers for areas smaller than the entire State. Statewide averages may mask slack job markets in some counties, cities, or towns. Accordingly, States should consider areas within, or combinations of, counties, cities, and towns. The Department also urges States to consider the particular needs of rural areas and Indian reservations. Although the Department is proposing to allow States flexibility in defining areas to be covered by waivers, the supporting data must correspond to the requested area (e.g., a county-wide waiver must be supported by county-wide data).

Unemployment figures for many local areas based on standard BLS data or methods are readily available. Through its Local Area Unemployment Statistics (LAUS) program, BLS works in concert with State employment security agencies to estimate unemployment rates for all states and counties, all cities with a population of 25,000 or more, all cities and towns in New England, and all metropolitan and small labor market areas in the United States. In addition, State employment security agencies can use standard BLS methods to generate unemployment rates for smaller geographic areas and special geographic areas such as Indian reservations, as long as the boundaries of those areas coincide with the boundaries of a group of census tracts. While standard methods can be used to estimate unemployment rates for smaller areas, the estimates will be less reliable. A list of State employment security agency contacts can be accessed through the BLS LAUS home page (found at http://stats.bls.gov:80/lauhome.htm). Monthly State and local area unemployment rates are also readily available from a variety of published sources. Current data can be obtained via the LAUS home page,

the LAUS program, BLS regional offices, or the State's employment security agency.

Lack of Sufficient Jobs

Section 6(o)(4)(A)(ii) of the Act allows the Department to waive the time limit for a group of individuals if the area in which the individuals reside ''does not have a sufficient number of jobs to provide employment for the individuals.'' The legislative history does not provide guidance on what types of waivers the Department should approve under this standard, and there are no standard data or methods to make the determination of the sufficiency of jobs. States requesting waivers are therefore free to compile evidence and construct arguments to show that in a particular area, there are not enough jobs for individuals who are affected by the time limit. However, as described in the December 3, 1996, guidance, some indicators that an area has insufficient jobs are: if the area is on the U.S. Department of Labor's (DOL) Employment and Training Administration's list of labor surplus areas; if the area qualifies for extended unemployment benefits; or if the area has a falling ratio of employment to population. No particular approach is required. Because waivers are approved based on current labor market conditions, evidence and data should be the most recent available to the State. The Department will make the decisions on a case-by-case basis.

Implementation

While most of the provisions of PRWORA were effective, and required to be implemented on August 22, 1996, some of the provisions in this rule have different statutory implementation dates. Section 115 (42 U.S.C. 862a), denial of benefits for drug-related convictions, was required to be implemented July 1, 1997, unless the State submitted a TANF plan to DHHS, in which case the effective date of Section 115 was the date the TANF plan was received by DHHS. In no event may State agencies disqualify an individual for a conviction occurring on or before August 22, 1996. States may also opt out of Section 115 by legislative action.

Sections 829 and 911 of PRWORA (Section 8(d) of the Act and 42 U.S.C. 608a) are mandatory and were required to be implemented on August 22, 1996, for all reductions in an assistance program's benefits initiated on or after that date for failure to perform a required action or for fraud. Section 819 of PRWORA (Section 6(i) of the Act) regarding comparable disqualifications is optional and, therefore, effective when the State chooses to implement it; but disqualifications imposed prior to August 22, 1996, shall not be imposed for food stamp purposes. The provisions in 42 U.S.C. 404(i) and (j) (Section 103(a) of PROWRA) are optional and, therefore, effective when the State chooses to implement them, but not prior to the State's receipt of a TANF block grant.

Pursuant to Section 824 of the PRWORA, (7 U.S.C. 2015(o)) the time limit for able-bodied adults is effective the date the State notifies recipients of the application of the time limit, or November 22, 1996 (the date that was three months after the date of enactment of the PRWORA), whichever is earlier.

The Department is proposing that the changes made by this rule would be effective and implemented no later than the first day of the month 180 days after publication of the final rule.

List of Subjects

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedures, Claims, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping, Social Security, Students.

Accordingly, 7 CFR Parts 272 and 273 are proposed to be amended as follows:

1. The authority citation for parts 272 and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.1, a new paragraph (c)(1)(vii) is added to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(c) Disclosure. (1) * * *

(vii) Local, State or Federal law enforcement officers, upon written request, for the purpose of obtaining the address, social security number, and, if available, photograph of any household member, if the member is fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of a New Jersey, a high misdemeanor), or is violating a condition of probation or parole imposed under a Federal or State law. The State agency shall also provide information regarding any household member, upon the official request of a law enforcement officer, necessary for the conduct of an official duty, such as apprehension or investigation, related to the any of the above-described individuals.

* * * * *

3. In § 272.2, new paragraphs (d)(1)(xiii) and (d)(1)(xiv) are added to read as follows:

§ 272.2 Plan of operation.

* * * * *

(d) *Planning documents.* (1) * * *

(xiii) If the State agency chooses to implement the optional provisions specified in (273.11(l), (m), and (n) of this chapter, the Plan's attachment shall include the options selected, guidelines to be used, and specify how the income of any disqualified individuals will be treated.

(xiv) If the State agency chooses to implement the optional provisions specified in (273.11(q), (r), and (s) of this chapter, the Plan's attachment shall include the options selected, and procedures to be used. The plan shall also include a description of the safeguards the State agency will use to restrict the use of information collected by a State agency in implementing the optional provision contained in § 273.11(r) of this chapter.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

4. In § 273.1, new paragraphs (b)(2)(viii), (b)(2)(ix), (b)(2)(x), (b)(2)(xi), (b)(2)(xii), and (b)(2)(xiii) are added to read as follows.

§ 273.1 Household concept.

* * * * *

(b) *Nonhousehold members.* * * *

(2) * * *

(viii) *School attendance requirements.* At State agency option, individuals who are disqualified in accordance with the school attendance provisions of § 273.11(m) and (n).

(ix) Individuals convicted of drug-related felonies. Individuals who are ineligible under § 273.11(o) because of a drug-related felony conviction.

(x) *Individuals disqualified from other means-tested programs.* At State agency option, individuals who are disqualified in another assistance program in accordance with § 273.11(l).

(xi) *Fleeing felons.* Individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, or who are violating a condition of probation or parole who are ineligible under § 273.11(p).

(xii) *Individuals ineligible because of child support issues.* Individuals disqualified for failure to cooperate with

child support enforcement agencies in accordance with § 273.11(q) or (r), or for being delinquent in any court-ordered child support obligation in accordance with § 273.11(s).

(xiii) *Able-bodied adults who have exceeded the time limit.* Persons ineligible under § 273.24, the time limit for able-bodied adults.

* * * * *

5. In § 273.2:

a. Two new paragraphs (f)(1)(xiv) and (f)(1)(xv) are added.

b. Paragraph (f)(8)(i)(C) is redesignated as paragraph (f)(8)(i)(D), and a new paragraph (f)(8)(i)(C) is added.

The additions read as follows:

§ 273.2 Application processing.

* * * * *

(f) *Verification.* * * *

(1) *Mandatory verification.* * * *

(xiv) *Additional verification for able-bodied adults subject to the time limit.* (A) *Work hours.* For individuals subject to the food stamp time limit of § 273.24 who are satisfying the work requirement by working, by combining work and participation in a work program, or by participating in a work or workfare program that is not operated or supervised by the State agency, the individuals' work hours shall be verified.

(B) *Countable months in another state.* For individuals subject to the food stamp time limit of § 273.24, the number of countable months (as defined in § 273.24(b)(1)) an individual has used in another State shall be verified if there is an indication that the individual participated in that State. The State agency may accept another State agency's assertion as to the number of countable months an individual has used.

(xv) *Verification of applicants fleeing to avoid prosecution or custody for felonies.* The State agency shall establish a system for verifying whether applicants or participants are subject to disqualification under the provisions of § 273.11(p) based on their possible status as individuals fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of New Jersey, a high misdemeanor) or who are violating a condition of probation or parole under a Federal or State law, or fleeing to avoid prosecution or custody for felonies; or are subject to disqualification under § 273.11(o) as individuals convicted of drug-related felonies.

* * * * *

(8) *Verification subsequent to initial certification.* * * *

(i) *Recertification* * * *

(C) For individuals subject to the food stamp time limit of § 273.24 who are satisfying the work requirement by working, by combining work and participation in a work program, or by participating in a work program that is not operated or supervised by the State agency, the individuals' work hours shall be verified.

* * * * *

6. In § 273.9, paragraph (b)(5)(i) is revised in its entirety to read as follows:

§ 273.9 Income and deductions.

* * * * *

(b) *Definition of income.* * * *

(5) * * *

(i) Moneys withheld from an income source, or moneys received from the income source, which are voluntarily or involuntarily returned to repay a prior overpayment from that income source, shall not be counted as income provided that the overpayment was not excludable under paragraph (c) of this section. However, this exclusion shall not apply to means-tested public assistance income sources when the overpayment was caused by the household.

* * * * *

7. In § 273.11:

a. The introductory text of paragraphs (c), (c)(1) and (c)(2) are revised.

b. Paragraph (c)(3)(ii) is revised.

c. Paragraph (k) is revised.

d. Paragraphs (l), (m), (n), (o), (p), (q), (r), and (s) are added.

The additions and revisions read as follows:

§ 273.11 Action on households with special circumstances.

* * * * *

(c) *Treatment of income and resources of certain nonhousehold members.* During the period of time that a household member cannot participate for the reasons addressed in this section, the eligibility and benefit level of any remaining household members shall be determined in accordance with the procedures outlined in this section. The State agency may opt to treat individuals disqualified under paragraph (l), (m), (n), (q), (r), or (s) of this section under either paragraph (c)(1) or (c)(2) of this section.

(1) *Intentional Program violation, felony drug conviction, or fleeing felon disqualifications, and workfare or work requirement sanctions.* The eligibility and benefit level of any remaining household members of a household containing individuals determined ineligible because of a disqualification for an intentional Program violation, a felony drug conviction, their fleeing felon status, noncompliance with a work requirement of § 273.7, or imposition of a sanction while they were participating in a household disqualified because of failure to comply with workfare requirements shall be determined as follows:

* * * * *

(2) *Ineligible alien, SSN disqualifications and ineligible ABAWDs.* The eligibility and benefit level of any remaining household members of a household containing individuals determined to be ineligible for being an ineligible alien, for refusal to obtain or provide an SSN, or for meeting the time limit for able-bodied adults without dependents shall be determined as follows:

* * * * *

(3) *Reduction or termination of benefits within the certification period.* * * *

(ii) *Disqualified or determined ineligible for reasons other than intentional Program violation.* If a household's benefits are reduced or terminated within the certification period for reasons other than an intentional Program violation disqualification, the State agency shall issue a notice of adverse action in accordance with § 273.13(a)(2) which informs the household of the ineligibility, the reason for the ineligibility, the eligibility and benefit level of the remaining members, and the action the household must take to end the ineligibility.

* * * * *

(k) *Reduction of public assistance benefits.* If the benefits of a household that is receiving public assistance are reduced under a Federal, State, or local means-tested public assistance program because of the failure of a household member to perform an action required under the assistance program or for fraud, the State agency shall not increase the household's food stamp allotment as the result of the decrease in income. In addition to prohibiting an increase in food stamp benefits, the State agency may impose a penalty on the household that represents a percentage of the food stamp allotment that does not exceed 25 percent. Reaching a time limit for time-limited benefits, having a child that is not eligible because of a family cap, or failure to comply with purely procedural requirement such as failure to submit a monthly report for the other program or failure to reapply for continued assistance under the other program, shall not be considered a failure to perform an action required by an assistance program for purposes of

this provision. This provision shall not be applied at the time of initial application for assistance. It shall be applied if the person was receiving such assistance at the time the reduction was imposed and to reductions imposed at the time of application for continued benefits if there is no break in participation. The person does not have to be certified for food stamps at the time of the failure to perform a required action for this provision to apply. Public assistance benefits shall be considered reduced if they are decreased, suspended, or terminated.

(1) For purposes of this provision a Federal, State, or local ''means-tested public assistance program'' shall mean any public or assisted housing under Title I of the United States Housing Act of 1937; any State program funded under part A of Title IV of the Social Security Act; any program for the aged, blind, or disabled under Titles I, X, XIV, or XVI of the Social Security Act; and State and local general assistance as defined in § 271.2 of this chapter. This provision must be applied to all applicable cases. If a State agency is not successful in obtaining the necessary cooperation from another Federal, State or local means-tested welfare or public assistance program to enable it to comply with the requirements of this provision, the State agency shall not be held responsible for noncompliance as long as the State agency has made a good faith effort to obtain the information. The State agency, rather than the household, shall be responsible for obtaining information about sanctions from other programs and changes in those sanctions.

(2) The prohibition on increasing food stamp benefits applies for the duration of the reduction in the assistance program, and shall be concurrent with the reduction in the other assistance program to the extent allowed by normal food stamp change processing and notice procedures.

(3) The State agency shall determine how to prevent an increase in food stamp benefits. Among other options, the State agency may increase the assistance grant by a flat percent, not to exceed 25 percent, for all households that fail to perform a required action in lieu of computing an individual amount or percentage for each affected household.

(4) If the allotment of a household is reduced under Title IV–A of the Social Security Act, the State agency may use the same procedures that apply under Title IV–A to prevent an increase in food stamp benefits as the result of the decrease in Title IV–A benefits. For example, the same budgeting procedures and combined notices and hearings may be used, but the food stamp allotment may not be reduced by more than 25 percent.

(5) In no event shall the prohibition on increasing food stamp benefits apply for longer than 1 year. The State agency may lift the ban on increasing food stamp benefits at any time if the person becomes ineligible during the disqualification period for some other reason.

(6) If an individual who fails to perform a required action in a State or local assistance program moves within the State, the prohibition on increasing benefits shall be applied to the gaining household unless that person is ineligible for the assistance program for some other reason. If such individual moves to a new State the prohibition on increasing benefits shall not be applied. If an individual fails to perform a required action in a Federal program, and the individual moves, either interstate or intrastate, the State must verify the status and continue the disqualification if appropriate.

(l) *Comparable disqualifications.* If a disqualification is imposed on a member of a household for failure to perform an action required under a Federal, State, or local means-tested public assistance program, the State agency may impose the same disqualification on the member of the household under the Food Stamp Program. The program must to be authorized by a Federal, State, or local law, but the provision itself does not have to be specified in the law. A State agency may choose to apply this provision to one or more of these programs, and it may select the types of disqualifications within a program that it wants to impose on food stamp recipients. The State agency shall be responsible for obtaining information about sanctions from other programs and changes in those sanctions.

(1) For purposes of this section Federal, State, or local ''means-tested public assistance program'' shall mean any public or assisted housing under Title I of the United States Housing Act of 1937; any State temporary assistance for needy families funded under part A of Title IV of the Social Security Act; any program for the aged, blind, or disabled under Titles I, X, XIV, XVI, or XIX of the Social Security Act; Medicaid under XX of the Social Security Act; and State and local general assistance as defined in § 271.2 of this chapter.

(2) This provision shall not be applied at the time of initial application for public assistance. It shall be applied if the person was receiving such assistance at the time the disqualification was imposed and to disqualifications imposed at the time of application for continued benefits if there is no break in participation with the following exceptions. Reaching a time limit for time-limited benefits or having a child that is not eligible because of a family cap shall not be considered failures to perform an action required by an assistance program. In addition, this provision shall not apply to purely procedural requirements such as failure to submit a monthly report for the other program or failure to reapply for continued assistance under the other program. Assistance disqualifications that were imposed while the person was receiving assistance and are still in effect shall be applied to both food stamp applicants and recipients.

(3) In no event shall the disqualification be applied for food stamp purposes for longer than 1 year. The State agency may stop the disqualification at any time if the person becomes ineligible for assistance for some other reason.

(4) If a disqualification is imposed for a failure of an individual to perform an action required under a program under Title IV–A of the Social Security Act, the State may use the rules and procedures that apply under the Title IV–A program to impose the same disqualification under the Food Stamp Program.

(5) Only the individual who committed the violation may be disqualified for food stamp purposes even if the entire assistance unit is disqualified for Title IV–A purposes.

(6) A comparable disqualification for food stamp purposes shall be imposed concurrently with the disqualification in the assistance program to the extent allowed by normal food stamp processing times and notice requirements. For example, if the assistance disqualification is for June and July, and the State is unable to disqualify the person until July for food stamp purposes, the person would only be disqualified for July for food stamp purposes.

(7) If there is a pending disqualification for a food stamp violation and a pending comparable disqualification, they shall be imposed concurrently to the extent appropriate. For example, if the household is disqualified for June for a food stamp violation and an individual is disqualified for June and July for an assistance program violation, the whole household shall be disqualified for June and the individual shall be disqualified for July for food stamp purposes.

(8) The State agency may choose to count all or only a prorated amount of

the member's income and expenses as available to the household. All of the member's resources shall be counted as available to the household.

(9) After a disqualification period has expired, the person may apply for food stamp benefits and shall be treated as a new applicant or a new household member, except that a prior disqualification based on a food stamp work requirement shall be considered in determining eligibility.

(10) A comparable food stamp disqualification may be imposed in addition to any coupon allotment reductions made in accordance with paragraph (k) of this section.

(11) State agencies shall state in their Plan of Operation if they have elected to apply comparable disqualifications and indicate the options and procedures allowed in paragraphs (l)(1), (l)(2), (l)(3), (l)(4), (l)(8), and (l)(10) of this section which they have selected.

(m) *School attendance.* (1) A State agency may not apply a food stamp sanction to an adult because he or she fails to ensure his or her minor children attend school. However, if the benefits of a household are reduced under a TANF sanction due to the failure of an adult to ensure that his or her minor dependent children attend school as required by State law while the children are living with him or her, the State agency shall not increase the household's food stamp allotment as the result of the decrease in income in accordance with paragraph (k) of this section. In addition to prohibiting an increase in food stamp benefits, the State agency may impose a penalty on the household that represents a percentage of the food stamp allotment that does not exceed 25 percent in accordance with paragraph (k) of this section. Finally, if a member of a household is disqualified under the TANF program for failure to ensure that his or her minor dependent children attend school as required by State law while the children are living with him or her, the State agency may impose the same disqualification on the member of the household under the Food Stamp Program in accordance with paragraph (l) of this section.

(2) A State agency electing to reduce the household's benefits in accordance with paragraph (k) of this section or to apply a comparable disqualification in accordance with paragraph (l) of this section shall so specify in its Plan of Operation. If the member will be disqualified, the State agency shall specify in its Plan of Operation if all or a prorated share of the income of the disqualified member shall be counted as available to the household. All of the disqualified member's resources shall be counted as available to the household. If the food stamp allotment is to be reduced, the State agency shall specify in its Plan of Operation the method of reduction.

(n) *Secondary school diploma.* (1) A State agency may not apply a food stamp sanction to an adult because he or she is not working toward, or does not have, a secondary school diploma or its recognized equivalent. However, if the benefits of a household are reduced under a TANF sanction because an adult who is older than age 20 and younger than age 51 does not have, or is not working toward attaining, a secondary school diploma or its recognized equivalent, the State agency shall not increase the household's food stamp allotment as the result of the decrease in income in accordance with paragraph (k) of this section. In addition to prohibiting an increase in food stamp benefits, the State agency may impose a penalty on the household that represents a percentage of the food stamp allotment that does not exceed 25 percent in accordance with paragraph (k) of this section. Finally, if a member of a household is disqualified under the TANF the State agency may impose the same disqualification on the member of the household under the Food Stamp Program in accordance with paragraph (l) of this section.

(2) A State agency electing to reduce the household's benefits in accordance with paragraph (k) of this section or to apply a comparable disqualification in accordance with paragraph (l) of this section shall so specify in its Plan of Operation. If the member will be disqualified, the State agency shall specify in its Plan of Operation if all or a prorated share of the income of the disqualified member shall be counted as available to the household. If the food stamp allotment is to be reduced, the State agency shall specify in its Plan of Operation the method of reduction. All of the disqualified member's resources shall be counted as available to the household.

(o) *Individuals convicted of drug-related felonies.* An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substance Act) shall not be considered an eligible household member unless the State legislature of the State where the individual is domiciled has enacted legislation exempting individuals domiciled in the State from the above exclusion. If the State legislature has enacted legislation limiting the period of disqualification, the period of ineligibility shall be equal to the length of the period provided under such legislation.

(p) *Fleeing felons and probation or parole violators.* Individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of New Jersey, a high misdemeanor) or who are violating a condition of probation or parole under a Federal or State law shall not be considered eligible household members.

(q) *Custodial parent's cooperation with the State agency.* (1) *Option to disqualify custodial parent for failure to cooperate.* At the option of a State agency, subject to paragraphs (q)(2) and (q)(4) of this section, no natural or adoptive parent or other individual (collectively referred to in this paragraph (q) as ''the individual'') who is living with and exercising parental control over a child under the age of 18 who has an absent parent shall be eligible to participate in the Food Stamp Program unless the individual cooperates with the State agency and the agency administering a Child Support Enforcement program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*).

(i) *Cooperation in obtaining support.* As a condition of eligibility for food stamps, the individual will be required to cooperate with the State agency in:

(A) Identifying and locating the absent parent of the child;

(B) Establishing the paternity of a child born out of wedlock;

(C) Obtaining support payments for the child or the individual and the child; and

(D) Obtaining any other payments or property due the child or the individual and the child.

(ii) *Cooperation.* Cooperation includes any of the following actions that are relevant to, or necessary for, the achievement of the objectives specified in paragraph (q)(1)(i) of this section:

(A) Appearing at any office of the State or local agency or the child support agency as necessary prior to receipt of benefits (or, if necessary for recipients, at recertification) to provide verbal or written information, or documentary evidence known to, possessed by, or reasonably obtainable by the individual. State agencies shall specify the actions, documents and information required of individuals to cooperate in achieving the objectives specified in paragraph (q)(1)(i) of this section;

(B) Appearing as a witness at judicial or other hearings or proceedings;

(C) (*1*) In the establishment of paternity, providing the name of the putative father and sufficient additional information to enable the State agency, if reasonable efforts were made, to verify the identity of the person named, including such information as the putative father's social security number, date of birth, past or present address, telephone number, past or present place of employment, past or present school attended, names and addresses of parents, friends or relatives able to provide location information, or other information which could enable service of process on such person.

(*2*) The state agency shall establish criteria for determining cooperation in cases where the individual cannot reasonably be expected to know the required identifying information about the father (including, but not limited to, cases where long-term recipients do not know the required information due to a lapse of a long period of time since contact with the father.)

(D) Paying to the child support agency any support payments received from the absent parent.

(2) *Claiming good cause for noncooperation.* Prior to requiring cooperation under paragraph (q)(1) of this section, the State agency will notify the household in writing of the right to good cause as an exception to the cooperation requirement and of all the requirements applicable to a good cause determination. Paragraph (q)(1) of this section shall not apply to the individual if good cause is found for refusing to cooperate, as determined by the State agency.

(i) *Circumstances under which cooperation may be ''against the best interests of the child.''* Under circumstances described in either paragraph (q)(1)(ii)(A) or (q)(1)(ii)(B) of this section, the individual's cooperation would be against the best interests of the child, and so the individual's failure to cooperate is deemed to be for ''good cause.''

(A) The individual's cooperation in establishing paternity, security support, or identifying and providing information to assist the State agency in pursuing third parties potentially liable for medical services is reasonably anticipated to result in:

(*1*) Physical harm to the child for whom support is sought;

(*2*) Emotional harm to the child for whom support is sought;

(*3*) Physical harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it would reduce such person's capability to care for the child adequately; or

(*4*) Emotional harm to the parent or caretaker relative with whom the child is living which would reduce such person's capacity to care for the child adequately.

(B) At least one of the following circumstances exists, and the State agency believes that, because of the existence of that circumstance, proceeding to establish paternity, secure support, or to identify and provide information to assist State agencies in pursuing third party liability for medical services would be detrimental to the child for whom support is sought:

(*1*) The child for whom support is sought was conceived as a result of incest or forcible rape;

(*2*) Legal proceedings for the adoption of the child are pending before a court of competent jurisdiction; or

(*3*) The individual is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep the child or relinquish him or her for adoption, and the discussions have not gone on for more than 3 months.

(ii) *Physical harm and emotional harm defined.* Physical harm and emotional harm must be of a serious nature in order to justify a finding of good cause under paragraph (q)(2) of this section. A finding of good cause for emotional harm may only be based upon a demonstration of an emotional impairment that substantially affects the individual's functioning.

(iii) *Special considerations related to emotional harm.* For every good cause determination which is based in whole or in part upon the anticipation of emotional harm to the child, the parent or the caretaker relative, as provided for in this section, the State agency will consider the following:

(A) The present emotional state of the individual subject to emotional harm;

(B) The emotional health history of the individual subject to emotional harm;

(C) Intensity and probable duration of the emotional impairment;

(D) The degree of cooperation to be required; and

(E) The extent of involvement of the child in the paternity establishment, support enforcement activity or collection of information to assist the State agency in the pursuit of third parties to be undertaken.

(iv) *Proof of good cause claim.* (A) The State agency will make a good cause determination based on the corroborative evidence supplied by the household only after it has examined the evidence and found that it actually verifies the good cause claim.

(B) The individual who claims good cause must provide corroborative evidence within 20 days (or whatever time frame the State Agency employs under Title IV, Part A, of the Social Security Act) from the day the claim was made. In exceptional cases where the State agency determines the applicant or recipient requires additional time because of the difficulty of obtaining the corroborative evidence, the agency shall allow a reasonable additional period of time upon approval by supervisory personnel.

(C) A good cause claim may be corroborated with the types of evidence chosen by the State agency.

(D) Where a claim is based on the individual's anticipation of physical harm and corroborative evidence is not submitted in support of the claim:

(*1*) The State agency will investigate the good cause claim when the agency believes that the claim is credible without corroborative evidence and corroborative evidence is not available.

(*2*) Good cause will be found if the claimant's statement and the investigation satisfy the agency that the individual has good cause for refusing to cooperate.

(E) A determination that good cause exists will be recorded in the case file.

(v) *Review by the Child Support Enforcement Program agency.* Prior to making a final determination of good cause for refusing to cooperate, the State agency will afford the Child Support Enforcement Program agency the opportunity to review and comment on the findings and the basis for the proposed determination and consider any recommendation from the Child Support Enforcement Program agency.

(vi) *Delayed finding of good cause.* The State agency will not deny, delay, or discontinue assistance pending a determination of good cause for refusal to cooperate if the applicant or recipient has complied with the requirements to furnish corroborative evidence and information.

(3) *Individual disqualification.* If the State agency has elected to implement this provision and determines that the custodial parent has not cooperated without good cause, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled to the extent specified in paragraph (c)(1) or (c)(2) of this section, depending on how the State agency opts to do it.

(4) *Fees.* A State electing to implement this provision shall not require the payment of a fee or other cost for services provided under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*)

(5) The period of disqualification ends once it has been determined that the individual is cooperating with the child support agency. The state agency must have procedures in place for re-qualifying such an individual.

(r) *Non-custodial parent's cooperation with child support agencies.* (1) *Option to disqualify non-custodial parent for failure to cooperate.* At the option of a State agency, subject to paragraphs (r)(2) and (r)(4) of this section, a putative or identified non-custodial parent of a child under the age of 18 (referred to in this subsection as ''the individual'') shall not be eligible to participate in the Food Stamp Program if the individual refuses to cooperate with the State agency administering the program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et. seq.*):

(i) In establishing the paternity of the child (if the child is born out of wedlock); and

(ii) In providing support for the child.

(2) *Guidelines for refusal to cooperate.* Refusal to cooperate includes:

(i) Refusal to appear for an interview;

(ii) Refusal to furnish requested documentation;

(iii) Refusal to cooperate with DNA testing; or

(iv) Failing to make payments to the Child Support Enforcement agency.

(3) *Individual disqualification.* If the State agency has elected to implement this provision and determines that the non-custodial parent has failed to cooperate, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled to the extent specified in paragraph (c)(1) or (c)(2) of this section depending on how the State agency opts to do it.

(4) *Fees.* A State electing to implement this provision shall not require the payment of a fee or other cost for services provided under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*)

(5) *Privacy.* The State agency shall provide safeguards to restrict the use of information collected by a State agency administering the program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*) to purposes for which the information is collected.

(6) The period of disqualification ends once it has been determined that the individual is cooperating with the child support agency. The State agency must have procedures in place for re-qualifying such an individual.

(s) *Disqualification for child support arrears.* (1) *Option to disqualify.* At the option of a State agency, no individualshall be eligible to participate in the Food Stamp Program as a member of any household during any month that the individual is delinquent in any payment due under a court order for the support of a child of the individual.

(2) *Exceptions.* A disqualification under paragraph (s)(1) of this section shall not apply if:

(i) A court is allowing the individual to delay payment; or

(ii) The individual is complying with a payment plan approved by a court or the State agency designated under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*) to provide support of a child of the individual.

(3) *Individual disqualification.* If the State agency has elected to implement this provision and determines that the individual should be disqualified for child support arrears, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled to the extent specified in paragraph (c)(1) or (c)(2) of this section, depending on how the State agency opts to do it.

(4) *Collecting claims.* State agencies shall initiate collection action as provided for in § 273.18 for any month a household member is disqualified for child support arrears by sending the household a written demand letter which informs the household of the amount owed, the reason for the claim and how the household may pay the claim. The household should also be informed as to the adjusted amount of income, resources, and deductible expenses of the remaining members of the household for the month(s) a member is disqualified for child support arrears.

8. In section 273.12, a new paragraph (a)(1)(vii) is added as follows:

§ 273.12 Reporting changes.

(a) *Household responsibility to report.* * * *

(1) * * *

(vii) For able-bodied adults subject to the time limit of § 273.24, any changes in work hours that bring an individual below 20 hours per week, averaged monthly.

* * * * *

9. Section 273.16 is revised to read as follows.

§ 273.16 Disqualification for intentional program violation.

(a) *Administrative responsibility.* Each State agency shall be responsible for effectively and efficiently:

(1) Investigating instances of alleged intentional Program violation (IPV) and ensuring that appropriate cases are timely acted upon in accordance with the procedures outlined in this section;

(2) Establishing and/or utilizing a system to determine whether an individual has committed an IPV and therefore warrants disqualification from the Program. This may be through administrative and/or judiciary means, or a combination of both; and

(3) Disqualifying an individual from participation in the Program, where appropriate, in accordance with the procedures outlined in this section.

(b) *Definition of an IPV.* (1) An IPV occurs when an individual intentionally either makes a false or misleading statement, or misrepresents, conceals or withholds facts or commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute relating to the use, presentation, transfer, acquisition, receipt, possession or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device).

(2) The determination of an IPV shall be based on clear and convincing evidence which demonstrates that the individual committed, or intended to commit, the violation.

(c) *Disqualification penalties.* (1) An individual found to have committed an IPV either through an administrative disqualification hearing (ADH) or by a Federal, State or local court, or who has signed either a waiver of his right to an ADH or a disqualification consent agreement in cases referred for prosecution, shall be ineligible to participate in the Program:

(i) For a period of one year for the first IPV, except as provided under paragraphs (c)(2), (c)(3), (c)(4) and (c)(5) of this section;

(ii) For a period of two years upon the second occasion of any IPV, except as provided in paragraphs (c)(2), (c)(3), (c)(4) and (c)(5) of this section; and

(iii) Permanently for the third occasion of any IPV.

(2) Except as provided under paragraph (c)(1)(iii) of this section, an individual found by a Federal, State or local court to have used or received coupons in a transaction involving the sale of a controlled substance (as

defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) shall be ineligible to participate in the Program:

(i) For a period of two years upon the first occasion of such violation; and

(ii) Permanently upon the second occasion of such violation.

(3) An individual found by a Federal, State or local court to have used or received coupons in a transaction involving the sale of firearms, ammunition or explosives shall be permanently ineligible to participate in the Program upon the first occasion of such violation.

(4) An individual found by a Federal, State or local court to have trafficked benefits for an aggregate amount of $500 or more shall be permanently ineligible to participate in the Program upon the first occasion of such violation.

(5) Except as provided under paragraph (c)(1)(iii) of this section, an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.

(6) The penalties in paragraphs (c)(2), (c)(3) and (c)(4) of this section may also apply in cases of deferred adjudication as described in paragraph (d)(4) of this section, where the court makes a finding that the individual engaged in the conduct described in paragraph (c)(2), (c)(3) or (c)(4) of this section.

(7) If a court fails to impose a disqualification or a disqualification period for any IPV, the State agency shall impose the appropriate disqualification penalty specified in paragraph (c) of this section unless it is contrary to the court order.

(8) State agencies shall disqualify only the individual found to have committed the IPV, or who signed the waiver of the right to an administrative disqualification hearing or disqualification consent agreement in cases referred for prosecution, and not the entire household.

(9) Even though only the individual is disqualified, the household is responsible for making restitution for the amount of any overpayment. All IPV claims shall be established and collected in accordance with the procedures set forth in § 273.18.

(10) The household shall be notified when it applies for benefits of the disqualification penalties if an individual intentionally violates the rules of the Program.

(11) The individual shall be notified in writing once it is determined that he/she is to be disqualified. The disqualification period shall begin no later than the second month which follows the date the individual receives written notice of the disqualification. The disqualification period shall continue uninterrupted until completed regardless of the eligibility of the disqualified individual's household.

(d) *Bases for disqualification.* (1) *Administrative disqualification hearing* (*ADH*). (i) *Definition.* An ADH is a hearing undertaken in a non-judicial setting to determine whether an individual committed an IPV. This is one of two administrative State agency options for making this determination.

(ii) *ADHs and fair hearings.* (A) The State agency may combine a fair hearing with an ADH if the factual issues arise out of the same, or related circumstances.

(B) If the amount of the claim is determined at an ADH, the individual's household shall lose its right to a subsequent fair hearing on the amount of the claim.

(iii) *Advance notice of hearing.* (A) The State agency shall provide written notice to the individual suspected of committing an IPV at least 30 days in advance of the date an ADH has been scheduled.

(B) The notice shall contain at a minimum:

(*1*) The date, time, and place of the hearing;

(*2*) The charge(s) against the individual;

(*3*) A summary of the evidence, and how and where the evidence can be examined;

(*4*) A warning that the decision will be based solely on information provided by the State agency if the individual fails to appear at the hearing;

(*5*) A statement that the individual or representative will, upon receipt of the notice, have a specified number of days from the date of the scheduled hearing to present good cause for failure to appear in order to receive a new hearing;

(*6*) A warning that a determination of IPV will result in disqualification periods as determined by paragraph (c) of this section, and a statement of which penalty the State agency believes is applicable to the case scheduled for a hearing;

(*7*) A listing of the individual's rights;

(*8*) A statement that the hearing does not preclude the State or Federal Government from prosecuting the individual for the IPV in a civil or criminal court action, or from collecting any overissuance(s); and

(*9*) If there is an individual or organization available that provides free legal representation, the notice shall advise the affected individual of the availability of the service.

(iv) *Program participation while awaiting a hearing.* A pending ADH or a pending ADH decision shall not affect the individual's or the household's right to be certified and participate in the Program.

(v) *Conducting the ADH.* The State agency shall establish its own procedures for conducting an ADH incorporating the requirements in this section.

(vi) *Written notification and time frame for a decision.* The State agency shall provide written notification of its decision to the individual within 180 days after the discovery of the suspected violation or within 60 days of the date of the hearing, whichever is sooner.

(vii) *Local-level ADHs.* The State agency may choose to provide ADHs at the local level in some or all of its project areas with a right to appeal to a State-level hearing. If the household or the State agency wishes to appeal a local-level hearing decision, the appeal request must be filed within 15 days of the local-level hearing decision notice.

(viii) *Appeal of a State-level ADH.* The State-level decision shall be binding on the State agency. Also, no further administrative appeal procedure exists for the affected individual after an adverse State-level ADH. The individual, however, is entitled to seek relief in a court having appropriate jurisdiction.

(2) *Waived ADHs.* (i) *State agency option and establishing procedures.* A State agency may allow an accused individual to waive his/her right to an ADH in exchange for serving a disqualification period without necessarily admitting guilt. For a State agency which chooses this option, the procedures established shall conform with the requirements outlined in this section.

(ii) *Waiver requirements.* (A) The State agency shall develop its own waiver form and provide written notification to the individual suspected of IPV that he/she can waive his/her right to an ADH.

(B) The waiver/written notification shall clearly inform the individual that once the individual signs the waiver, he/she shall be disqualified from the Program in accordance with paragraph (c) of this section. A signed waiver shall have the same effect as a finding made after an ADH.

(iii) *Appeal of a signed waiver.* No further administrative appeal procedure shall be made available to the affected individual after he/she signs the waiver to the ADH. The individual, however, is

entitled to seek relief in a court having appropriate jurisdiction.

(3) *Court referrals.* A State agency may seek a determination of IPV and subsequent disqualification by referring appropriate cases for prosecution in a court of appropriate jurisdiction. This is one of two judicial State agency options for making this determination. The State agency shall establish procedures to determine the types of cases to be referred for prosecution.

(4) *Deferred adjudication.* (i) *State agency option and establishing procedures.* A State agency may allow an accused individual to sign a disqualification consent agreement for cases of deferred adjudication. For a State agency which chooses this option, the procedures established shall conform with the requirements outlined in this section.

(ii) *Written agreement.* The State agency shall develop its own disqualification consent agreement and provide written notification to the accused individual of the consequences of consenting to a disqualification (as defined in paragraph (c) of this section) as part of a deferred adjudication.

(5) *Conducting both a court action and an ADH.* State agencies may:

(i) Simultaneously begin and/or conduct an ADH and court action and may proceed with a court action whether or not a violation has been determined by the ADH; and

(ii) Conduct and make a determination based on an ADH for any case for which the court has not already returned a verdict.

(e) *Reporting requirements.* (1) Each State agency shall report to FNS information concerning individuals disqualified for IPV, including those individuals disqualified based on the determination of an administrative disqualification hearing official or a court of appropriate jurisdiction and those individuals disqualified as a result of signing either a waiver of right to a disqualification hearing or a disqualification consent agreement in cases referred for prosecution. This information shall be submitted to FNS so that it is received no later than 30 days after the date the disqualification has taken effect.

(2) Each State agency shall report information concerning each individual disqualified for IPV in a format designed by FNS. The format shall include the individual's social security number, date of birth, and full name, the number of the disqualification (1st, 2nd or 3rd), the State and county in which the disqualification took place, the date on which the disqualification took effect, and the length of the disqualification period imposed.

(3) Each State agency shall submit the required information on each individual disqualified for IPV through a reporting system in accordance with procedures specified by FNS.

(4) All data submitted by State agencies will be available for use by any State welfare agency.

(i) State agencies shall, at a minimum, use the data for the following:

(A) To determine the eligibility of individual Program applicants prior to certification in cases where the State agency has reason to believe a household member is subject to disqualification in another political jurisdiction, and

(B) To ascertain the appropriate penalty to impose, based on past disqualifications, in a case under consideration.

(ii) State agencies may also use the data in other ways, such as the following:

(A) To screen all Program applicants prior to certification, and

(B) To periodically match the entire list of disqualified individuals against their current caseloads.

(5) The disqualification of an individual for IPV in one political jurisdiction shall be valid in another.

(6) In cases where the disqualification for IPV is reversed by a court of appropriate jurisdiction, the State agency shall submit a report to purge the file of the information relating to the disqualification which was reversed in accordance with instructions provided by FNS.

(f) *Reversed disqualifications.* In cases where the determination of IPV is reversed by a court of appropriate jurisdiction, the State agency shall reinstate the individual in the Program if the household is eligible. The State agency shall restore benefits that were lost as a result of the disqualification in accordance with the procedures specified in § 273.17.

10. A new § 273.25 is added to read as follows:

§ 273.25 Time limit for able-bodied adults.

(a) *Definitions.* For purposes of the food stamp time limit, the terms below have the following meanings.

(1) *Fulfilling the work requirement* means:

(i) Working 20 hours per week, averaged monthly; for purposes of this provision, 20 hours a week averaged monthly means 80 hours a month;

(ii) Participating in and complying with the requirements of a work program 20 hours per week, as determined by the State agency;

(iii) Working and participating in a work program for a total of 20 hours per week, as determined by the State agency; or

(iv) Participating in and complying with a workfare program.

(2) *Working* means:

(i) Work in exchange for money;

(ii) work in exchange for goods or services (''in kind'' work); or

(iii) Unpaid work under standards established by the State agency.

(3) *Work Program* means:

(i) A program under the Workforce Investment Act (Pub.L. 105–220);

(ii) A program under section 236 of the Trade Act of 1974 (19 U.S.C. 2296); or

(iii) An employment and training program, other than a job search or job search training program, operated or supervised by a State or political subdivision of a State that meets standards approved by the Governor of the State, including a program under § 273.7(f). Such a program may contain job search or job search training as a subsidiary component as long as such component is less than half the requirement.

(4) *Workfare program* means:

(i) A program under § 273.22; or

(ii) A comparable program established by a State or political subdivision of a State.

(b) *General Rule.* Individuals are not eligible to participate in the Food Stamp Program as a member of any household if the individual received food stamps for more than three countable months during any three-year period, except that individuals may be eligible for up to three additional countable months in accordance with paragraph (e) of this section.

(1) *Countable months.* Countable months are months during which an individual receives food stamps for the full benefit month while not either:

(i) Exempt under paragraph (c) of this section;

(ii) Covered by a waiver under paragraph (f) of this section; or

(iii) Fulfilling the work requirement as defined in paragraph (a)(1) of this section.

(2) *Good cause.* As determined by the State agency, if an individual would have worked an average of 20 hours per week but missed some work for good cause, the individual shall be considered to have met the work requirement if the absence from work is temporary and the individual retains his or her job.

(3) *Measuring the three-year period.* The three-year period may be measured and tracked as the State agency deems appropriate; except that, with respect to a State, the three-year period:

(i) Shall be measured and tracked consistently so that individuals who are similarly situated be treated the same; and

(ii) Shall not include any period before the earlier of November 22, 1996, or the date the State notified food stamp recipients of the application of Section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104–193).

(4) *Treatment of income and resources.* The income and resources of an individual made ineligible under this paragraph shall be handled in accordance with § 273.11(c)(2).

(5) *Benefits received erroneously.* If an individual subject to this section receives food stamp benefits erroneously, the State agency may opt to consider the benefits to have been received unless or until they are repaid in full.

(6) *Verification.* Verification shall be in accordance with (273.2(f)(1) and (f)(8).

(7) *Reporting.* A change in work hours below 20 hours per week, averaged monthly, is a reportable change in accordance with § 273.12(a)(1)(vii). Work performed in a job that was not reported according to the requirements of § 273.12 shall be considered ''work'' for purposes of this provision.

(8) *Applicability of Food Stamp Act.* Nothing in this paragraph shall make an individual eligible for food stamp benefits if the individual is not otherwise eligible for benefits under the other provisions of these regulations and the Food Stamp Act of 1977, as amended.

(c) *Exemptions.* An individual is exempt from the time limit if he or she is

(1) Under 18 or older than 50 years of age;

(2) Determined by the State agency to be medically certified as physically or mentally unfit for employment. An individual is medically certified as physically or mentally unfit for employment if he or she:

(i) Is receiving temporary or permanent disability benefits issued by governmental or private sources; or

(ii) Provides a statement from a physician or a licensed or certified psychologist that he or she is physically or mentally unfit for employment.

(3) Is a parent (natural, adoptive, or step) of a household member under age 18;

(4) Is residing in a household where a household member is under age 18;

(5) Is otherwise exempt from work requirements under section 6(d)(2) of the Food Stamp Act, as implemented in regulations at § 273.7(b); or

(6) Is pregnant.

(d) *Regaining eligibility.*

(1) An individual denied eligibility under paragraph (b) of this section shall regain eligibility to participate in the Food Stamp Program if, as determined by the State agency, during any 30 consecutive days, he or she:

(i) Worked 80 or more hours;

(ii) Participated in and complied with the requirements of a work program for 80 or more hours;

(iii) Worked and participated in a work program for a total of 80 hours; or

(iv) Participated in and complied with a workfare program.

(2) An individual regaining eligibility under paragraph (d)(1) of this section shall have benefits calculated as follows:

(i) For individuals regaining eligibility by working, participating in a work program, or combining hours worked and hours participating in a work program, the State agency may either prorate benefits from the day the 80 hours are completed or from the date of application.

(ii) For individuals regaining eligibility by participating in a workfare program, and the workfare obligation is based on an estimated monthly allotment prorated back to the date of application, then the allotment issued must be prorated back to this date.

(e) *Additional three-month eligibility.* An individual who regained eligibility under paragraph (d) of this section and who is no longer fulfilling the work requirement as defined in paragraph (a) of this section is eligible for a period of three consecutive countable months (as defined in paragraph (b) of this section), starting on the date the individual first notifies the State agency that he or she is no longer fulfilling the work requirement, unless the individual has been satisfying the work requirement by participating in a work or workfare program, in which case the period starts on the date the State agency notifies the individual that he or she is no longer meeting the work requirement. An individual shall not receive benefits under this paragraph (e) more than once in any three-year period.

(f) *Waivers.* (1) *General.* On the request of a State agency, the FNS may waive the time limit for a group of individuals in the State if FNS determines that the area in which the individuals reside:

(i) Has an unemployment rate of over 10 percent; or

(ii) Does not have a sufficient number of jobs to provide employment for the individuals.

(2) *Required data.* In developing unemployment rates or labor force data to support waiver requests, States shall use standard Bureau of Labor Statistics (BLS) data or methods.

(3) *Effective date of certain waivers.* In areas for which the State certifies that data from BLS show an unemployment rate above 10 percent, the State may begin to operate the waiver at the time the waiver request is submitted. FNS will contact the State if the waiver must be modified.

(4) *Duration of waiver.* In general, waivers will not be approved for more than one year, and the duration of a waiver should bear some relationship to the documentation provided in support of the waiver request. FNS will consider approving waivers for up to one year based on documentation covering a shorter period, but the State must show that the basis for the waiver is not a seasonal or short term aberration.

(5) *Areas covered by waivers.* States may define areas to be covered by waivers, but the data and analysis used to support the waiver must correspond to the defined area.

Dated: November 30, 1999.

Shirley R. Watkins,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 99–32527 Filed 12–16–99; 8:45 am]

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federal register

Friday
December 17, 1999

Part VI

Department of Education

Office of Special Education and Rehabilitative Services; National Institute on Disability and Rehabilitation Research; Notice

DEPARTMENT OF EDUCATION

National Institute on Disability and Rehabilitation Research

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed funding priorities for fiscal years 2000–2001 for Rehabilitation Engineering Research Centers (RERCs).

SUMMARY: The Assistant Secretary for the Office of Special Education and Rehabilitative Services proposes funding priorities for two Rehabilitation Engineering Research Centers under the National Institute on Disability and Rehabilitation Research (NIDRR) for fiscal years 2000–2001. The Assistant Secretary takes this action to focus research attention on areas of national need. We intend the priorities to improve rehabilitation services and outcomes for individuals with disabilities. This notice contains proposed priorities under the Disability and Rehabilitation Research Projects and Centers Program for an RERC related to technologies for children with orthopedic disabilities and an RERC on low vision and blindness.

DATES: Comments must be received on or before January 18, 2000.

ADDRESSES: All comments concerning these proposed priorities should be addressed to Donna Nangle, US Department of Education, 400 Maryland Avenue, SW, room 3418, Switzer Building, Washington, DC 20202–2645.

Comments may also be sent through the Internet: donna__nangle@ed.gov

You must include the term ''Disability and Rehabilitation Research Projects and Centers'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Donna Nangle. Telephone: (202) 205–5880. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205–2742. Internet: donna__nangle@ed.gov

Individuals with disabilities may obtain this document in an alternate format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding these proposed priorities.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed priorities. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these priorities in Room 3424, Switzer Building, 330 C Street S.W., Washington, D.C., between the hours of 9 a.m. and 4:30 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed priorities. If you want to schedule an appointment for this type of aid, you may call (202) 205–8113 or (202) 260–9895. If you use a TDD, you may call the Federal Information Relay Service at 1–800–877–8339.

These proposed priorities support the National Education Goal that calls for every American to possess the skills necessary to compete in a global economy.

The authority for the Secretary to establish research priorities by reserving funds to support particular research activities is contained in sections 202(g) and 204 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 762(g) and 764). Regulations governing this program are found in 34 CFR Parts 350 and 353.

We will announce the final priorities in a notice in the **Federal Register**. We will determine the final priorities after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing or funding additional priorities, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which the Assistant Secretary chooses to use one or more of these proposed priorities, we invite applications through a notice published in the **Federal Register**. When inviting applications we designate each priority as absolute, competitive preference, or invitational.

Rehabilitation Engineering Research Centers

The authority for RERCs is contained in section 204(b)(3) of the Rehabilitation Act of 1973, as amended (29 U.S.C. 764(b)(3)). The Assistant Secretary may make awards for up to 60 months through grants or cooperative agreements to public and private agencies and organizations, including institutions of higher education, Indian tribes, and tribal organizations, to conduct research, demonstration, and training activities regarding rehabilitation technology in order to enhance opportunities for meeting the needs of, and addressing the barriers confronted by, individuals with disabilities in all aspects of their lives. An RERC must be operated by or in collaboration with an institution of higher education or a nonprofit organization.

Description of Rehabilitation Engineering Research Centers

RERCs carry out research or demonstration activities by:

(a) Developing and disseminating innovative methods of applying advanced technology, scientific achievement, and psychological and social knowledge to (1) Solve rehabilitation problems and remove environmental barriers, and (2) Study new or emerging technologies, products, or environments;

(b) Demonstrating and disseminating (1) Innovative models for the delivery of cost-effective rehabilitation technology services to rural and urban areas, and (2) Other scientific research to assist in meeting the employment and independent living needs of individuals with severe disabilities; or

(c) Facilitating service delivery systems change through (1) The development, evaluation, and dissemination of consumer-responsive and individual and family-centered innovative models for the delivery to both rural and urban areas of innovative cost-effective rehabilitation technology services, and (2) other scientific research to assist in meeting the employment and independent needs of individuals with severe disabilities.

Each RERC must provide training opportunities to individuals, including individuals with disabilities, to become researchers of rehabilitation technology and practitioners of rehabilitation technology in conjunction with institutions of higher education and nonprofit organizations.

The Department is particularly interested in ensuring that the expenditure of public funds is justified by the execution of intended activities and the advancement of knowledge and, thus, has built this accountability into the selection criteria. Not later than three years after the establishment of

any RERC, NIDRR will conduct one or more reviews of the activities and achievements of the Center. In accordance with the provisions of 34 CFR 75.253(a), continued funding depends at all times on satisfactory performance and accomplishment.

Proposed General RERC Requirements

The Assistant Secretary proposes that the following requirements apply to these RERCs pursuant to these absolute priorities unless noted otherwise. An applicant's proposal to fulfill these proposed requirements will be assessed using applicable selection criteria in the peer review process. The Assistant Secretary is interested in receiving comments on these proposed requirements:

- The RERC must have the capability to design, build, and test prototype devices and assist in the transfer of successful solutions to relevant production and service delivery settings.
- The RERC must evaluate the efficacy and safety of its new products, instrumentation, or assistive devices.
- The RERC must involve individuals with disabilities and, if appropriate, their representatives, in planning and implementing its research, development, training, and dissemination activities, and in evaluating the Center.

Absolute Priorities

Under an absolute priority we consider only applications that meet one of these absolute priorities (34 CFR 75.105(c)(3)).

Proposed Priority 1: Technologies for Children with Orthopedic Disabilities

Background

It is estimated that 6 million children, age 18 and younger, in the United States have some type of disability. The prevalence of children with orthopedic impairments in the U.S., including paralysis and congenital anomalies, is roughly 420,000 (8.4 percent) (LaPlante, M. and Carlson, D., ''Disability in the United States: Prevalence and Causes,'' *1992 Report of the Disability Statistics Rehabilitation Research and Training Center,* NIDRR, U.S. Department of Education, 1995). The majority of these children are unable to perform a major activity or are limited in the amount or types of major activities, including education and play, they can perform (Wenger, B.L., Kaye, H.S. and LaPlante, M.P., ''Disabilities among children,'' *Disability Statistics Abstract (No 15),* NIDRR, U.S. Department of Education, 1996). Children with disabilities present unique challenges for health care professionals when compared to adults with similar disabilities. For example: children experience periods of accelerated growth affecting shape, strength and body alignment; their body sizes are disproportionate to adults—they are not scaled-down adults; they experience developmental stages that affect their fine and gross motor skills; their capabilities change as they mature and as they learn to control their bodies and their environment; and parental expectations about their child's disability can influence medical treatment and therapeutic interventions.

Chapter 5 of NIDRR's Long-Range Plan (64 FR 45766) discusses the importance of research and development activities that will enhance mobility and improve manipulation for individuals with orthopedic impairments. Children with orthopedic impairments present unique challenges for rehabilitation specialists. The technology to 'replace' a child's missing limb does not exist today. It is possible, however, to restore considerable function with a prosthesis. The usefulness of such a device depends largely upon its weight, how well it fits, how easy it is to control and its durability, reliability and aesthetics. Continual developmental changes, including physical, emotional, and social growth, make it difficult to fit a child with a prosthesis and to determine the most appropriate time for introducing a prosthesis to a child. For example, the importance of fitting a child early with a prosthesis is well cited. However, there continues to be discussion about which developmental milestones to consider when determining the most suitable prosthesis for a child (Patton, J.G., ''Development approach to pediatric upper-limb prosthetic training,'' *Atlas of Limb Prosthetics: Surgical, Prosthetic, and Rehabilitation Principles,* Mosby, St Louis, pgs. 778–793, 1992).

In addition to congenital and acquired amputations there are other conditions that can cause orthopedic impairments in children. Cerebral palsy (CP) is a motor disorder originating from a central nervous system injury that occurs before, during or shortly after birth. Children under the age of five who sustain brain injuries are also classified as having CP. The disability ranks third among childhood disabilities (LaPlante, M.P., *Disability risks of chronic illness and impairments,* Disability Statistics Program, San Francisco, CA., 1989) and is the most common cause of paralysis in children (Wenger, B.L., Kaye, H.S. and LaPlante, M.P., op. cit., 1996). The reported prevalence of CP in the U.S. is two per thousand and the incidence is approximately one per thousand live births (Turk, M.A., ''Early development-related conditions,'' *Assessing Medical Rehabilitation Practices: The Promise of Outcomes Research,* Marcus J. Fuhrer, ed., pgs. 371–372, 1997). Individuals with CP typically have abnormal muscle tone, muscle weakness, primitive reflexes, or uncoordinated movements requiring seating and orthotic interventions for postural control and alignment (Cook, A.M. and Hussy, S.M., *Assistive Technologies: Principles and Practice,* Mosby, St. Louis, pg. 237, 1995). Spina bifida is a congenital anomaly in which the neural tube that forms the spinal cord does not fully develop, leading to a number of lower extremity problems, including muscle paralysis, hip dislocations, knee hypertension, and club feet. The reported incidence of spina bifida is between 0.5 and 1 per thousand (Turk, M.A., op. cit., pgs. 378–379, 1997).

The most common management strategy for motor impairments caused by cerebral palsy and spina bifida is developmental therapy (i.e., physical, occupational, speech and language therapies). However, orthotics, specific spasticity-reducing regimens (Baclofen pumps, botulinum toxin injections), orthopedic surgery, and adaptive equipment also are used in intervention. Orthotics are used on both upper and lower extremities to improve function, to prevent or compensate for anomolies, and to control muscle weakness, spasticity and structural instability. Most orthotic devices (e.g., ankle-foot orthoses) are designed to be rigid. Dynamic orthoses and splints for gait, spasticity and contracture management may have significant application.

Adaptive equipment is used to improve functional independence in mobility, self-care, communication, environmental control, and school activities. There is no definitive study on how to make the best choice among all the options or which improves function the most (Turk, M.A., op. cit., pg. 376, 1997).

Composite materials have much to offer in prosthetic and orthotic design. They are strong, lightweight, and durable. However, these materials require different and more costly manufacturing techniques than those used with traditional materials such as metal and thermoplastics. A problem associated with composite materials is that they are difficult to postform, a process whereby prosthetic or orthotic devices are adjusted slightly during final fittings (White, M., ''Development of an advanced lightweight composite orthosis,'' Presented at ASM

International—Aeromat '92, New Trends in Advanced Composites, Anaheim, CA., May 20 1992).

Leisure time is critical to a child's well-being and development. Play is one means for children to master developmental tasks and learn important behavioral and social skills. The ability to interact effectively with the environment through play can affect a child's self-esteem, behavior, self-awareness, confidence, and competency (Masten, A.S., ''The development of competence in favorable and unfavorable environments: Lessons from research on successful children,'' *American Psychologist,* vol. 53, pgs. 205–220, 1998). Children with disabilities, including those with amputations, cerebral palsy and spina bifida, encounter many challenges in their attempts to engage in learning and play activities. Often sensory and motor impairments severely limit the degree to which they are able to negotiate their environment and interact with others. Facilitating play for these children involves adapting the environment and providing appropriate technologies that will enhance interactive play and social skill development. The product market is challenged to meet the demands of millions of children with disabilities and their families who need alternative strategies in order to engage in recreation and social activities.

Priority 1

The Assistant Secretary proposes to establish a RERC on technologies for children with orthopedic disabilities to identify and develop technologies that will help children with orthopedic disabilities to overcome functional deficits and to support their ability to learn, play and interact socially. The RERC must:

(1) Develop and evaluate new, lightweight upper and lower limb prosthetic and orthotic devices for children;

(2) Investigate the use of dynamic orthoses for controlling spasticity and contractures for children with orthopedic impairments including those with cerebral palsy and spina bifida;

(3) Identify, develop, and evaluate models for determining when during children's development to introduce assistive technologies and prosthetic and orthotic devices;

(4) Investigate, develop, and evaluate technologies, and strategies for their use, that will enable young children, including children with cerebral palsy and spina bifida, to participate in interactive play and socialization activities; and

(5) Develop and implement, in consultation with the NIDRR-funded RERC on Technology Transfer, a utilization plan for ensuring that all new and improved technologies developed by this RERC are successfully transferred to the marketplace.

In carrying out the above required activities, the RERC must:

- Develop and implement, during the first year of the grant and in consultation with the NIDRR-funded National Center for the Dissemination of Disability Research (NCDDR), a plan to effectively disseminate the RERC's research outcomes to all appropriate target audiences including: clinicians, engineers, manufacturers, individuals with disabilities, families, disability organizations, technology service providers, businesses, and journals;
- In the third year of the grant, conduct a state-of-the-science conference on technologies for children with orthopedic disabilities and publish a comprehensive report in the fourth year of the grant;
- Collaborate on research projects of mutual interest with the RERC on Prosthetics and Orthotics, the RERC on Wheeled Mobility, and the RRTC on Children with Special Health Care Needs; and
- Address the needs of children with orthopedic disabilities from minority backgrounds and cultures.

Proposed Priority 2: Low Vision and Blindness

Background

According to recent estimates there are more than 3 million Americans with low vision, and almost one million who are legally blind (National Eye Institute, ''Vision research: A national plan 1999–2003,'' A report of the National Advisory Eye Council, National Institutes of Health, 1999). Approximately 7.8% of persons over 65 cannot see well enough to read newspaper print (Nelson, K.A., ''Statistical brief #35: Visual impairment among elderly Americans: statistics in transition,'' *Journal of Visual Impairment and Blindness,* vol. 81, pgs. 331–334, 1987), and the number of persons in this age group is projected to increase twice as fast as the population as a whole (Schmeidler, E. and Halfman, D., ''Statistics on visual impairment on older persons, disability in children, life expectancy,'' *Journal of Visual Impairment and Blindness,* vol. 91, pgs. 602–606, 1997). Blind and visually impaired individuals face major barriers in information access and handling, orientation and mobility, and access to jobsites and public facilities, resulting in very high rates of unemployment (Kirchner, C. and Schmeidler, E., ''Prevalence and employment of people in the United States who are blind or visually impaired,'' *Journal of Visual Impairment and Blindness,* vol. 91, pgs. 508–511, 1997; Hagemoser, S.D., ''The relationship of personality traits to the employment status of persons who are blind,'' *Journal of Visual Impairment and Blindness,* vol. 90, pgs. 134–144, 1996). There is also a growing and underserved group of individuals with a combination of multiple sensory, physical and cognitive impairments (Malakpa, S., ''Job placement of blind and visually impaired people with additional disabilities'' *RE:View,* vol. 26, pgs. 69–77, 1994).

The leading causes of vision impairment in children in the U.S. are cortical visual impairment (35%), retinopathy of prematurity (ROP), optic nerve hypoplasia, and other retinal conditions (Murphy, D. and Good, W.V., ''The epidemiology of blindness in children in California,'' American Academy of Opthalmology, pg. 157, 1997; Oxford Register of Early Childhood Impairments Annual Report, The National Perinatal Epidemiology Unit, Ratcliffe Infirmary, pgs. 32–36, 1998). As a result of improvements in medical diagnosis, treatment and technologies, more premature infants are surviving birth. However, a significant number of newborn infants experience traumatic conditions that include blindness and cognitive and motor deficits. New approaches and technologies are needed to identify and separate the sensory and cognitive deficits so that habilitation can be planned and monitored more effectively (Good, W.V., Jan, J.E., deSa, L., Barkovich, A.J., Groenveld, M. and Hoyt, C.S., ''Cortical visual impairment in children : A major review,'' *Survey of Opthalmology,* vol. 38, pgs. 351–364, 1994). Intervention in the very young age groups offers maximum promise of cost effectiveness and independent functioning throughout life.

Wayfinding refers to the techniques used by persons who are blind or visually impaired as they move from place to place independently. Wayfinding is commonly divided into orientation and mobility skills. Orientation refers to the ability to monitor one's position in relation to the environment. Mobility refers to one's ability to move safely, from one location to the next with a limited amount of veering. Orientation and mobility are prerequisites to success at school, on the job, and in daily living. Various electronic devices and environmental modifications have been used in

attempts to improve wayfinding and to reduce veering. Current technologies, including clear-path and drop-off detectors, do little to prevent veering.

Low vision or blindness frequently coexists with other disabilities including hearing loss, cognitive impairments and mobility limitations. Individuals with multiple disabilities present technological challenges and require complex adjustments to achieve functionality in and across environments (Greenbaum, M.G., Fernandes, S. and Wainapel, S.F., ''Use of a motorized wheelchair in conjunction with a guide dog for the legally blind and physically disabled,'' *Archives of Physical Medicine and Rehabilitation,* vol. 79(2), pgs. 216–217, 1998).

The most common cause of visual impairment among the aging population is Age Related Maculopathy (ARM) (Fletcher, D.C. and Schucard, R.A., ''Preferred retinal loci relationship to macular scotomas in a low-vision population,'' *Opthalmology,* vol. 104, pgs. 632–638, 1997). Visual impairments among this population impact a wide variety of activities of daily living. Further, visual impairment is often accompanied by hearing loss, cognitive deficits, and motor dysfunction. Many older individuals reside in congregate care settings (i.e., nursing homes) where the prevalence of eye disorders can be as high as 90% (Marx, M.S., Werner, P., Feldman, R. and Cohen-Mansfield, J., ''The eye disorders of residents of a nursing home,'' *Journal of Visual Impairment and Blindness,* vol. 88(5), pgs. 462–468, 1994; Whitmore, W.G., ''Eye disease in a geriatric nursing home population,'' *Opthalmology,* vol. 96, pgs. 393–398, 1989; Horowitz, A., ''Vision impairment and functional disability among nursing home residents,'' *The Gerontologist,* vol. 34, pgs. 316–323, 1994). These facilities could be a platform for reaching many consumers with simple vision screening technologies that would permit non-clinical personnel to rapidly screen residents for visual impairments and make appropriate referrals. Currently, methods for assessing ARM include, but are not limited to, residual visual function and identifying optimal locations on the retina for reading and other tasks (Fletcher, D.C. and Schucard, R.A., op. cit., 1997). These methods address one eye at a time, and the advantages of binocular vision are often lost (Paul, W., ''The role of computer assistive technology in rehabilitation of the visually impaired: A personal perspective,'' *American Journal of Opthalmology,* vol. 127(1), pgs. 75–76, 1999; Schuchard, R.A. and Kuo, K., ''Retinal correspondence and binocular perception characteristics in low vision people with binocular eccentric PRLs,'' *Investigative Opthalmology and Vision Science,* vol. 91, pgs. 602–606, 1999).

Chapter 5 of NIDRR's Long-Range Plan published on December 7, 1999 (64 FR 68575) discusses the importance of directing research and development activities toward the problems faced by individuals who have significant visual, hearing, and communication impairments. The number of individuals with both severe hearing and visual impairments (deaf-blind) is small but increasing. The greatest challenges persons with multiple sensory impairments face are communication and access to information technology (Engelman, M.D., Griffin, H.C. and Wheeler, L., ''Deaf-blindness and communication: Practical knowledge and strategies,'' *Journal of Visual Impairments and Blindness,* vol. 92(11), pgs. 783–798, 1999). Individuals who are deaf-blind rarely use Braille for communication purposes. To date, technologies for individuals who are deaf-blind have focused primarily on tactile interpreting for face-to-face communication.

In today's complex and multifaceted electronic world, access to graphical and spatial information is critical for persons who are blind or visually impaired to be successful in school and work (Kent, D., ''Book review: Let's learn shapes with Shapely-Cal,'' *Journal of Visual Impairment and Blindness,* vol. 92(4), pgs. 245–247, 1998). Tactile graphical information and spatial and geometric concepts are difficult to represent for persons who are blind. Converting pictures or signs into raised tactile form has proven to be costly and time consuming (Horsfall, B., ''Photopolymers, computer-aided design, and tactile signs,'' *Journal of Visual Impairment and Blindness,* vol. 92(11), pgs. 823–826, 1998). Audio and audio-tactile methods of graphics presentation and spatial and geometric concepts may promote parity between individuals who are blind or visually impaired and others in a variety of environments including school, work, and recreation.

Priority 2

The Assistant Secretary proposes to establish an RERC that will identify and develop technologies that will improve assessment of vision impairments and promote independence for individuals with low vision and blindness. The RERC must:

(1) Investigate, develop, and evaluate new screening technologies that will identify and differentiate between vision and cognitive impairments in infants;

(2) Develop and evaluate new wayfinding technologies that can be used by persons with coexisting disabilities;

(3) Investigate, develop, and evaluate simple vision screening and assessment technologies and approaches for identifying visual impairments associated with aging;

(4) Investigate, develop, and evaluate new technologies to facilitate face-to-face communication for individuals who are deaf-blind and methods that will enable individuals who are blind or deaf-blind to navigate and interpret graphical, spatial and geometric information; and

(5) Develop and implement, in consultation with the NIDRR-funded RERC on Technology Transfer, a utilization plan for ensuring that all new and improved technologies developed by this RERC are successfully transferred to the marketplace.

In carrying out the above required activities, the RERC must:

- Develop and implement, during the first year of the grant and in consultation with the NIDRR-funded National Center for the Dissemination of Disability Research (NCDDR), a plan to effectively disseminate the RERC's research outcomes to all appropriate target audiences including: clinicians, engineers, manufacturers, individuals with disabilities, families, disability organizations, technology service providers, businesses, journals, organizations representing minorities and other underrepresented groups;
- In the third year of the grant, conduct a state-of-the-science conference on technologies for individuals with low vision and blindness and publish a comprehensive report in the fourth year of the grant;
- Collaborate on research projects of mutual interest with NIDRR-funded RERCs on Information Technology Access and Telecommunications Access, RRTCs on visual disabilities and appropriate professional organizations; and
- Address the needs of children with vision disabilities from minority backgrounds and cultures.

Proposed Additional Selection Criterion

The Assistant Secretary will use the selection criteria in 34 CFR 350.54 to evaluate applications under this program. The maximum score for all the criteria is 100 points; however, the Assistant Secretary also proposes to use the following criterion so that up to an additional ten points may be earned by

an applicant for a total possible score of 110 points:

Within these absolute priorities, we will give the following competitive preference to applications that are otherwise eligible for funding under these priorities:

Up to ten (10) points based on the extent to which an application includes effective strategies for employing and advancing in employment qualified individuals with disabilities in projects awarded under these absolute priorities. In determining the effectiveness of those strategies, we will consider the applicant's success, as described in the application, in employing and advancing in employment qualified individuals with disabilities in the project.

For purposes of this competitive preference, applicants can be awarded up to a total of 10 points in addition to those awarded under the published selection criteria for these priorities. That is, an applicant meeting this competitive preference could earn a maximum total of 110 points.

Applicable Program Regulations: 34 CFR Parts 350 and 353.

Program Authority: 29 U.S.C. 762 and 764.

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(Catalog of Federal Domestic Assistance Number 84.133E, Rehabilitation Engineering Research Centers)

Dated: December 13, 1999.

Judith E. Heumann,

Assistant Secretary for Special Education and Rehabilitative Services.

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Part VII

Department of Energy

10 CFR Parts 709, 710 and 711

Polygraph Examination Regulation; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 709, 710 and 711

[Docket No. CN–RM–99–POLY]

RIN 1992–AB24

Polygraph Examination Regulation

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or the Department) today is publishing a final rule for the use of polygraph examinations for certain DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions at DOE. The regulation describes the categories of individuals who will be eligible for polygraph testing and controls for the use of such testing and for prevention of unwarranted intrusion into the privacy of individuals. This regulation is an important element of the Department's efforts to protect highly sensitive and classified information and materials to which certain DOE and contractor employees have access. The final rule adopted today also contains conforming changes to regulations governing the Department's Personnel Security Assurance Program (PSAP) and Personnel Assurance Program (PAP).

EFFECTIVE DATE: January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Douglas Hinckley, U.S. Department of Energy, Office of Counterintelligence, CN–1, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–5901; or Lise Howe, U.S. Department of Energy, Office of General Counsel, GC–73, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–2906.

SUPPLEMENTARY INFORMATION:

I. Introduction and Need for the Rule
II. Background
III. Discussion of General Public Comments
IV. Section-by-Section Review and Discussion of Public Comments
V. Regulatory Review
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I. Introduction and Need for the Rule

The national weapons laboratories of DOE are premier institutions among the world's government-sponsored scientific research and development organizations. Their discoveries not only helped the United States prevail in the Cold War, but they are providing for the continued national security through their mission to maintain the safety, security, and reliability of the nation's nuclear stockpile. As the repository of America's most advanced know-how in nuclear and related armaments and the home of some of America's finest scientific minds and engineering capabilities, these labs have been and will continue to be major targets of foreign intelligence services.

This threat to DOE and its facilities is not new; indeed it has been confirmed throughout the years by reports from the Federal Bureau of Investigation (FBI), the General Accounting Office (GAO), the intelligence community, independent commissions, private management consultants, and DOE's inspector general and security experts. Most recently it has been highlighted in Presidential Decision Directive (PDD)–61, ''The U.S. Department of Energy Counterintelligence Program,'' and in a report on security problems at DOE by a Special Investigative Panel of the President's Foreign Intelligence Advisory Board (the Rudman report). (The unclassified versions of these documents are on DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

During the past decade, DOE's security programs have been challenged as the potential threats faced by DOE have become more extended. The number of nations possessing, developing, or seeking weapons of mass destruction continues to increase, and warnings mount about the espionage goals of other nations. However, as the Rudman report found, DOE has ''devoted too little time, attention, and resources to the prosaic but grave responsibilities of security and counterintelligence in managing its weapons and other national security programs.'' (Rudman report at 1.) The weapons laboratories utilize some of the most advanced security technology in the world. Nevertheless, as the Rudman report noted, however, weak systems of personnel assurance, information security, and counterintelligence have invited attack by foreign intelligence services. (*Id.* at 3.)

DOE has acknowledged these deficiencies. In the past year, DOE has taken steps to improve security and counterintelligence throughout the Department in order to strengthen its protection of information and technologies in connection with DOE's atomic energy defense activities. Reform has focused on: the structure of the counterintelligence program; selection and training of field counterintelligence personnel; counterintelligence analysis; counterintelligence and security awareness; protections against potential insider threats; computer security; improved coordination with the FBI, the Central Intelligence Agency (CIA), and the National Security Agency (NSA); and the establishment of a counterintelligence-scope polygraph program.

II. Background

DOE has clear authority to implement a counterintelligence-scope polygraph program. DOE, as the successor agency to the Atomic Energy Commission, has broad national security responsibilities under the Atomic Energy Act of 1954 (AEA or Atomic Energy Act) to direct the development, use, and control of atomic energy. These responsibilities include a specific mandate to protect sensitive and classified information and materials involved in the design, production, and maintenance of nuclear weapons, as well as a general obligation to ensure that permitting an individual to have access to information classified under the AEA will not endanger the nation's common defense and security. Section 161 of the AEA authorizes DOE to adopt rules necessary to carry out those functions. 42 U.S.C. 2201.

Various Executive Orders of government-wide applicability also require DOE to take steps to protect classified information. Executive Order No. 12958, ''Classified National Security Information'' (April 17, 1995), requires the Secretary to establish controls to ensure that classified information is used only under conditions that provide adequate protection and prevent access by unauthorized persons. Executive Order 12968, ''Access to Classified Information'' (August 2, 1995), requires the Secretary to establish and maintain an effective program to ensure that employee access to classified information is clearly consistent with the interests of national security. In addition, in February 1998, President Clinton issued PDD–61, ''U.S. Department of Energy Counterintelligence Program,'' a classified document containing the President's determination that DOE must do more to protect the highly sensitive and classified information at its facilities. The President instructed DOE to develop and implement specific measures to reduce the threat to such information. Such measures may include additional requirements for financial disclosure, reporting of foreign travel, the establishment of Special

Access Programs (SAPs) where appropriate, and use of polygraph and psychological screening.

Congress recognized that polygraph examinations may appropriately be used by the Department when it provided two relevant exemptions from the general prohibitions contained in the Employee Polygraph Protection Act (Pub. L. 100–347) (EPPA) against the use of polygraph examinations in private employment settings. The prohibition in the EPPA does not apply to counterintelligence polygraph examinations administered by DOE to any expert, consultant or contractor employee of DOE in connection with atomic energy defense activities, 29 U.S.C. 2006(b)(1)(B). The prohibition also does not apply to counterintelligence polygraph examinations administered by a Federal agency, in the performance of an intelligence or counterintelligence function, to an individual whose duties involve access to Top Secret classified information or information designated as being within a SAP. 29 U.S.C. 2006(b)(2). The Congress in the EPPA leaves to DOE the discretion to develop rational procedures for evaluating and processing the results of polygraph examinations and for protecting individuals from misuse of such an examination.

DOE believes that requiring counterintelligence-scope limited polygraph examinations for individuals in positions with access to the most sensitive and classified information and materials in connection with DOE's atomic energy defense activities is one of several necessary, prudent actions required to fulfill its national security responsibilities. A counterintelligence-scope polygraph examination both serves as a means to deter unauthorized disclosures of classified information and provides a means for early detection of disclosures to enable DOE to take steps promptly to mitigate harm to the national security. A counterintelligence-scope polygraph examination is also an integral element of the DOE Accelerated Access Authorization Program (AAAP), a program that DOE utilizes to grant interim personnel security clearances on an expedited basis. In addition, use of a polygraph examination when an individual requests one as a means of explanation and corroboration in order to resolve issues in a counterintelligence or personnel security investigation is an additional component of the overall inquiry which hastens the DOE's resolution of such issues.

On March 17, 1999, DOE began developing and implementing a counterintelligence-scope polygraph requirement for sensitive positions by issuing an internal DOE directive, DOE Notice 472.2, Use of Polygraph Examinations. That Notice establishes a polygraph requirement for Federal employees who occupy or seek to occupy certain sensitive positions. The DOE Notice also provides for polygraph examinations to be administered to Federal employees as part of the AAAP and, upon employee request, as a means of resolving remaining questions. (The Notice is on DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

DOE published a Notice of Proposed Rulemaking (NOPR) on August 18, 1999 (64 FR 45062), that proposed expanding the counterintelligence polygraph program to cover all employees at its facilities, contractor employees as well as Federal employees, in positions with access to the most sensitive categories of classified information and materials, as well as applicants for such positions. The NOPR also proposed conforming changes to regulations governing the Department's PAP and PSAP.

After the NOPR was published, Congress directed DOE in section 3154 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 160–65) (NDAA), enacted on October 5, 1999, to conduct a counterintelligence polygraph program for specified defense-related activities of the Department. Section 3154 requires DOE to issue rules for administration of counterintelligence polygraph examinations to all officers or employees of the Department, experts or consultants under contract to DOE, and officers or employees of DOE contractors, who are in SAPs or the PSAP. Section 3154 provides for consultation with the FBI in developing the rule. It also requires DOE to submit to Congress, within 180 days after the date of enactment of the Act, a plan to extend the counterintelligence polygraph program to DOE employees and contractor employees who have access to the PAP and information identified as Sensitive Compartmented Information (SCI).

The NOPR explicitly covered SAP, PSAP, and PAP employees. It also covered employees with access to SCI by reason of proposed section 709.4(a)(1) and (2). As required by section 3154 of the NDAA, DOE provided a draft of this rule to the FBI for comment. DOE has been advised that pursuant to section 3154 the FBI concurs in issuance of today's final rule and did not recommend any changes.

In accordance with the Atomic Energy Act and section 3154 of the NDAA, DOE today addresses the relevant major issues from the public comments and after full consideration of those comments, DOE adopts a final rule governing use of counterintelligence-scope polygraph examinations for national security purposes, and use of polygraph examinations initiated at the request of an individual to address questions in the context of counterintelligence investigations or personnel security inquiries.

III. Discussion of General Public Comments

DOE received one hundred and five written comments on the proposed rule. In addition, eighty-seven people presented oral comments during public hearings held at Lawrence Livermore, Sandia, and Los Alamos National Laboratories, and Washington, D.C. on September 14, 16, 17 and 22, 1999, respectively. DOE has carefully considered all of these comments in preparing this final rule.

Some comments were general in nature, addressing over-arching issues such as the validity and reliability of polygraph examinations, the effect of the proposed polygraph program on national security and on retention and hiring of employees at the national laboratories, the constitutionality of DOE's proposed polygraph program, and alternatives to the program. This section discusses these issues and DOE's responses.

Other comments addressed specific elements and sections of the proposed rulemaking. DOE discusses those comments in section IV below. That section also explains the changes that DOE has made to the rule in response to the public comments and as a result of additional internal review.

a. Validity of Polygraph. DOE received numerous comments asserting that polygraph examinations have no theoretical foundation or validity. According to some commenters, while there is disagreement among scientists about the use of polygraph testing in specific-incident criminal matters, there is almost universal agreement that polygraph screening in the employment context is completely invalid. Other commenters stated that they believe that polygraph examinations lack reliability and may result in an unacceptable number of false positives and false negatives.

DOE developed and published the NOPR under general discretionary rulemaking authority in the Atomic Energy Act. In the absence of a specific Congressional mandate for a counterintelligence-scope polygraph examination program, the advisability of such a program in light of the facts

about polygraph reliability were fair subjects for public comment. However, during the public comment period, Congress enacted section 3154 of the NDAA. Section 3154 supplements the general authority of the Atomic Energy Act, and includes a non-discretionary mandate to implement a counterintelligence-scope polygraph program by rule for each person in four ''high risk'' programs.

Due to enactment of this non-discretionary mandate, DOE concludes as a matter of law that it is no longer free to act favorably on comments arguing generally against establishment of a counterintelligence-scope polygraph examination program because of information and claims about deficiencies in polygraph reliability. In DOE's view, this conclusion applies even though DOE's proposal listed more ''high risk'' programs than the four programs listed in section 3154. There is no meaningful distinction among the various programs listed in the NOPR with regard to general objections to polygraph examinations on grounds of alleged excessive unreliability.

Although, as a purely legal matter, there is no obligation to respond to comments generally attacking DOE's proposal to establish a polygraph examination program, DOE nevertheless is responding to specific objections to polygraph reliability that should be considered because, if valid, they might suggest modification of the proposed procedures. Commenters offering these objections did not suggest modifying those procedures. Nor did they offer supporting scientific information to validate their objections.

Some of the comments pointed to various medications and drugs, such as beta blockers and antimuscarines, and argued that ingestion of any of these substances, or the presence of illness or disease could invalidate a polygraph examination. DOE disagrees with these comments because neither these substances nor the presence of an illness or disease will cause differential effects within a particular examination as the examiner moves from one question to another. In addition, DOE has added to section 709.4(b)(2) a medical exception to the final rule for any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested.

Other comments focused on various features of the polygraph instrument or polygraph procedures. One comment speculated about the relationship between electrode polarization of the sensors and known facts about electrodermal activity. Another suggested that blood pressure recordings are unreliable. Still another argued for instantaneous heart rate measures. With regard to electrodermal blood pressure, and heart rate measures, DOE is not persuaded that there is any significant inaccuracy because the examiner is looking only at the relative magnitude of phasic responses. The issue is changes in skin conditions, blood volume and heart rate to specific questions when they are repeated several times.

In view of the foregoing, DOE concludes that none of the reliability issues suggested in public comments warrants changes in the proposed polygraph procedures. Moreover, given their speculative nature, they do not warrant curtailing the number of categories of employees who are subject to polygraph examinations under today's final rule.

b. Johnson Memorandum. Another commenter asserted that DOE's decision to implement a counterintelligence-scope polygraph program is inconsistent with President Johnson's memorandum entitled ''Use of Polygraph in the Executive Branch.'' That memorandum, which is intended to ''prevent unwarranted intrusion into the privacy of individuals,'' prohibits federal agencies from subjecting federal employees to polygraph examinations except in limited situations. One of the exceptions permits an executive department or agency that has an intelligence or counterintelligence mission directly affecting national security to use polygraph examinations for employment screening, and personnel investigations, and intelligence and counterintelligence operations. DOE believes that the institution of its polygraph program is clearly permitted within the terms of the Johnson memorandum.

c. Employee Morale and Retention and Hiring. DOE has received a number of comments asserting that the polygraph program will have a negative impact on employee morale and that the establishment of the polygraph program will make it more difficult to retain and recruit the high caliber of scientists needed to maintain the safety and reliability of the nuclear weapons stockpile. In the opinion of many commenters, this potential loss of employees ultimately will so significantly degrade the quality of scientific research necessary to ensure the continuance of a reliable nuclear deterrent that the national security of the United States will be threatened.

The issues of recruitment and retention of personnel and their potential impact on national security are matters of great importance. DOE notes these issues pre-date its proposed use of counterintelligence-scope polygraph examinations, and are well documented in the March 1999 Report of the Commission on Maintaining United States Nuclear Weapons Expertise (Chiles report). (The report, which was cited by a number of commenters, is available at DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

The Chiles report characterized the DOE as being in a war for talent with the private sector. The scientific and technical talent that DOE must attract and retain has many options in today's competitive technology marketplace. The Chiles report points out the reasons DOE has not been successful in recruiting and retaining laboratory employees, and section 3163 of the NDAA requires DOE to report to Congress on measures that will be taken to retain skills necessary to maintain the U.S. nuclear deterrent force.

DOE's federal and contractor employees have achieved remarkable scientific advances and have contributed immensely to the nation's security. DOE recognizes that enhanced security and counterintelligence measures may be factors in attracting and retaining the best and brightest scientific and technical talent. The value of the contributions of DOE's employees was taken into account in developing this rule. DOE further notes the National Reconnaissance Office, NSA, CIA, and FBI also recruit scientists. They continue to be successful in recruiting and retaining top-caliber individuals in their fields despite the use of polygraph examinations in their screening processes.

DOE received at least ten comments that the proposed regulation reflects a lack of trust in the employees of the national laboratories. Commenters objected to what they perceived as a new DOE requirement that they must now prove their loyalty to the United States. Several commenters cited factors which they argued demonstrated their loyalty, including military backgrounds, and scientific contributions toward nuclear deterrence. While the polygraph requirement is a new condition of participating in select programs that involve access to the most sensitive classes of information with which DOE deals, DOE does not view it as materially different from other measures presently utilized. DOE currently conducts background investigations and

periodic reinvestigations, monitors financial records, imposes restrictions on publishing materials, and, for some employees, requires mandatory drug tests and medical assessments. Despite these measures, critical reports from the FBI, the GAO, the intelligence community, independent commissions, private management consultants, and DOE's inspector general and security experts have judged DOE's security program to be lacking. Now, the President, through PDD–61, has directed DOE to consider establishing a polygraph program as one component of an overall counterintelligence program. In addition, Congress, speaking through the NDAA, has mandated similar remedial measures. The polygraph program is a new component being added to existing protections, rather than a fundamental change in DOE's treatment of national laboratory or other contractor and DOE personnel.

d. Effect of the NDAA. Although DOE's notice of proposed rulemaking cited general rulemaking authority in the Atomic Energy Act of 1954 as the legal basis for DOE's proposal, several comments focused on pending legislation that eventually was enacted as the NDAA. Some comments argued for extending or reopening the comment period because the Congressional bill language differed from the terms of DOE's proposal. One of the comments specifically noted that the Congressional bill language required consultation with the FBI in the development of the regulation and identified fewer classes of employees to be polygraphed than the number of classes listed in the notice of proposed rulemaking. These features appear in the final legislative language, enacted as section 3154 of the NDAA.

With regard to the foregoing comments, section 3154 of the NDAA is significant for this rulemaking chiefly because it requires FBI consultation on rule development, buttresses the Department's authority for carrying out this rulemaking, and gives specific directions that resolve some issues (*e.g.*, whether to establish a polygraph program) posed as matters of policy in DOE's proposal. The requirement for FBI consultation is not reason enough to reopen the comment period because section 3154 does not specifically require that consultation occur prior to publication of a proposal. The FBI consultation was carried out in connection with DOE's consideration of the public comments received on the proposal. Enactment of additional authority for this rulemaking is also not a reason to reopen the comment period because the substantive differences between section 3154 and the proposed regulation do not warrant such a reopening. Substantively, section 3154 requires DOE to prescribe regulations for conducting a counterintelligence polygraph program applicable to each covered person in certain ''high-risk'' programs. It is silent and neutral on the issue of whether to include other classes of employees. It is mandatory with regard to some of the details of basic program elements of initial testing and consent, periodic testing, the scope of questions calculated to obtain counterintelligence information, procedures to identify and address ''false positives,'' and the circumstances for undertaking adverse personnel actions on the basis of a response to a question in a polygraph examination. The DOE notice of proposed rulemaking specifically addressed each of these program elements. Apart from some mandatory details to which DOE must conform regardless of what public comments may be directed to them, section 3154 does not significantly alter, or add to, the policy issues in this rulemaking. Members of the public have already had a full and fair opportunity to comment on those issues. On the basis of the foregoing, DOE concludes that additional opportunity to comment is unnecessary, and, given the need to enhance security at the national laboratories, contrary to the public interest.

e. Constitutional Claims. Some commenters stated that this proposed rulemaking was unconstitutional and violated the Constitution's Fourth Amendment prohibition against unreasonable searches and the Fifth Amendment protection against self-incrimination. Other commenters stated that the proposal would erode civil liberties and invade privacy. DOE believes that the case law on these issues is well settled, and that the counterintelligence polygraph program as DOE proposes to use it does not violate an individual's civil liberties. The proposal does not violate the Fourth Amendment because an individual must give his or her consent before taking the polygraph examination. The Fifth Amendment is not violated because the proposal provides an individual an opportunity to consult with an attorney and contains a statement of the privilege against self-incrimination. Furthermore, polygraph examination results generally are not admissible in a criminal trial.

f. Alternatives to Polygraph. DOE received a number of suggestions for alternatives to the polygraph program. These included enhanced or more frequent background investigations; ''old fashioned detective work'' and surveillance; interview hot lines to report suspicious behavior; larger security staffs; spot checks of employees as they enter and leave DOE facilities; an open dialogue with lab employees on how to improve security; peer counseling for new hires; examination of financial records and money wired to employee accounts from foreign sources; monitoring of banking and charge accounts to look for unusual financial or travel activities; improved security of computer systems; classified areas of the facilities with some individuals having two offices: one for classified work and a second one for unclassified work; use of magnetic tape on classified documents to detect improper removal of such documents; and undercover or sting operations. In the opinion of DOE, while some of these suggested alternatives would be useful once it has been determined that an individual should be monitored because of some suspicious activity, these activities would be exceedingly intrusive into the lives of DOE and contractor employees if adopted on a widespread basis. DOE believes that the polygraph program is more narrowly focused and less intrusive because it does not require constant monitoring, and more effective as a screening device than many of these alternatives.

Other commenters suggested that DOE should use the ''guilty knowledge'' polygraph test format rather than the control question format. DOE did not accept these suggestions because it believes that the control question format, which is more standardized and therefore more easily applied to a diverse population, is more appropriate for the counterintelligence scope polygraph program that it has proposed.

Other commenters suggested that the money spent on the polygraph program would be better spent on the suggested alternatives to enhance external security and to perform more background investigations. DOE does not believe that it is necessary to spend more money on additional external security enhancements since its systems already are among the best in the federal government. DOE notes that the polygraph program serves an important function that is different from the background investigation, or additional external security enhancements. Whereas the background investigation provides an external view of the individual, *i.e.*, information derived from friends, neighbors, and coworkers, and external documents such as financial records, the polygraph examination provides an internal view of how the individual understands his or her behavior, a view that is rarely

seen by anyone other than the individual. Additional enhanced external security measures by themselves provide little protection against the cleared employee who decides to engage in espionage. However, when external security measures are coupled with other tools such as polygraph examinations the combination constitutes a strong deterrent to those who would compromise national security and defense.

g. Use of Polygraph Countermeasures. Several individuals expressed their belief that spies trained in polygraph countermeasures will be able to pass the counterintelligence-scope polygraph examination. DOE is aware that there have been cases in which agents of a foreign intelligence service have been able to successfully employ polygraph countermeasures. While such countermeasures are relatively easy to teach in a laboratory environment, they are much more difficult to employ in real life situations. The Department of Defense Polygraph Institute (DODPI) continues to conduct research on countermeasures and how to counter countermeasures, and DOE's polygraph examiners receive training in detecting countermeasures as part of their training requirements. Accordingly, DOE is not persuaded that it should dispense with counterintelligence-scope polygraph examinations because of the potential use of countermeasures.

IV. Section-by-Section Review and Discussion of Public Comments

Subpart A—General Provisions

Section 709.1 What Is the Purpose of This Part?

One commenter suggested that DOE should state more clearly the desired goal of the regulation at the beginning and describe in clear, precise terms the steps of the process by which the goal will be achieved. A second commenter questioned the relationship of proposed section 709.1, which establishes the purpose of this regulation, to proposed section 709.4(6), which describes a category of individuals eligible for polygraph testing. In response to these comments DOE has revised section 709.1. Section 709.1 of the final rule states that its purpose is to describe the categories of individuals who are eligible for counterintelligence-scope polygraph testing, and to provide guidelines for the use of counterintelligence-scope polygraph examinations and exculpatory examinations and guidelines to protect the rights of individuals subject to this regulation.

DOE believes that it is unnecessary to make section 709.1 more specific regarding the precise procedures the Department will follow in achieving the goal of the regulation because the operative provisions in subparts B and C of the regulation cover those procedures.

Section 709.3 What Are the Definitions of Terms Used in This Part?

Several commenters requested that DOE clarify terms or add definitions for terms used in the NOPR. DOE has revised several definitions. DOE also has added to section 709.3 a definition of ''access'' as it applies to this regulation. In addition, DOE has added definitions of ''access authorization,'' ''control questions,'' ''deception indicated,'' ''eligibility evaluation,'' ''local commuting area,'' ''no deception indicated,'' ''no opinion,'' ''personnel security clearance,'' ''polygraph examination records,'' ''polygraph report,'' ''relevant questions,'' and ''unresolved issues.''

DOE is deleting the definition of ''Presidential appointee'' in light of its decision to eliminate the proposed exception from the polygraph requirement for any Presidential appointee who had received a favorably adjudicated, full-field FBI background investigation.

Section 709.4 To Whom Does the Polygraph Examination Requirement Under This Part Apply?

A number of commenters alleged that the categories of positions subject to a polygraph examination included more positions than necessary. Several commenters stated that the NOPR included positions whose incumbents merely have access to ''sensitive'' information, as opposed to classified information. The categories of positions identified in the rule have access to DOE's most sensitive and classified information and materials. Although the focus is on ''classified'' information and materials, DOE would be remiss if it ignored the potential damage that would result from the unauthorized disclosure of ''sensitive'' information and material.

Other commenters noted that the categories were excessively vague or that the categories did not specify which individuals actually will be polygraphed. Still other commenters expressed concern specifically that proposed section 709.4(a)(6), which provides that positions are eligible for polygraph examination that ''DOE has determined have a need-to-know or access to information specifically designated by the Secretary or his delegatee regarding the design and operation of nuclear weapons and associated use control features,'' was so broad that everyone with a ''Q'' clearance would be included.

DOE does not intend to include in section 709.4 everyone with a ''Q'' clearance. PDD–61 charged DOE with developing and implementing specific measures for reducing the threat to sensitive and classified information at DOE. DOE determined that the best approach was first to identify those ''high risk'' programs that control DOE's most sensitive information. DOE concluded that the individuals in the ''high risk'' programs identified in section 709.4(a)(1)–(8) are the most attractive targets to foreign intelligence services because of the highly sensitive information to which they have access, and therefore represent the greatest potential threat to national security.

The Offices of Counterintelligence (709.4(a)(1)), Intelligence (709.4(a)(2)), Independent Oversight and Performance Assurance (709.4(a)(7)), and Security and Emergency Operations (709.4(a)(8)) administer DOE's counterintelligence, intelligence and security programs and therefore have responsibility for the highly sensitive and classified information, including SCI, and materials within these programs. Similarly, SAPs (709.4(a)(3)) involve highly sensitive and classified information and materials. DOE notes that other U.S. government agencies routinely require counterintelligence-scope polygraph examinations as a prerequisite for obtaining or retaining access to SAP programs. Section 709.4(a)(6) includes positions that DOE has determined have need-to-know or access to information regarding the design and operation of nuclear weapons and associated use control features.

Several commenters recommended that the ''PSAP'' (709.4(a)(4)) and ''PAP'' (709.4(a)(5)) categories should not automatically be included in the categories of employees subject to polygraph examinations. These commenters asserted that there are strong and legitimate arguments for the people in these programs being subject to psychiatric and drug abuse testing, but they did not believe that there is a strong correlation between their job responsibilities and the espionage threat. The PAP and PSAP include individuals who are assigned nuclear explosive duties (PAP) or have access to Category I quantities of special nuclear material (PSAP). In both cases, the potential for causing damage to national security is great. Moreover, as noted previously in the NDAA, Congress has required DOE to polygraph individuals

who are members of SAPs and the PSAP and to present a plan to Congress within 180 days concerning the polygraphing of individuals who are members of the PAP or have access to SCI.

DOE recognizes that many individuals in positions within these eight categories are uncertain as to whether they actually will be polygraphed. DOE has decided to issue an implementation plan simultaneously with this final rule. That plan identifies the positions whose incumbents will be polygraphed initially and provides for a review of the program after twelve months. (The implementation plan is on DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

Several commenters objected to proposed section 709.4(b)(1), which provided that the polygraph examination requirement would not apply to Presidential appointees who had received a favorably adjudicated full-field FBI background investigation. Upon review, DOE has decided to delete proposed section 709.4(b)(1), believing that anyone with access to DOE's highly sensitive information or materials should meet the same standards, regardless of position.

DOE also has decided to delete proposed paragraph 709.4(b)(2) which provides that the polygraph requirement does not apply to positions requiring access to SAPs that are intelligence-related and therefore subject to requirements promulgated by the Director of Central Intelligence. This paragraph is unnecessary because proposed section 709.4(b)(4) of the NOPR (now renumbered as section 709.4(b)(1)) contains an exception for individuals for whom the Director of the Office of Counterintelligence gives a waiver based upon certification from another Federal agency that the individual has successfully completed a full-scope or counterintelligence-scope polygraph examination administered within the last five years.

DOE received comments suggesting that the rule should contain an exception for medical reasons. DOE agrees with this suggestion and has added a new paragraph 709.4(b)(2) that provides an exception from this regulation for any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested.

DOE also received comments objecting to paragraph 709.4(b)(3) that provides that the polygraph examination requirement does not apply to individuals for whom the Secretary of Energy gives a written waiver in the interest of national security. DOE has decided not to delete this provision, believing that it is necessary to provide the Secretary the authority to grant a national security exemption similar to that provided by other agencies that conduct counterintelligence-scope polygraph programs. DOE recognizes the success of the counterintelligence polygraph program depends in large measure upon employees' confidence that no one is being arbitrarily targeted or preferentially exempted, but believes that this written exemption is appropriately limited.

Section 709.4(c) of the NOPR provided that the Director of the Office of Counterintelligence (D/OCI), in consultation with the appropriate Program Manager, would establish the criteria for identifying the specific positions that warrant a polygraph examination and the order of priority for conducting polygraph examinations. Several commenters stated that DOE should have provided the criteria as part of the NOPR so that the public could comment on the criteria. While DOE believes that it was appropriate to solicit public comments on the categories of positions described in 709.4(a)(1)–(8), the criteria that DOE will use to identify the specific positions for polygraph examinations within those eight categories are subject to review and change. DOE has revised paragraph 709.4(c) to provide that the appropriate Program Manager for positions identified in paragraphs (a)(1)–(8) of this section, rather than the D/OCI, identifies, in order of priority, those specific positions that will be polygraphed. New paragraph (d) requires the Program Manager to submit those positions to the D/OCI for review and concurrence. The D/OCI forwards the positions, with any suggested additions or deletions, to the Secretary for approval. This revision will provide an extra level of review to ensure that no positions are targeted unfairly.

Section 709.5 How Will an Individual Know If His or Her Position Will be Eligible for a Polygraph Examination?

DOE received several comments seeking clarification of the relationship of proposed section 709.5 to proposed section 709.4. The purpose of section 709.5 is to describe the process by which an individual will be notified that he or she is eligible for a polygraph examination. DOE has revised proposed section 709.5 to provide that, when a polygraph examination is scheduled, DOE must notify the individual, in accordance with section 709.21. Applicants for those positions identified in section 709.4(a)(1)–(8) will be notified in the vacancy announcement that the individual selected for the position may be required to complete successfully a counterintelligence-scope polygraph examination before being hired.

Section 709.6 How Often Will an Individual be Subject to Polygraph Examination?

DOE has added a new section 709.6 to clarify that the individuals in positions identified in section 709.4(a)(1)–(8) are subject to a five-year periodic, as well as an aperiodic, reinvestigation polygraph examination.

Subpart B—Polygraph Examination Protocols and Protection of National Security

Section 709.11 What Types of Topics Are Within the Scope of a Polygraph Examination?

Several commenters suggested that some of the six counterintelligence topics identified in proposed paragraph 709.11(b) should be revised or deleted. DOE has decided not to accept this suggestion, because DOE believes that paragraph 709.11(b) accurately states the topics on which DOE should focus during a counterintelligence-scope polygraph examination. Furthermore, these topics are the same ones used by the eleven other federal agencies that utilize polygraph examinations for screening purposes.

Several commenters recommended that DOE modify the regulation to explain that the examiners will ask ''control questions.'' Control questions are a standard part of a counterintelligence-scope polygraph examination and are designed to determine an individual's ability to respond during a polygraph examination. Since they do not constitute the topics of the counterintelligence-scope polygraph examination, it is not necessary to identify control questions in this section of the regulation. However, DOE has revised section 709.24(d) to clarify that the examiner will review with the individual all the questions to be asked during the examination.

DOE received several general comments concerning section 709.11(c), which limits the type of questions that DOE may ask during the polygraph examination. One commenter suggested that DOE revise proposed section 709.11(c)(2) to refer to ''conduct that has no counterintelligence implication'' as distinguished from ''conduct that has no

security implication,'' as it read in the NOPR. Section 709.11(c)(2) has been revised to reflect this suggestion.

Other commenters expressed concern that DOE would expand the scope of the polygraph examination in the future to ask either lifestyle questions or questions not covered by the six topics identified in proposed paragraph 709.11(a). DOE may not ask lifestyle questions or expand the six topics without amending this regulation after providing an opportunity for public comment.

One commenter asked how DOE could guarantee, without counsel or witnesses present, that the examiner would not ask inappropriate questions, notwithstanding section 709.11(c), which would make the individual so upset that he or she would ''fail'' the test. DOE tapes the entire test from the beginning to the conclusion. In addition, a senior examiner continually supervises the conduct of the examination via a closed-circuit system, and would be able to intervene immediately if the examiner were to ask any inappropriate questions.

Section 709.12 How Does DOE Determine the Wording of Questions?

Several commenters asserted that proposed sections 709.11 and 709.12 do not adequately restrict the subject areas of the questions, thereby allowing different questions for different individuals. Section 709.11 limits the subject matter of any questions asked to the six topics identified in that section. However, the examiner is afforded flexibility in the formulation of the actual questions in order to assist the individual being tested to understand the topics of the examination. It would be counterproductive to predetermine the exact wording of the counterintelligence questions because some individuals may find it confusing or difficult to respond to the questions without additional clarification. The examiner needs to have the flexibility to determine the wording of a specific question based upon a pretest interview with the individual. In DOE's experience, this is the best way to assure the individual understands the question and can answer it appropriately, thereby minimizing the likelihood of unresolved issues.

Section 709.13 May An Individual Refuse to Take a Polygraph Examination?

One commenter asked what DOE would do with any information gathered during an examination if the individual terminated the examination, given that the regulation provides that DOE will treat a termination as a refusal to take the polygraph examination under section 709.13. DOE will make decisions on a case-by-case basis in accordance with the provisions of this regulation about information developed during a counterintelligence-scope polygraph examination that is terminated before completion.

Section 709.14 What Are The Consequences of a Refusal to Take a Polygraph Examination?

The discussion of this section in the preamble of the NOPR stated that ''[a]ll polygraph examinations administered by DOE are voluntary.'' In other words, DOE cannot compel an individual to take a polygraph test against his or her will. A large number of commenters took exception to that statement in the NOPR, noting that the refusal to take a polygraph examination may result in a severe job consequence, including denial or loss of access to the information or activity that justified the polygraph examination. DOE has noted before that the polygraph examination requirement does not differ significantly from other requirements for jobs within the DOE complex involving access to highly sensitive and classified information. Refusal to complete a financial disclosure form, complete or cooperate in a security investigation, agree to be fingerprinted, or follow established security procedures will result in denial or loss of a personnel security clearance. Nonetheless, DOE has deleted the term ''voluntary'' from proposed section 709.23(c). Section 709.23(c) of the final rule now provides that DOE may not administer a polygraph examination unless DOE has obtained written consent from the individual.

Proposed section 709.14 provided that DOE may deny applicants or incumbents who refuse to take a polygraph examination access to the information or involvement in the activities that justified the polygraph examination. After DOE issued the NOPR, Congress enacted the NDAA, which requires DOE to polygraph individuals who are members of SAPs and the PSAP. The NDAA also requires DOE to present a plan to Congress within 180 days for polygraphing individuals who are subject to the PAP or who have access to SCI. In addition, the NDAA provides that DOE may not grant initial access to SAPs and the PSAP to any covered individual who has not consented in writing to and undergone a counterintelligence polygraph examination. The law further provides that an incumbent may not have continued access to either of these programs unless that person undergoes a counterintelligence polygraph examination within five years after receiving initial access, and thereafter not less frequently than every five years, and at any time at the direction of the D/OCI.

DOE has revised section 709.14 by adding new paragraphs (a)–(d) to conform it with the specific terms of section 3154 of the NDAA. The new paragraph (a) provides that DOE and its contractors must refuse to employ, assign, or detail any individual who is an applicant for employment, assignment, or detail to one of the positions described in section 709.4(a)(1)–(8), and refuses to take a counterintelligence polygraph examination required by statute as an initial condition of access. The new paragraph (b) provides that DOE and its contractors may refuse to employ, assign, or detail any individual who is an applicant for employment, assignment, or detail to a position described in section 709.4(a)(1)–(8) and refuses to take a counterintelligence polygraph examination otherwise required by this part as an initial condition of access.

The new paragraph (c) provides that DOE and its contractors must deny an incumbent access to any position described in section 709.4(a)(1)–(8), consistent with section 709.15, if that individual refuses to take a counterintelligence polygraph examination required by statute. The new paragraph (d) provides that DOE and its contractors may deny an incumbent access to any position described in section 709.4(a)(1)–(8), consistent with section 709.15, if the individual refuses to take a couterintelligence polygraph examination otherwise required by this part. DOE has redesignated the proposed paragraphs 709.14(b), (d), (e), and (f) as paragraphs 709.14(e), (f), (g), and (h), respectively.

Several commenters asked whether the refusal to take a polygraph meant the revocation of a personnel security clearance (*i.e.*, revocation of an access authorization), the automatic loss of a ''Q'' clearance, or loss of a job. Refusal to be polygraphed does not result in the termination of one's personnel security clearance. DOE recognizes that its use of the term ''access'' in this part may have caused confusion because of its similarity to the term ''access authorization'' as used in 10 CFR part 710. DOE has added definitions to section 709.3 of ''access,'' ''access authorization,'' and ''personnel security clearance'' to clarify their use in this regulation.

Proposed section 709.14(c) also provided that, ''[i]f the individual is a DOE employee, DOE may reassign or realign the individual's duties or take other action, consistent with the denial of access.'' Several commenters asked DOE to clarify the phrase ''take other action.'' In new paragraphs (c) and (d), DOE has added a sentence that indicates that if the individual is a DOE employee, DOE may reassign or realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access. DOE has added a definition of ''local commuting area'' to section 709.3 of the final rule. DOE recognizes that in some instances, if the individual's skills are intrinsically linked to a program identified in section 709.4(a)(1)–(8) and access to that program has been denied, it may not be possible to reassign that individual or realign that individual's duties within the local commuting area. In such circumstances, DOE may have no reasonable option other than to terminate that individual's employment.

The language of the NOPR discussing this section provided that:

> In some instances, the information or activities may be essential to the individual's ability to do his or her job. In such a case, the employer (whether DOE or contractor) must make every effort to find a new position for which the individual would be suitable, consistent with that denial of access. [64 FR 45063]

Both employees and contractors asked DOE to explain what ''make every effort'' entailed. DOE will make every reasonable effort to find a job for employees who refuse to take a polygraph examination and therefore are denied access to the information or involvement in the activities that justified conducting the polygraph examination. Specifically, DOE will look for appropriate jobs within the local commuting area.

In addition, a comment from a contractor suggested that DOE should delete all language in the NOPR that explicitly or implicitly references conduct of the contractor. DOE has decided not to delete all language that references conduct of the contractor because DOE believes that contractor employees should be treated similarly to federal employees under this regulation whenever possible. DOE strongly encourages contractors to make a similar effort to locate job opportunities for employees who refuse to take a polygraph examination.

Proposed section 709.14(f) would prohibit DOE from recording in a personnel file an employee's refusal to take a polygraph examination, and the NOPR encouraged contractors to adopt a similar policy. Nonetheless, one commenter expressed concern that the revocation of a clearance and transfer to an unclassified position will be recorded by the contractor and have the same effect as an entry into the employee's personnel file. Refusal to be polygraphed results in denial or loss of access to the position that required the polygraph examination, but does not result in the loss of a personnel security clearance.

Section 709.15 How Does DOE Use Polygraph Examination Results?

Section 709.15(a) of the NOPR contemplates an ''in-depth interview'' by the polygraph examiner if there are unresolved issues. One commenter stated that this seemed very vague and alarmingly broad. Accordingly, DOE has added a definition of ''unresolved issues.'' The same commenter asked if the individual would be attached to the polygraph instrument during the in-depth interview, and whether there would be limitations on the subject areas that may be explored in the in-depth interview. The individual will not be attached to the polygraph during the in-depth interview. DOE will explore only relevant topics that require resolution.

One commenter asked DOE to set a time limit for the in-depth interview, while another asked DOE to indicate the time frame within which the eligibility evaluation typically would be concluded. DOE is aware of the stress that the process may cause some individuals. DOE will not extend the evaluation period beyond that absolutely necessary to conduct a fair, in-depth interview or an appropriate eligibility evaluation which considers the examination results, the individual's personnel security file, and all other pertinent facts. In fairness to the individual, it is inappropriate to set arbitrary time limits because a deadline might result in an incomplete eligibility evaluation.

One commenter asked what assistance the employee may seek during the evaluation process and suggested that the national laboratory employing the individual should be allowed to assist in the resolution of the issue. DOE believes that there may be instances in which the national laboratories may be called upon to assist; however, any such instances will be addressed on a case-by-case basis. It is inappropriate to make a general statement identifying particular organizations or persons DOE might ask to assist in resolving issues.

One commenter suggested that there would be great value in reassuring individuals that no denial of access to a position identified in section 709.4(a)(1)–(8) would take place until the eligibility evaluation has been completed, unless the denial of access is justified by serious national security concerns. DOE agrees that no denial or revocation of access to the position will take place until the eligibility evaluation has been completed. DOE believes that this is consistent with section 3154(g) of the NDAA that provides that:

> [The polygraph regulations] shall include procedures * * *
>
> (2) ensuring that adverse personnel actions not be taken against an individual solely by reason of that individual's physiological reaction to a question in a polygraph examination, unless reasonable efforts are first made to independently determine through alternative means the veracity of that individual's response to the question.

In addition, the Conference Committee Report states that:

> The conferees direct that the Secretary not use failure of such polygraph examinations as the sole basis for the removal of any covered employee.
>
> H.R. Report No. 106–301, 106th Cong. 1st Sess. 917 (1999) (''Conference Report'').

Paragraph 709.15 (c) has been revised to reflect that no denial or revocation of access to the information or involvement in the activities that justified conducting the polygraph examination will take place until the eligibility evaluation has been completed. However, if justified by serious national security concerns, access may be suspended, but not denied, in accordance with section 709.25.

Another individual noted that while proposed paragraph 709.15(c) provides that DOE may interview the individual as part of the eligibility evaluation, it does not give the individual the opportunity to provide additional information or the right to an interview. The individual always has the right to provide additional relevant information. DOE does not believe it is necessary or appropriate to accord the individual the right to an interview in all instances. Proposed paragraph 709.15(c) has been revised to indicate that OCI will conduct an eligibility evaluation, and that it will interview the individual if it determines that such an interview will assist in resolving the issue.

Several commenters recommended that the regulation should be revised to provide a specific appeals process. DOE has decided that it is not appropriate to establish an appeals process in this part for positions that are established pursuant to other DOE regulations, e.g., PAP 10 CFR part 711; PSAP 10 CFR part 710, subpart B. However, paragraph 709.15(e) has been added to provide that

DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions at DOE whose access to the categories described in 709.4(a)(1)–(8) is denied or revoked may request reconsideration by the relevant head of the departmental element, as identified in the notice of revocation or denial.

One commenter asked DOE to define ''eligibility evaluation'' more precisely. DOE has added a definition of ''eligibility evaluation'' to section 709.3. Procedures for the eligibility evaluation have been added to section 709.15. Another commenter asked a series of questions concerning the eligibility evaluation: (1) Who in DOE conducts the eligibility evaluation; (2) why is the personnel security file a part of the evaluation process; (3) what constitutes ''other pertinent information''; (4) how is an individual notified of the evaluation results; (5) is a written record maintained of the evaluation; and (6) does an individual has access to the examination and evaluation results. Section 709.15 has been revised to indicate that the Office of Counterintelligence will conduct the eligibility evaluation. The personnel security file often is an important source of information for resolving counterintelligence issues. It is impossible to describe what constitutes ''other pertinent information'' since the information considered by OCI depends upon the counterintelligence topics that require resolution. The decision about whether or not to grant, retain, deny, or revoke access is made by the appropriate Program Manager. The polygraph report and the eligibility evaluation are permanent records. An individual is able to file requests for release of these records under the provisions of the Privacy Act.

One commenter requested DOE provide the individual with a written copy of the examiner's opinions or conclusions as well as the questions asked and charted responses before DOE may deny the individual access to a position identified in section 709.4(a)(1)–(8). DOE will not establish a policy of releasing written copies of examiners' opinions and conclusions or the questions asked and charted responses because such materials contains information concerning investigative techniques of the Department. However, an individual may file a request for the release of these materials under the Freedom of Information Act or the Privacy Act and the request will be processed in accordance with the applicable regulations.

DOE has added a new paragraph 709.15(f) which indicates that, using the DOE security criteria used to grant or deny access to classified information, OCI will make a determination whether disclosures during a counterintelligence polygraph examination warrant referral to the Office of Security and Emergency Operations or the Manager of the applicable Operations Office. OCI will not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance.

Subpart C—Safeguarding Privacy and Employee Rights

Section 709.21 When Is an Individual Notified That a Polygraph Examination is Scheduled?

Several commenters stated that the forty-eight hour notification prior to a polygraph examination was insufficient notice. DOE's proposal was based on the policy guidance contained in the Department of Labor's regulation implementing the EPPA (29 CFR 801.23(a)(1)). In light of the comments, DOE has revised proposed section 709.21 to provide that individuals will receive notification of at least ten days, excluding weekend days and holidays, as opposed to forty-eight hours.

Other commenters asked how individuals would be notified of a scheduled examination. A DOE representative from the DOE Test Center will call individuals by telephone and will set a date and a time for their counterintelligence-scope polygraph examination. DOE will follow up with a letter to the individual confirming the date and time, and providing additional administrative instructions, including directions to get to the test center.

DOE also received several comments that suggested DOE should not simply offer to make available to individuals a copy of this regulation as provided in section 709.21 of the NOPR, but instead should provide individuals with the regulation. DOE agrees with those comments and has revised section 709.21 accordingly.

Section 709.22 What Rights to Counsel or Other Representation Does an Individual Have?

The proposed regulation provides that an individual has the right, at his or her expense, to obtain or consult with legal counsel or another representative prior to the polygraph examination. One commenter suggested that legal counsel of the individual's choosing should be provided at DOE's expense. DOE has not adopted this suggestion because DOE has concluded that it is not an appropriate use of taxpayer dollars.

One commenter requested DOE make clear in the regulation that only the examiner and the individual will be present in the room during the polygraph examination. The commenter was concerned that additional personnel in the room could make the individual feel he or she was being ''ganged up on,'' thus adding to the individual's level of stress. DOE agrees with this concern and has revised section 709.22 to make clear that only the individual and the examiner are in the room during the polygraph examination. All examinations, however, are monitored by a senior examiner via a closed-circuit system and are videotaped from beginning to end for the protection of the individual and the examiner.

DOE received a number of comments objecting to the ban on having legal counsel in the room during the polygraph examination. On a related issue some commenters addressing section 709.15 (How does DOE use polygraph examination results?) suggested that DOE should permit an individual to consult with counsel if a personal interview takes place as part of the eligibility evaluation process. Other commenters suggested that not only should the individual have legal counsel present in the room during the polygraph examination, but should also have another witness or even two witnesses, such as an independent, certified polygrapher or a union representative. DOE believes that the presence of legal counsel or other witnesses in the examination room would be a distraction to the individual and the examiner and would interfere with conducting the examination. Furthermore, DOE notes that the prohibition on consulting with counsel is consistent with provisions of the EPPA (29 U.S.C. 2007(b)(2)(A)). Legal counsel or witnesses may not be present in the examination room or during any interview that may occur as part of the polygraph examination. However, legal counsel may be available for private consultation in a private room at the test center before the examination. DOE has added a new paragraph (b) that provides an individual may consult with legal counsel or another representative any time during a personal interview that is conducted as part of the eligibility evaluation process.

Section 709.23 How Does DOE Obtain an Individual's Consent to a Polygraph Examination?

DOE received questions about the content of the polygraph consent form.

In addition, several commenters asked if by signing the consent form the individual was waiving any rights, such as the right against self-incrimination. The individual is asked to sign a form that states that the individual consents to the polygraph examination and that no threats have been made or promises extended to the individual to obtain his or her agreement to take a polygraph examination. No specific warning regarding self-incrimination is required, other than that given by the examiner in accordance with section 709.24. However, the exclusion of a specific warning does not preclude the individual from consulting with legal counsel prior to the polygraph examination at the individual expense. The individual is asked to sign a second portion of the consent form at the end of the polygraph examination reaffirming that the examination was taken freely. There is nothing in the form that could be interpreted in any way as a waiver of an individual's rights accorded by law.

DOE also has deleted the requirement in proposed paragraph (b) to offer a copy of this part because it has revised section 709.21 to require that DOE provide a copy of this part.

Section 709.24 What Other Information is Provided To the Individual Prior To a Polygraph Examination?

DOE received several types of comments concerning the use of audio and video recording devices during the examination. Several commenters stated that DOE should provide each individual a copy of polygraph reports and any audio or video tape made of the test, possibly at the individual's own expense. Other commenters suggested that the individual should have the right to record the polygraph examination, and any interview that might occur as part of the eligibility evaluation in accordance with section 709.15. DOE will not establish a policy of releasing the polygraph reports or videotapes of examinations or permitting individuals to record all or any portion of the polygraph examination or related interviews. Such materials contain information concerning investigative procedures and techniques of the Department. However, an individual may file a request for the release of these materials under the Freedom of Information Act or the Privacy Act and the request will be processed in accordance with applicable regulations.

Other commenters noted that the text of section 709.24 does not indicate how the videotape of the polygraph examination might be used if an individual should reveal information not specifically related to counterintelligence matters in the course of attempting to resolve questions raised during the polygraph examination. One commenter asked specifically if the videotape would be used in a possible criminal action against the individual, and if so, how would the individual's right against self-incrimination be preserved? All polygraph records are protected in accordance with section 709.26. If the individual reveals information concerning a security matter, OCI will make a determination, based upon the DOE security criteria used to grant or deny access to classified information, whether such information warrants referral, as appropriate, to the Office of Security and Emergency Operations or the Manager of the applicable Operations Office for appropriate action with respect to that individual's personnel security clearance. OCI will not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance. As to the concern about the right against self-incrimination, section 709.24 provides that the examiner will advise the individual of his or her privilege against self-incrimination.

Another commenter noted that the proposed regulation requires the examiner to inform the individual of any audio or video recording devices, but is silent on the disclosure of other observation devices, such as two-way mirrors and observation rooms. DOE has modified the regulation to reflect that the examiner will provide this information.

One commenter suggested that the regulation should contain a clear statement of the individual's rights—the rights in the pre-test phase, the actual testing phase, and the post-test phase—akin to those found in the Department of Labor (DOL) regulation at 29 CFR 801.22–25 for employees in the private sector. DOE believes that the regulation adopted today constitutes a substantially comparable statement of an individual's rights in the pre-test, test, and post-test phases, although they are not in the same format as the DOL regulation. For example, the medical exception and the limitation on the types of questions set forth at 29 CFR 801.22 are similar to provisions of section 709.4 and section 709.11, respectively, of the regulation. The provision in 29 CFR 801.23 concerning the information that must be provided to the individual before the examination is similar to that in section 709.24 of the regulation.

Several commenters asserted that the individual should receive a copy of the questions far enough in advance of the scheduled examination to obtain legal advice, if desired. The individual may seek detailed guidance from counsel based upon the description of the counterintelligence topics identified in section 709.11, which also lists the types of questions that may not be asked. It is not possible to provide the exact questions in advance, because, as section 709.12 explains, the exact wording of the polygraph questions is determined by the examiner based on the examiner's pretest interview of the individual, the individual's understanding of the questions, and other input from the individual.

Another commenter suggested that DOE should add a paragraph to proposed section 709.24 stating that the examiner must advise the individual that he or she may decline to answer any question that would divulge or compromise classified information. DOE does not believe that this is necessary because all of the examiners hold a ''Q'' access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, they must have been granted SCI access approval. DOE will protect from public disclosure all videotapes and other polygraph records.

DOE received several suggestions that the privilege against self-incrimination must be made available, and that exercising that privilege while answering a specific question, or questions, does not constitute a refusal to submit to the examination or, by itself, a termination of the examination. Section 709.24(e) provides that, before administering the examination, the examiner must advise the individual of his or her privilege against self-incrimination. DOE recognizes and respects the individual's privilege in this regard. However, exercise of that privilege will constitute a refusal to submit to the examination or a termination of the examination.

One commenter noted that the proposed regulation fails to notify the individual of the office within DOE to which complaints should be addressed in the event the individual feels that the examiner has violated his or her rights. DOE has added a new paragraph 709.24(f) which provides that the individual will receive a pre-addressed envelope addressed to the D/OCI in Washington, D.C., which may be used to submit comments or complaints concerning the examination. As part of DOE's commitment to protecting the privacy of any individual polygraphed under this program, the D/OCI is the

only person who routinely will see such letters.

Section 709.25 Are There Limits on Use of Polygraph Examination Results That Reflect ''Deception Indicated'' or ''No Opinion''?

Section 709.25(a) of the NOPR provided that DOE or its contractors may not take an adverse personnel action against an individual solely on the basis of a polygraph examination result of ''deception indicated'' or ''no opinion'' except when the Secretary or the Secretary's designee made a written determination that the information to which the individual had access is of such extreme sensitivity that access under the circumstances posed an unacceptable risk to national security or defense. Several commenters interpreted section 709.25(a) to mean that any individual whose polygraph results are ''deception indicated'' or ''no opinion'' may have his or her access to classified information suspended. DOE has combined portions of paragraphs (a) and (b) of proposed section 709.25 into a new paragraph 709.25(a). Section 709.25 of the final rule makes clear that DOE and its contractors may not take adverse personnel actions against individuals solely on the basis of a polygraph examination result of ''deception indicated'' or ''no opinion'' or use those polygraph examination results as a substitute for any other required investigation.

Several commenters objected to the authority provided in proposed section 709.25(a) for the Secretary, or his designee, to suspend access under certain conditions, arguing that the Secretary already has the authority to suspend a personnel security clearance. DOE has retained this authority because it addresses the suspension of access as distinguished from suspension of a personnel security clearance, but has clarified its use in section 709.25(b) of the final rule.

Several commenters asked DOE to clarify or specify by category the phrases in the proposed paragraph 709.25(a) ''under the circumstances,'' and ''of such extreme sensitivity.'' In revising section 709.25, DOE has deleted both of these phrases. Another commenter asked DOE to specify at least by category those circumstances where access to the information ''poses an unacceptable risk to national security or defense,'' arguing that such circumstances should be restricted to those where there is an imminent danger to national security or defense that requires the Secretary or the designee to act immediately and investigate later. DOE does not agree with the commenter's recommendation that an unacceptable risk to national defense and security must be ''imminent.'' The fact that the individual has access to DOE's most sensitive information (709.4(a)(1)–(8)), and the Secretary or the D/OCI has information, based upon the individual's admissions during the polygraph examination, that the individual poses an unacceptable risk to national defense and security is sufficient justification for suspending the individual's access.

The new paragraph 709.25(b) (hereinafter referred to as the ''national security or defense'' exception) states that the Secretary or the Director of the Office of Counterintelligence, may suspend an individual's access based upon a written determination that the individual's admission(s) of involvement in one or more of the activities covered by a counterintelligence-scope polygraph examination, when considered in the context of the individual's access to one or more of the ''high risk'' programs identified in section 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. The new paragraph also states that DOE will investigate the matter immediately and make a determination of whether to revoke the individual's access.

One commenter suggested that the regulation should include a requirement that if the ''national security or defense'' exception is used, that DOE will investigate the matter immediately and restore the status quo ante, at the earliest date, if there is no clear and convincing evidence to corroborate the negative polygraph examination results. Another commenter suggested that DOE should limit the time to six months that an individual's access may be suspended, and that after such time, if there is no additional information, that the individual's access will be reinstated. DOE agrees with the suggestion that it should immediately investigate the matter and determine whether to maintain or revoke the individual's access. DOE will make every effort to ensure that the suspension of access is as short as possible, but does not believe that it is appropriate to establish artificial time limits for investigations concerning national security matters, or an unduly high evidentiary standard for corroboration of polygraph results.

Another commenter recommended that while the individual's access is suspended the individual should be paid at the same pay grade. DOE agrees with this recommendation because suspension of access does not constitute an adverse personnel action.

One commenter suggested that the regulation should provide that the ''national security or defense'' exception will not be used except where the polygraph examination has been employed in response to a specific counterintelligence concern as distinct from its use as a general screening instrument. If there is no known problem, the commenter asserted that employees should not be adversely impacted by polygraph results, given the high probability of false positives. DOE disagrees. It has revised section 709.25 to make clear that the use of the ''national security or defense'' exception is limited to instances involving the individual's admission of involvement in one or more of the counterintelligence topics, which when considered in the context of the individual's access to one or more of the ''high risk'' programs identified in section 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. The same commenter suggested that the regulation should include a review mechanism for use of the ''national security or defense'' exception, which is independent of the office that recommends exceptions, to ensure that the exception is not abused. Proposed section 709.25 provided that the exception could be exercised by the Secretary or the Secretary's designee. DOE has revised the language of section 709.25 to provide that the ''national security or defense'' exception can be made only by the Secretary or the Director of the Office of Counterintelligence, and that it must be made in writing. DOE believes that the Secretary and the D/OCI must have the authority immediately to suspend an individual's access when they are in receipt of information that the individual poses an unacceptable risk to national security or defense.

Finally, one commenter stated that the proposed regulation did not reflect the full range of possible results since this section only considers ''deception indicated'' and ''no opinion.'' DOE believes that the regulation, taken in its entirety, does address the full range of possible results. The same commenter suggested that DOE should indicate the basis for arriving at the determinations of ''deception indicated'' and ''no opinion.'' DOE has revised the regulation in section 709.3 to provide a definition of each of these terms.

Section 709.26 How Does DOE Protect the Confidentiality of Polygraph Examination Records?

One commenter stated that counterintelligence officials no doubt would share information on individuals who refuse to take a polygraph examination. OCI will not share information on such individuals, except as provided in this rule. Under the provisions of section 709.26(e), DOE must protect from disclosure the fact that an individual refused to take a polygraph examination. However, in accordance with section 709.14, OCI must notify the individual's relevant Program Manager who must implement any actions required by section 709.14. In addition, as noted before, DOE will record a refusal in the individual's personnel security file, but not in his or her personnel file.

One commenter noted that DOE may not begin collecting and storing polygraph information until it publishes a Privacy Act notice regarding the establishment of a system of records on polygraph examinations. The Office of Counterintelligence has an existing system of records, System of Records 84, which was established in 1994. DOE is amending this system of records to clarify that polygraph examination records will be stored in this system and to explain how they will be protected.

Several commenters recommended that all the records of the polygraph examination be destroyed within a specified period of time following completion of the polygraph examination. The polygraph report is a permanent record. An individual is able to file a request for release of the polygraph report under the provisions of the Privacy Act. DOE has added a new paragraph (f) to section 709.26 which provides that, subject to DOE Order 1324.5B, with the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the eligibility evaluation is completed, and a favorable recommendation has been made to grant or continue the access any of to the positions identified in section 709.4(a)(1)–(8). If the recommendation is to deny or revoke access to the position, then the records are retained at least until the final resolution of any request for reconsideration by the individual or the completion of any ongoing investigation.

Subpart D—Polygraph Examination and Examiner Standards

Section 709.31 What Are The DOE Standards for Polygraph Examinations and Polygraph Examiners?

One commenter on this section suggested that DOE should publish standards for polygraph examinations and examiners that are at least as stringent as those set by the Department of Labor at 29 CFR 801.26. The commenter noted that DOE had not established a limit on the number of examinations that a polygrapher is permitted to conduct in a day. DOE has reviewed the provisions of 29 CFR 801.26 and has determined that those qualifications and requirements, such as a minimum bond requirement, are more appropriately applied to private examiners as opposed to those under contract to a federal agency. Nonetheless, DOE has revised section 709.31 to limit the number of examinations to five that an examiner may perform in a day. DOE has added a new paragraph (b) that provides that a polygraph examiner may not administer any more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which an individual voluntarily terminates the examination prior to the actual testing phase.

DOE received a number of comments concerning the polygraph examiners themselves. One commenter suggested that, in order to reduce costs, DOE should hire independent contractors, who would provide their own polygraph equipment. A second commenter objected to DOE's use of contractors, rather than federal employees. A third commenter objected that DOE, as part of its effort to assure that it only used experienced polygraphers, was hiring experienced examiners from other federal agencies rather than training its own from the start. Still others suggested that DOE should hire female examiners to examine female individuals. Finally, several commenters recommended using independent polygraph examiners or permitting the individual to select his or her own polygrapher. DOE has considered these diverse comments and decided not to revise the proposed regulation because the commenters' suggestions would unnecessarily restrict DOE's ability to select the best polygraphers available.

A few commenters suggested that each polygraph examiner must obtain a personnel security clearance at or above that of the individual whom they are examining, or else the examiner should not be allowed to ask questions that concern classified information. DOE agrees with this comment. Proposed paragraph 709.31(c)(2) requires that DOE polygraph examiners complete a single scope background investigation and a counterintelligence scope polygraph examination. DOE believes that it is also appropriate to require the examiners to hold a ''Q'' access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, each examiner must have been granted SCI access approval. DOE has revised and relettered the proposed paragraph as paragraph 709.31(d)(2) to reflect these levels of required clearance and access.

One commenter suggested that each polygraph examiner should have adequate training in analysis of physiological data and that each should be a physician licensed in the District of Columbia and the state in which the polygraph examination is being conducted. Furthermore, the commenter believed that the polygraph examiners should meet the same annual requirements as those imposed on participants in the PAP and PSAP, go through a full-field FBI investigation, and make public a financial disclosure statement. Other suggested requirements included an annual psychological examination which focused on emotional stability and the ability to maintain objectivity while making judgments about people which may affect national security; urine tests taken before administering any polygraph examinations in order to demonstrate that the examiner is not impaired by alcohol; and constant monitoring to assure that the examiner does not drink alcoholic beverages after the urine test but before conducting the polygraph examination. DOE believes that these requirements are unnecessary and would not substantially enhance the reliability of DOE's polygraph program. In addition, the regulation already provides for appropriate monitoring of examinations.

DOE has deleted from paragraph 709.31(a) the statements concerning inspection, approval and certification of the DOE Test Center, because, although true, they did not state regulatory requirements.

Section 709.32 What Are The Training Requirements for Polygraph Examiners?

A number of commenters objected to what appeared to be minimal training requirements for polygraph examiners. Proposed section 709.32(a) provided that polygraph examiners must undergo a minimum forty hours of training annually within the discipline of

Forensic Psychophysiological Detection of Deception. This language established the annual continuing education requirement, as distinguished from the initial training required to become a polygraph examiner. DOE has revised section 709.32 to make clear the forty hours is an annual continuing education requirement and redesignated that section as paragraph (b). In addition, DOE has added a new paragraph 709.32(a) that establishes that each polygraph examiner must undergo an initial training period of thirteen weeks in accordance with the procedures and standards established by the DODPI.

V. Regulatory Review

A. National Environmental Policy Act

One commenter asserted that the proposed regulation would require the establishment of a number of offices and the hiring of new staff to administer the proposed polygraph examinations and therefore would require the preparation of an environmental assessment or impact statement. This rule establishes the procedures for use of polygraph examinations. DOE has determined that this rule is covered under the Categorical Exclusion found in the Department's National Environmental Policy Act regulations at paragraph A.6 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required. Furthermore, while DOE did hire new staff in order to implement DOE Notice 472.2 as it applied to Federal employees, it has no intention of building new facilities or hiring new staff to administer this program. The Department has made no determination that the institution of polygraph examinations will require any significant enlargement of staff or construction of new facilities. In any event, it is clear that not every Federal procurement or hiring decision necessitates an environmental impact statement. NEPA never has been applied to such administrative Federal actions.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that an agency prepare an initial regulatory flexibility analysis for any rule, for which a general notice of proposed rulemaking is required, that would have a significant economic effect on small entities. A final regulatory flexibility analysis must be prepared and made available when a final rule is published. These requirements do not apply if the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605.

Comments submitted during this rulemaking prompted DOE to reevaluate the application of the Regulatory Flexibility Act to this rule. DOE finds that this rulemaking does not directly regulate small businesses or small governmental entities. The rule applies to individuals who currently are employed by, or applicants for employment by, some of the DOE's prime contractors. Furthermore, the contractors are primarily large businesses. Even if the rulemaking were to directly regulate some small businesses that are subcontractors, the rule does not have a significant economic impact because it would not impose unallowable costs on the small businesses. Accordingly, DOE certifies that the rule will not have a substantial impact on a significant number of small entities.

C. Paperwork Reduction Act

DOE has determined that this rule does not contain any new or amended record keeping, reporting, or application requirements, or any other type of information collection requirements subject to the Paperwork Reduction Act (Pub. L. No. 96–511).

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This rule does not impose a Federal mandate on State, local or tribal governments. This rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

E. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. While today's rule applies to individuals who may be members of a family, the rule does not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

F. Executive Order 12866

Section 6 of Executive Order 12866 provides for a review by the Office of Information and Regulatory Affairs (OIRA) of a significant regulatory action, which is defined to include an action that may have an effect on the economy of $100 million or more, or adversely affect, in a material way, the economy, competition, jobs, productivity, the environment, public health or safety, or State, local, or tribal governments. DOE has concluded that this rule is not a significant regulatory action.

G. Executive Order 13132

Executive Order 13132 (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect 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. No further action is required by Executive Order 13132.

H. Executive Order 12875

Executive Order 12875 (Enhancing Intergovernmental Partnership), provides for reduction or mitigation, to the extent allowed by law, of the burden on State, local and tribal governments of unfunded Federal mandates not required by statute. The analysis under the Unfunded Mandates Reform Act of 1995, satisfies the requirements of Executive Order 12875. Accordingly, no further analysis is required under Executive Order 12875.

I. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

J. Executive Order 13084

Under Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments), DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs. This rule would not have such effects. Accordingly, Executive Order 13084 does not apply to this rulemaking.

K. Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(3).

List of Subjects

10 CFR Part 709

Polygraph tests.

10 CFR Part 710

Administrative practice and procedure, Classified information, Government contracts, Government employees, Nuclear materials.

10 CFR Part 711

Administrative practice and procedure, Alcohol abuse, Drug abuse, Government contracts, Government employees, Health, Nuclear safety, and Occupational safety and health.

Issued in Washington, D.C. on December 13, 1999.

Edward J. Curran,

Director, Office of Counterintelligence.

For the reasons stated in the preamble, DOE amends Chapter III of title 10 of the Code of Federal Regulations as set forth below:

1. New part 709 is added to read as follows:

PART 709—POLYGRAPH EXAMINATION REGULATIONS

Subpart A—General Provisions

Sec.
709.1 What is the purpose of this part?
709.2 What is the scope of this part?
709.3 What are the definitions of the terms used in this part?
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709.26 How does DOE protect the confidentiality of polygraph examination records?

Subpart D—Polygraph Examination and Examiner Standards

709.31 What are the DOE standards for polygraph examinations and polygraph examiners?
709.32 What are the training requirements for polygraph examiners?

Authority: 42 U.S.C. 2011, *et seq.*, 42 U.S.C. 7101, *et seq.*, 42 U.S.C. 7383h.

Subpart A '' General Provisions

§ 709.1 What is the purpose of this part?

This part:

(a) Describes the categories of individuals who are eligible for counterintelligence-scope polygraph testing; and

(b) Provides guidelines for the use of counterintelligence-scope polygraph examinations and for the use of exculpatory polygraph examinations, upon the request of an individual, in order to resolve counterintelligence investigations and personnel security issues; and

(c) Provides guidelines for protecting the rights of individual DOE, and DOE contractor, and employees subject to this rule.

§ 709.2 What is the scope of this part?

This part includes:

(a) A description of the conditions under which DOE may administer and use polygraph examinations;

(b) A description of the positions which DOE may subject to polygraph examination;

(c) Controls on the use of polygraph examinations; and

(d) Safeguards to prevent unwarranted intrusion into the privacy of individuals.

§ 709.3 What are the definitions of the terms used in this part?

For purposes of this part:

Accelerated Access Authorization Program or AAAP means the program for granting interim access to classified

matter and special nuclear material based on a drug test, a National Agency Check, a psychological assessment, and a counterintelligence-scope polygraph examination consistent with this part.

Access means the admission of DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE to the eight categories of positions identified in § 709.4(a)(1)–(8).

Access authorization means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Adverse personnel action means

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. Chapter 75; or

(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

Contractor means a DOE contractor or a subcontractor at any tier.

Control questions means questions used during a polygraph examination that are designed to produce a physiological response, which may be compared to the physiological responses to the relevant questions.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.

Deception indicated means an opinion that indicates that an analysis of the polygraph charts reveal physiological responses to the relevant questions that were indicative of evasion.

DOE means the Department of Energy.

Eligibility evaluation means the process employed by the Office of Counterintelligence to determine whether DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE will be recommended for access or continued access to the eight categories of positions identified in § 709.4(a)(1)–(8).

Intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons.

Local commuting area means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

No deception indicated means an opinion that indicates that an analysis of the polygraph charts revealed the physiological responses to the relevant questions were not indicative of evasion.

No opinion refers to an evaluation of a polygraph test in which the polygraph examiner cannot render an opinion based upon the physiological data on the polygraph charts.

Personnel Assurance Program or PAP means the human reliability program set forth under 10 CFR part 711 designed to ensure that individuals assigned to nuclear explosive duties do not have emotional, mental or physical incapacities that could result in a threat to nuclear explosive safety.

Personnel Security Assurance Program or PSAP means the program in subpart B of 10 CFR part 710.

Personnel security clearance means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Polygraph means an instrument that

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

Polygraph examination means a process that encompasses all activities that take place between a polygraph examiner and individual during a specific series of interactions, including the pretest interview, the use of the polygraph instrument to collect physiological data from the individual while the polygraph examiner is presenting a series of tests, the test data analysis phase, and the post-test phase.

Polygraph examination records means all records of the polygraph examination, including the polygraph report, audio-video recording, and the polygraph consent form.

Polygraph report refers to a polygraph document that may contain identifying data of the individual, a synopsis of the basis for which the examination was conducted, the relevant questions utilized and the polygraph examiner's conclusions.

Polygraph test means that portion of the polygraph examination during which the polygraph instrument collects physiological data based upon the individual's responses to test questions from the examiner.

Relevant questions are those questions used during the polygraph examination that pertain directly to the issues for which the examination is being conducted.

Special Access Program or SAP means a program established under Executive Order 12958 for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

Unresolved issues refers to an opinion which indicates that the analysis of the polygraph charts revealed consistent, significant, timely physiological responses to the relevant questions in personnel screening.

§ 709.4 To whom does the polygraph examination requirement under this part apply?

(a) Except as provided in paragraph (b) of this section, this part applies to DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE, who are in:

(1) Positions that DOE has determined include counterintelligence activities or access to counterintelligence sources and methods;

(2) Positions that DOE has determined include intelligence activities or access to intelligence sources and methods;

(3) Positions requiring access to information that is protected within a non-intelligence special access program (SAP) designated by the Secretary of Energy;

(4) Positions that are subject to the Personnel Security Assurance Program (PSAP);

(5) Positions that are subject to the Personnel Assurance Program (PAP);

(6) Positions that DOE has determined have a need-to-know or access to information specifically designated by the Secretary regarding the design and operation of nuclear weapons and associated use control features;

(7) Positions within the Office of Independent Oversight and Performance Assurance, or any successor thereto, involved in inspection and assessment of safeguards and security functions, including cyber security, of the Department;

(8) Positions within the Office of Security and Emergency Operations, or any successor thereto;

(9) The Accelerated Access Authorization Program (AAAP); and

(10) Positions where the applicant or incumbent has requested a polygraph examination in order to respond to questions that have arisen in the context of counterintelligence investigations or personnel security issues. These examinations are referred to in this part as exculpatory polygraph examinations.

(b) This part does not apply to:

(1) Any individual for whom the Director of the Office of Counterintelligence (D/OCI), gives a waiver, based upon certification from another Federal agency that the individual has successfully completed a full scope or counterintelligence-scope polygraph examination administered within the last five years;

(2) Any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested; or

(3) Any individual for whom the Secretary of Energy gives a written waiver in the interest of national security.

(c) The Program Manager responsible for each program with positions identified in paragraphs (a)(1)–(8) of this section identifies in the first instance, in order of priority, those specific positions that will be polygraphed.

(d) The Program Manager submits positions identified under paragraph (c) of this section to the D/OCI for review and concurrence. The D/OCI forwards the positions, with suggested additions or deletions, to the Secretary for approval.

§ 709.5 How will an individual know if his or her position will be eligible for a polygraph examination?

(a) All positions in the programs described in § 709.4(a)(1)–(8) are eligible for polygraph examination. When a polygraph examination is scheduled, DOE must notify the individual, in accordance with § 709.21.

(b) Any job announcement or posting with respect to any position in those programs must indicate that the selection of an individual for the position may be conditioned upon his or her successful completion of a counterintelligence-scope polygraph examination.

§ 709.6 How often will an individual be subject to polygraph examination?

Positions identified in § 709.4(a)(1)–(8) are subject to a five year periodic, as well as an aperiodic, reinvestigation polygraph.

Subpart B—Polygraph Examination Protocols and Protection of National Security

§ 709.11 What types of topics are within the scope of a polygraph examination?

(a) DOE may ask questions that are appropriate to a counterintelligence-scope examination or that are relevant to the matter at issue in an exculpatory examination.

(b) A counterintelligence-scope polygraph examination is limited to topics concerning the individual's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign contacts, and deliberate damage to or malicious misuse of a U.S. government information or defense system.

(c) DOE may not ask questions that:

(1) Probe a person's thoughts or beliefs;

(2) Concern conduct that has no counterintelligence implication; or

(3) concern conduct that has no direct relevance to an investigation.

§ 709.12 How does DOE determine the wording of questions?

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the individual, the individual's understanding of the questions, and other input from the individual.

§ 709.13 May an individual refuse to take a polygraph examination?

(a) Yes. An individual may refuse to take a counterintelligence-scope or exculpatory polygraph examination, and an individual being examined may terminate the examination at any time.

(b) If an individual terminates a counterintelligence-scope or exculpatory polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to take a polygraph examination under § 709.14.

§ 709.14 What are the consequences of a refusal to take a polygraph examination?

(a) If an individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8), and the individual refuses to take a counterintelligence polygraph examination required by statute as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail the individual to the identified position.

(b) If the individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8) and the individual refuses to take a counterintelligence polygraph examination otherwise required by this part, DOE and its contractors may refuse to employ, assign, or detail the individual to the identified position.

(c) If an individual is an incumbent in a position described in § 709.4(a)(1)–(8) and the individual refuses to take a counterintelligence polygraph examination required by statute as a condition of continued access, DOE and its contractors must deny the individual access to the information or involvement in the activities that justified conducting the examination, consistent with § 709.15. If the individual is a DOE employee, DOE may reassign or realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access.

(d) If the individual is an incumbent in a position described in § 709.4(a)(1)–(8), and the individual refuses to take a counterintelligence polygraph examination as required by this part, DOE and its contractors may deny that individual access to the information or involvement in the activities that justified conducting the examination, consistent with § 709.15. If the individual is a DOE employee, DOE may reassign or realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access.

(e) If the individual is a DOE employee whose current position does not require a counterintelligence polygraph examination and is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8), the individual's refusal to take a polygraph examination will not affect the individual's current employment status.

(f) If an individual refuses to take a polygraph examination as part of the Accelerated Access Authorization Program, DOE must terminate the accelerated authorization process and the individual may continue to be processed for access authorization under the standard DOE personnel security process.

(g) Since an exculpatory polygraph examination is administered at the request of an individual, DOE and its contractors may not take any adverse personnel action against an individual for refusing to request or take an exculpatory polygraph examination. DOE and its contractors may not record an individual's refusal to take an exculpatory polygraph examination in the individual's personnel security file, or any investigative file. DOE also may

not record the fact of that refusal in a DOE employee's personnel file.

(h) If a DOE employee refuses to take a counterintelligence polygraph examination, DOE may not record the fact of that refusal in the employee's personnel file.

§ 709.15 How does DOE use polygraph examination results?

(a) If, following the completion of the polygraph test, there are any unresolved issues, the polygraph examiner must conduct an in-depth interview of the individual to address those unresolved issues.

(b) If, after the polygraph examination, there are remaining unresolved issues that raise significant questions relevant to the individual's access to the information or involvement in the activities that justified the polygraph examination, DOE must so advise the individual and provide an opportunity for the individual to undergo an additional polygraph examination. If the additional polygraph examination is not sufficient to resolve the matter, DOE must undertake a comprehensive investigation of the individual, using the polygraph examination as an investigative lead.

(c) The Office of Counterintelligence (OCI) will conduct an eligibility evaluation that considers examination results, the individual's personnel security file, and other pertinent information. If unresolved issues remain at the time of the eligibility evaluation, DOE will interview the individual if it is determined that a personal interview will assist in resolving the issue. No denial or revocation of access will occur until the eligibility evaluation is completed.

(d) Following the eligibility evaluation, D/OCI must recommend, in writing, to the Program Manager responsible for the access that the individual's access be approved or retained, or denied or revoked.

(1) If the Program Manager agrees with the recommendation, the Program Manager will notify the individual, in writing, that the individual's access has been approved or retained, or denied or revoked.

(2) If the Program Manager disagrees with the D/OCI's recommendation the matter will be referred to the Secretary for a final decision.

(3) If the Program Manager denies or revokes the individual's access, and the individual is a DOE employee, DOE may reassign the individual or realign the individual's duties within the local commuting area or take other actions consistent with the denial of access.

(4) If the Program Manager denies the individual's access and the individual is an applicant for employment, assignment, or detail to one of the positions described in 709.4(a)(1)–(8), DOE and its contractors may refuse to employ, assign or detail the individual to the identified position.

(5) If the Program Manager revokes the access of an individual assigned or detailed to DOE, DOE may remove the individual from access to the information that justified the polygraph examination and return the individual to the agency of origin.

(6) If the Program Manager denies or revokes the access for an individual applying for a DOE access authorization or already holding a DOE access authorization, DOE may initiate an administrative review of the individual's clearance eligibility under the DOE regulations governing eligibility for a security clearance at 10 CFR part 710.

(7) For cases involving a question of loyalty to the United States, DOE may refer the matter to the FBI as required by section 145d of the AEA.

(e) DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions within DOE whose access to the categories described in § 709.4(a)(1)–(8) is denied or revoked may request reconsideration by the relevant head of the departmental element, as identified in the notice of denial or revocation. Individuals who decline to take the counterintelligence scope polygraph examination will not be afforded these reconsideration rights.

(f) Utilizing the DOE security criteria used to grant or deny access to classified information, OCI will make a determination whether an individual completing a counterintelligence polygraph examination has made disclosures that warrant referral, as appropriate, to the Office of Security and Emergency Operations or the Manager of the applicable Operations Office. OCI will not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance.

Subpart C—Safeguarding Privacy and Employee Rights

§ 709.21 When is an individual notified that a polygraph examination is scheduled?

When a polygraph examination is scheduled, DOE must notify the individual, in writing, of the date, time, and place of the polygraph examination, and the individual's right to obtain and consult with legal counsel or to secure another representative prior to the examination. DOE must provide a copy of this part to the individual. The individual must receive the notification at least ten days, excluding weekend days and holidays, before the time of the examination except when good cause is shown or when the individual waives the advance notice provision.

§ 709.22 What rights to counsel or other representation does an individual have?

(a) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative prior to the polygraph examination. The counsel or representative may not be present during the polygraph examination. No one other than the individual and the examiner may be present in the examination room during the polygraph examination.

(b) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative at any time during an interview conducted in accordance with § 709.15(c).

§ 709.23 How does DOE obtain an individual's consent to a polygraph examination?

DOE may not administer a polygraph examination unless DOE has:

(a) Notified the individual of the polygraph examination in writing in accordance with § 709.21; and

(b) Obtained written consent from the individual.

§ 709.24 What other information is provided to the individual prior to a polygraph examination?

Before administering the polygraph examination, the examiner must:

(a) Inform the individual of the use of audio and video recording devices and other observation devices, such as two-way mirrors and observation rooms;

(b) Explain to the individual the characteristics and nature of the polygraph instrument and examination;

(c) Explain the physical operation of the instrument and the procedures to be followed during the examination;

(d) Review with the individual the control questions and relevant questions to be asked during the examination;

(e) Advise the individual of the individual's privilege against self-incrimination; and

(f) Provide the individual with a pre-addressed envelope addressed to the D/OCI in Washington, D.C., which may be used to submit comments or complaints concerning the examination.

§ 709.25 Are there limits on use of polygraph examination results that reflect ''deception indicated'' or ''no opinion''?

(a) DOE or its contractors may not:

(1) Take an adverse personnel action against an individual solely on the basis of a polygraph examination result of ''deception indicated'' or ''no opinion''; or

(2) Use a polygraph examination that reflects ''deception indicated'' or ''no opinion'' as a substitute for any other required investigation.

(b) The Secretary or the D/OCI may suspend an individual's access based upon a written determination that the individual's admission of involvement in one or more of the activities covered by the counterintelligence polygraph, when considered in the context of the individual's access to one or more of the high risk programs identified in § 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. In such cases, DOE will investigate the matter immediately and make a determination of whether to revoke the individual's access.

§ 709.26 How does DOE protect the confidentiality of polygraph examination records?

(a) DOE owns all polygraph examination records and reports.

(b) Except as provided in paragraph (c) of this section, the Office of Counterintelligence maintains all polygraph examination records and reports in a system of records established under the Privacy Act of 1974, 5 U.S.C. 552a.

(c) The Office of Intelligence also may maintain polygraph examination reports generated with respect to individuals identified in § 709.4(a)(2) in a system of records established under the Privacy Act.

(d) Polygraph examination records and reports used to make AAAP determinations or generated as a result of an exculpatory personnel security polygraph examination are maintained in a system of records established under the Privacy Act of 1974.

(e) DOE must afford the full privacy protection provided by law to information regarding an employee's refusal to take a polygraph examination.

(f) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the eligibility evaluation is completed, provided that a favorable recommendation has been made to grant or continue the access to the position. If a recommendation is made to deny or revoke access to the information or involvement in the activities that justified conducting the polygraph examination, then all the records are retained at least until the final resolution of any request for reconsideration by the individual or the completion of any ongoing investigation.

Subpart D—Polygraph Examination and Examiner Standards

§ 709.31 What are the DOE standards for polygraph examinations and polygraph examiners?

(a) DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE administers only DODPI approved testing formats.

(b) A polygraph examiner may administer no more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which an individual voluntarily terminates an examination prior to the actual testing phase.

(c) The polygraph examiner must be certified to conduct polygraph examinations under this part by the DOE Psychophysiological Detection of Deception/Polygraph Program Quality Control Official.

(d) To be certified under paragraph (c) of this section, an examiner must have the following minimum qualifications:

(1) The examiner must be an experienced counterintelligence or criminal investigator with extensive additional training in using computerized instrumentation in Psychophysiological Detection of Deception and in psychology, physiology, interviewing, and interrogation.

(2) The examiner must have a favorably adjudicated single-scope background investigation, complete a counterintelligence-scope polygraph examination, and must hold a ''Q'' access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, he or she must have been granted SCI access approval.

(3) The examiner must receive basic Forensic Psychophysiological Detection of Deception training from the DODPI.

(4) The examiner must be certified by DOE to conduct the following tests:

(i) Test for Espionage, Sabotage, and Terrorism;

(ii) Counterintelligence-Scope Polygraph Tests;

(iii) Zone Comparison Tests;

(iv) Modified General Question Tests;

(v) Peak of Tension Tests; and,

(vi) Relevant and Irrelevant and Directed Lie Control Tests.

§ 709.32 What are the training requirements for polygraph examiners?

(a) Examiners must complete an initial training course of thirteen weeks, or longer, in conformance with the procedures and standards established by DODPI.

(b) Examiners must undergo annual continuing education for a minimum of forty hours training within the discipline of Forensic Psychophysiological Detection of Deception.

(c) The following organizations provide acceptable curricula to meet the training requirement of paragraph (b) of this section:

(1) American Polygraph Association,

(2) American Association of Police Polygraphists, and

(3) Department of Defense Polygraph Institute.

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL

2. The authority citation for part 710 continues to read as follows:

Authority: Sec. 145, 68 Stat. 942 (42 U.S.C. 2165) and sec. 161, 68 Stat. 948 (42 U.S.C. 2201); E.O. 10450, 3 CFR 1949–1953 Comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended, 3 CFR Chap. IV; sec. 104(c), 38 Stat. 1237 (42 U.S.C. 5814); sec. 105(a), 88 Stat. 1238 (42 U.S.C. 5815); secs. 641, 644, 646, 91 Stat. 598, 599 (42 U.S.C. 7251, 7254, and 7256).

3. In § 710.57 (subpart B), paragraphs (f) through (i) are redesignated as paragraphs (g) through (j) and a new paragraph (f) is added to read as follows:

§ 710.57 Supervisory review.

* * * * *

(f) Applicants tentatively selected for PSAP positions and each individual occupying a PSAP position, but not yet holding a PSAP access authorization, must submit to a polygraph examination under 10 CFR part 709.

* * * * *

PART 711—PERSONNEL ASSURANCE PROGRAM (PAP)

4. The authority citation for part 711 continues to read as follows:

Authority: 42 U.S.C. 2201(p), 7191.

5. In § 711.5:

a. Paragraph (b)(6) is amended by removing the word ''and'' from the end of the paragraph;

b. Paragraph (b)(7) is amended by removing the period at the end of the paragraph and adding ''; and'' in its place; and

c. Paragraph (b)(8) is added to read as follows:

§ 711.5 General requirements.

* * * * *

(b) * * *

(8) Be eligible for a polygraph examination under 10 CFR part 709.

* * * * *

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Friday
December 17, 1999

Part VIII

Department of Education

Office of Special Education and Rehabilitative Services; Special Education—Technology and Media Services for Individuals With Disabilities Program; Notice

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Special Education—Technology and Media Services for Individuals With Disabilities Program

AGENCY: Department of Education.

ACTION: Notice inviting public comments.

SUMMARY: Section 687(c)(2) of the Individuals with Disabilities Education Act (IDEA), as amended, requires that, after September 30, 2001, funds from an award made under this authority may only be used for video description and captioning of educational, news, and informational television, videos, or materials. The Secretary of Education invites comments and recommendations from the public on what the term ''educational, news, and informational'' encompasses in reference to the description and captioning of television, videos, and materials.

DATES: All comments must be received by the Department on January 18, 2000.

ADDRESSES: Written comments should be addressed to Debra Sturdivant, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3527, Switzer Building, Washington, DC 20202–2641. FAX: (202) 205–8105 (FAX is the preferred method for requesting information). Telephone: (202) 205–8038. If you prefer to send your comments through the Internet, use the following address: *comments@ed.gov*

You must include the phrase ''educational media activities'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Debra Sturdivant (202) 205–8038 or Jo Ann McCann (202) 205–8475, U.S. Department of Education, 400 Maryland Avenue, SW., Washington DC 20202–2641. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternate format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to the contact persons listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding what the term ''educational, news, and informational''means in reference to the description and captioning of television, videos or materials.

During and after the comment period, you may inspect all public comments concerning this issue in Room 3512, 330 C Street SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments. If you want to schedule an appointment for this type of aid, you may call (202) 205–8113 or (202) 260–9895. If you use a TDD, you may call the Federal Information Relay Service at 1–800–877–8339.

Background

On June 4, 1997, the President signed into law Public Law 105–17, the Individuals with Disabilities Education Act Amendments of 1997. In accordance with section 687(c)(2) of the amended IDEA, after September 30, 2001, funds from an award made under this authority may only be used for video description and captioning of educational, news, and informational television, videos, or materials. Based on this provision, the Secretary proposes to provide guidance to awardees as well as potential applicants regarding the range of television, videos, or materials appropriate for description or captioning under this program. After September 30, 2001, an awardee may be required to substitute some or all of the television, videos, and materials that it describes or captions under an award made under this authority with different television, videos, and materials in order to comply with the requirement that all videos description and captioning be of educational, news, or informational programming and materials.

The Department currently provides funding for the description of network and cable television programming and home videos, which makes television programming and home videos more accessible to individuals who are blind or have low vision. In addition to presenting the visual elements of a television program or home video, description helps these individuals to better understand concepts such as facial expressions, body language, fashion, colors, shapes and relative sizes.

The Department currently funds the description of a limited number of programs for PBS, Nostalgia Television, Turner Classic Movies, and Kaleidoscope Television. Additional hours of programming are available on the World Wide Web at NarrativeTV.com. Popular videos are described and made available for sale to individuals. Many libraries also purchase these described versions for their patrons. Described movies include such movies as Dumbo, Sneakers, The Rock, Casablanca, and Jurassic Park.

The Department also provides funding for the closed captioning of television and videos, which provides a visual presentation of the audio portion and enables individuals who are deaf or hard of hearing to watch television or videos along with their non-disabled family members and peers. Individuals, who can hear, as well as those with a hearing loss, may also advance their literacy skills through incidental learning by watching captioned television or videos.

The Department currently funds a wide range of closed captioned national television programming. Department funded captioned programming is available on the major networks, ABC, CBS, NBC, FOX, and Telemundo, which broadcasts and is captioned in Spanish, as well as on a wide variety of cable networks such as ESPN, DISCOVERY, The History Channel, PAX–TV, Nickelodeon, Lifetime, SCI–FI, MSNBC, CNN Headline News, and Disney.

Closed captioned news and public information programming includes major national broadcast news and cable news. Closed captioned children's programming includes Sesame Street, Saturday morning cartoons, nature programming and children's specials. Closed captioned daytime programming provides access to daytime drama, talk shows, baby care, and home and family programming. Closed captioning of sports programming provides access to major regional and national sporting events, including football, baseball, golf, soccer, tennis, hockey, and fishing. Closed captioned syndicated programs make it possible to have captioned versions of the reruns of programs such as ''M*A*S*H'', ''I Love Lucy'', ''Beverly Hillbillies'', and the ''Twilight Zone''.

The Department provides funding for projects to close caption local news programming in cities across the country.

The Department also provides funding for open captioning of educational videos. Open captioned videos, which include a small percentage in Spanish, are used by students and other individuals who are deaf or hard of hearing, and teachers, parents and other individuals directly involved in activities promoting the advancement of individuals who are deaf or hard of hearing. Popular open captioned educational videos funded by the Department include shows on deaf

culture, sign language, holidays, science, social studies, and history. Sample titles include, ''Deaf Culture Lecture'', ''Playing in the Park'' and ''Read Any Good Fingers Lately''.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

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(Catalog of Federal Domestic Assistance Number 84.327: Technology and Media Services for Individuals with Disabilities Program)

Dated: December 13, 1999.

Judith E. Heumann,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 99–32722 Filed 12–16–99; 8:45 am]

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